UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARK A. FAVORS, HOWARD LEIB, LILLIE H. GALAN, EDWARD A. MULRAINE, WARREN SCHREIBER, AND WEYMAN A. CAREY,

PLAINTIFFS,

1:11-CV-05632 (RR) (GEL) DLI)

DONNA KAYE DRAYTON, EDWIN ELLIS, AIDA FORREST, GENE A. JOHNSON, JOY WOOLLEY, SHEILA WRIGHT, LINDA LEE, SHING CHOR CHUNG, JULIA YANG, JUNG HO HONG, JUAN RAMOS, NICK CHAVARRIA, GRACIELE HEYMANN. SANDRA MARTINEZ, EDWIN ROLDAN, MANOLIN TIRADO, SANTIAGO DIAZ, EDWIN FIGUEROA, LINDA ROSE, EVERET MILLS, ANTHONY HOFFMAN, KIM THOMPSON-WEREKOH, CARLOTTA BISHOP, CAROL RINZLER, GEORGE STAMATIADES, JOSEPHINE RODRIGUEZ, SCOTT AUSTER, MELVIN BOONE, GRISSELLE GONZALEZ, DENNIS O. JONES, REGIS THOMPSON LAWRENCE, AUBREY PHILLIPS, AND YITZCHOK ULLMAN;

INTERVENOR PLAINTIFFS,

V.

ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK, ROBERT J. DUFFY, AS PRESIDENT OF THE SENATE OF THE STATE OF NEW YORK, DEAN G. SKELOS, AS MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE OF THE STATE OF NEW YORK, SHELDON SILVER, AS SPEAKER OF THE ASSEMBLY OF THE STATE OF NEW YORK, JOHN L. SAMPSON, AS MINORITY LEADER OF THE SENATE OF THE STATE OF NEW YORK, BRIAN M. KOLB, AS MINORITY LEADER OF THE ASSEMBLY OF THE STATE OF NEW YORK, THE NY STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPOR-TIONMENT ("LATFOR"), JOHN J. MCENENY, AS MEMBER OF LATFOR, ROBERT OAKS, AS MEMBER OF LATFOR, ROMAN HEDGES, AS MEMBER OF LATFOR, MICHAEL F. NOZZOLIO, AS MEMBER OF LATFOR, MARTIN MALAVE DILAN, AS MEMBER OF LATFOR, AND WELQUIS R. LOPEZ, AS MEMBER OF LATFOR,

DEFENDANTS.

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RAMOS PLAINTIFF-INTERVENORS' SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff-Intervenors Juan Ramos, Nick Chavarria, Graciela Heymann, Sandra Martinez, Edwin Roldan, Manolin Tirado, Santiago Diaz and Edwin Figueroa ("Ramos Intervenors") file this Supplemental Memorandum of Law in further support of Ramos Intervenors's April 12, 2012 Motion for Preliminary Injunction (ECF Doc. 305).[1] Ramos Intervernors do so per the Court's April 20, 2012 request that Plaintiffs produce evidence supporting their claim that the ten percent variance in the challenged New York State 2012 redistricting Senate Plan is unconstitutional or not supported by rational justifications and/or legislative reasoning.

In an effort to provide the information requested, Ramos Intervenors' supplemental memorandum refers to exhibits that are identified in the sworn declaration of undersigned counsel. These exhibits and our analyses detailed below are based on the information, sworn declarations, testimony, transcripts, and other files from the New York Senate's submission to the United States Department of Justice for Section 5 preclearance review, as posted on the LATFOR website. Ramos Intervenors also generally rely on expert affidavits submitted by the Drayton Intervenors, and the electronically filed ("ECF") records from parties in this case.

In addition, we supply an alternative 63-seat Senate plan, a census-driven table as well as aver to events leading up to this late enacted legislation in support of our position that the discrimination alleged runs afoul of the Equal Protection Clause of the United States.[2]

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[1] Specifically, Ramos Intervenors moved pursuant to Fed. R. of Civ. Proc. 65, for this Court to: 1) issue a preliminary injunction enjoining the Defendants from implementing the New York State 2012 redistricting Senate Plan, absent either a court order to do so or a determination that the current map is lawful or constitutional; and, 2) issue an order to provide for expedited discovery for disclosure of information in the possession and custody of Defendants and their agents regarding the genesis, design and reasoning for creating a severely malapportioned state plan.

[2] By our calculus, Defendants' Senate Plan over-populated the downstate region consisting of New York City and Long Island, by 344,536 people which constitutes more than one whole Senate district. Ramos Interven. FAC ¶¶ 40-42

I. Defendants Senate Majority Failed To Make An Honest and Good Faith Effort To Create Districts As Nearly Equal In Population As Practicable.

The facts set forth below demonstrate that the deviation rate differential in the 2012 Senate Plan and what it could have been, has been produced in violation of the Supreme Court's honest and good faith standard. *Reynolds v. Sims*, 377 U.S. 533 (1964). Defendants' severely malapportioned redistricting of the Senate plan is attributable to "discriminatory state action", *Abate v. Rockland County Legislature, 964 F. Supp. 817, 819 (S.D.N.Y. 1997),* or "the result of an unconstitutional or irrational purpose", *Marylanders for Fair Representation v. Schaefer, 849 F. Supp. 1022, 1032 (D. Md. 1994).*

Accordingly, contrary to Defendants' position, this case is not a "rehash" of the *Rodriguez v Pataki* litigation of a decade ago. The claims are not all identical as a racial claim has been interposed by Plaintiff-Intervenors. Facts have changed. Material demographic facts, circumstances and conditions differentiate this matter from the situation addressed in *Rodriguez*. *Cf. Rodriguez v. Pataki*, 308 F.Supp.2d 346, 352 (2004) ("The plaintiffs do not assert that racial discrimination accounts for the population deviation.") Instead, what remains apparent from a review of this record is that the Senate Majority has failed to ensure that its State Senate seats are apportioned equally, ensuring that the constitutionally guaranteed right to vote is "not denied by debasement or dilution of the weight of a citizen's vote." *Larios v. Cox,* 300 F. Supp. 2d 1320 at 1337 (N.D. Ga.)(three-judge panel), *summarily aff'd*, 542 U.S. 947 (2004) (*citing Reynolds v. Sims*, 377 U.S. at 555, 568; *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964)). "Each state…is required to 'make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id*. at 1339. Defendant's focus on the "ten percent rule" is simply not dispositive of this matter. *Id*. at 1340-1341. "The invariable

objective . . . remains 'equal representation for equal numbers of people.'" *Id.* at 1337 (*quoting Wesberry v. Sanders*, 376 U.S at 18).

a. Defendants Are Unable To Demonstrate The Honest and Good Faith Efforts Made In Creating An Equipopulous Legislative Senate Plan; Even Malapportionment Under 10 Percent Is Invalid Where Illegal Voter Dilution Harms Racial Minorities.

The timing of events leading up to New York State's Chapter 16 state redistricting legislation demonstrates Defendants' lack of good faith and honest effort to draw equally populated senate districts as required. Owing to the bad faith of Defendants and LATFOR, the public knew nothing about a 63-seat decision until the end stage of the state redistricting process. Such an understanding emerged in January, 2012 with the release of the State Majority's 63-seat proposal. Until such time, the vast majority of the public and civil rights community was kept in the dark. Defendants Senate Plan was, in turn, enacted S. 6696 (Chapter 16 of the Laws of 2012) with 63-seats on March 14, 2012.

Over the four month period from July 6, 2011 through Nov. 18, 2011, LATFOR held public hearings seeking testimony and comment while leaving the public with the impression that the Senate Plan would consist of 62-seats. In a rushed two-month time-frame, from January 10, 2012 through February 16, 2012, LATFOR held ten hearings. The last meeting on March 14, 2012 was for the public to watch the LATFOR members speak. Ex. A. List of LATFOR public hearings, dates, and places *(Full transcripts are available at http://www.latfor.state.ny.us/justice2012/?sec=sendoj2012).*

Given the timetable above, LATFOR and the Senate Majority did not attempt to satisfy the good faith requirements set forth in *Reynolds v. Sims*, 377 U.S. 533 (1964). Instead, the Defendants deliberately misdirected the public and deftly dangled false transparency to confuse

New Yorkers. The New York public, in turn, invested valuable time and resources to participate in redistricting in the spirit of seeking improved state government, accountability in redistricting districts, and promoting civic participation. Serious community groups and individuals expended hundreds of hours to educate and weigh community input. Technical evaluations in the mapping process also took place, in earnest, over months before submissions could be made.

Nothing regarding evolving, inchoate or already predetermined decisions on a 62-seat, 63-seat or other numbered seat plans were ever revealed during the first 90% of the process. Further, despite the prodding initiated at the August 4, 2011 LATFOR hearing by Senate Minority LATFOR representative Senator Martin Dilan, the Senate Majority LATFOR Co-chair Nozollio (R-Fayette) offered no information about when a decision might be made to the public on the size of the proposed Senate plan. Senator Nozollio merely respond that the New York Constitution would control the determination of the size of the Senate plan.

Though this basic premise remained undisputed, throughout this process, Senator Dilan and others remained troubled by how this Constitutional provision would be applied and how soon the public would be notified. Senator Dilan asked the LATFOR Co-Chair to provide fair notice to the public so that plans could properly be made for comment and submission. This same dialogue was repeated often with no resolution at other hearings. Ex. B- *Compare* Transcripts, August 4, 2011 LATFOR Public Hearing, 104:1-22, *with* Transcript, August 10, 2011 LATFOR Public Hearing, 27: 14-24, *and* Transcript, September 21, 2011 LATFOR Public Hearing, 158: 1-24. Instead, for several months, in response to these inquiries, LATFOR's Senate Co-Chair Nozollio cited the need to ascertain the public's opinion on the question of a 62- or 63-seat and to know what, if any, preference or desire the public may have had. Transcript, LATFOR August 4, 2011 Hearing, 49:1-21.

Yet, if the decision to choose a 63-seat plan was the result of the New York Constitution's mandatory redistricting requirement in determining the size of the Senate, a position espoused by Defendants in Defense Counsel Carvin's legal memo, dated January 5, 2012, it did not matter what the public's desire or opinions were, unless the sole purpose was to buy time, and, cynically protract the misdirection of the public and the minority community. Further, if this same interpretation was well-grounded and clear and had been upheld as deployed in the 2002 Redistricting Senate plan, a decision to resort to the 63-size option made public in January 2012 was unreasonable at about 11 months after the March 2011 release of the 2010 census data. The application of constitutional methods used in the 2012 Senate plan also deviated from the method applied in 2002, and, from applications consistently used in consecutive redistricting cycles since 1970.

LATFOR's role was to provide research assistance to the task force members, gather public input and timely impart redistricting process information to the public. The charade to keep the 63-seat decision hidden until the last stage of redistricting demonstrates the bad faith of Defendants. It was incumbent upon the LATFOR Co-Chairs to warn the groups and individuals that filed their 62-seat plans to get ready to file 63-seat submissions. The public did not know nor was LATFOR interested in the public's input about where to place a new district, or, what factors should be used to decide its location.

Defendants' unreasonable conduct and lack of transparency on such a critical development did not build trust in the LATFOR leadership nor in the ultimate redistricting process, as intended. With limited resources and no expectation of a last minute switch, serious minded mappers, such as Common Cause New York, and the Unity Plan sponsored civil rights organizations and their constituent coalitions, could not have reasonably been expected to

simultaneously draw both 62- and 63- seat plans. Consequently, based on the facts available at the time, they timely submitted their 62-seat Senate maps.

These facts, as outlined above, do not lend credulity nor establish Defendants good faith efforts.

Finally, in response to Defendants' representation that "[t]here was plenty of 63-seat [plan] alternatives [filed] well in advance of January [2012]." Ex. C- Court Transcript, April 20, 2012, 75: 23-24. Ramos Intervenors maintain that of the 21 sets of full or partial plans submitted to LATFOR, maps were focused on the common belief that a 62-seat basis was operational. If 63-seat plans existed and were submitted to LATFOR before January 2012, such plans were not made available in the submission to the Justice Department nor can they be found on LATFOR's website. Ex. D- LATFOR- Senate Department of Justice Submission, Joint Exhibit 22- Alternative Plan Submissions.

b. Beyond the circumstantial evidence that some legitimate criteria may have been applied, nothing adequately explains the Senate's 63-seat scheme of regionalized malapportionment and the theft of a full majority-minority Latino district from the Bronx.

Mysteries have abounded in 2012 Senate Plan redistricting. The paucity of criteria, legitimate or not, may be made evident in Defendants occasional comments. Stock responses have been recited for talismanic use.[3] Otherwise, the official justifications have been provided by their counsel. During the brief two-hour Senate Chamber "debate" before the scheduled vote of S. 9696, LATFOR's co-chair Senator Nozollio was asked to explain how the 63-seat plan was

[3] Senator Nozollio handily cites to Senate Majority's outside counsel Michael Carvin and the advisory role played in the New York Senate's current and prior redistricting process. Under probing questioning from Senator Gianaris (D-Queens) he was, however, unable to affirm that in 2012 two counting methodologies had been applied simultaneously in different regions by his counsel, unlike as applied in the 2002 Senate Plan, in determining the size of the senate. Ex. E- NY Senate Transcript, March 14 , 2012, 73:12- 81:10.

developed and what criteria were relied upon. Peer senators sought detailed explanations of the Senate Plan's 63-seat plan. Yet, what was systematically plotted based on the Senate Majority's "redistricting matrix" still remains unknown. Without discovery, this Court could not determine whether these matters manifest the root animus or were mere by-products of legitimate criteria or unconstitutional practices, tainted by bias and/or arbitrariness.

By way of what we can gleam from the proceedings, Senator Nozollio may have *inadvertently* divulged some of the thinking that went into how the malapportioned districts in Long Island and New York City were shaped and purposefully malapportioned. This information was triggered in response to Senator Gustavo Rivera's (D-Bronx) question regarding whether the minority communities of Nassau County and Suffolk County "[should have gotten] an opportunity to elect someone of their own choosing, as per Section 2 and Section 5 of the Voting Rights Act?" given their recent growth. Senator Nozillo responded:

> Each have had <u>at least 90 percent</u> of the core of their existing district-- those on [Long Island] island, those in Suffolk County in particular, 90 percent of the cores of existing districts were retained by this plan. That is an item that is part of the redistricting matrix that we particularly are very proud of, in keeping the cores of existing districts together. And that those districts in Suffolk County virtually all are preserved to 90 percent capacity, as you move further east-- excuse me, west, that that district core is <u>not under</u> <u>80 percent</u> moving west... [emphasis provided]
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> Ex. E- NY State Senate Transcript, March 14, 2012, 117:13-118:23.

Simply stated, the New York 2012 Senate Plan had intentionally preserved the Senate districts of Nassau and Suffolk counties, all majority white and Republican-incumbent held districts with a 90% protective umbrella. This appears to be how Defendants adhered to the 10 percent deviation as a "safe harbor" rule. But, the senate districts, going west, such as those in New York City, with substantial minority populations and minority senators, were afforded only 80% preservation of their senatorial cores. Inconsistency, policy-dysphoria, bias, and

discriminatory intent are issues of fact here. The aggregate downstate margins, as we know them from the record, left sufficient leeway for the Defendants to craft statewide malapportioned districts at wholesale.

In addition to these furtive revelations by Defendants, Plaintiff Intervenors rely on the open, credible and detailed analyses by the expert, Todd Breitbart, as rendered from public records (ECF Doc. 305-1, and, 327) to support our claims about the patterns of malapportioned districts in the Defendants' 2012 Senate Plan; as we have stated, the impacts from and deviations in the State's plan cannot be properly explained as neutral nor consistent with accepted redistricting criteria under the U.S. Constitution and N.Y. Constitution.

"The large deviations present in the Chapter 16 Senate Plan, and its regional bias, cannot be justified by reliance upon any of the traditional redistricting principles recognized in the New York Constitution or accepted by other courts." (ECF Doc. 327 ¶ 37.)

Defendants malapportionment scheme as scrutinized with an expert eye demonstrates in a compelling manner, how the 2012 Senate Plan had failed to abide by New York's Constitution, Article III, Section 4 traditional redistricting principles, such as, drawing the Senate districts "in as compact form as practicable", preserving "county integrity" by avoiding the division of counties, avoiding the splitting of minor counties, minimizing the creationof bi-county districts, and, following block-on-border mandates. Other extra-constitutional criteria that the Senate Plan lionize appear to not to have been subordinated to the traditional rules of equal population and criteria cited above. Id. ¶¶ 6, 10, 32-33, 36-63, and 87. Defendants plan defends its "adherence to two "traditional" principles that are ***not*** constitutional requirements: avoiding the pairing of incumbents and preserving the cores o existing districts.: Id. ¶ 48.

Mr. Breitbart also discussed how the Senate Majority departs from the constitutional principles in prior redistricting cycles. LATFOR Hearing, Sept. 21, 2011, 224-225. He also confirms how black and Latino residents, particularly in Nassau County, have been consistently split up, cracked, and effectively short-changed by race-conscious gerrymanders for "four decades". Ex. B, LATFOR Hearing, Sept. 21, 2011, 213-216.

In light of this expert's analysis, the Senate Majority's tenuous redistricting scheme amply demonstrates the lack of primacy for the equal population rule and no consistent subordination to otherwise legitimate principles. Was similar criteria applied in the other districts, in other parts of the state? How were other criteria and guide-posts developed for the Senate map designers to apply? Why and how were the remaining districts in the State under-populated? Had New York's redistricting criteria been consistent and not arbitrarily applied, one should find a general pattern of mixed deviation districts, up and down percentages, in districts adjoining each other, reflecting the specific and real gradients considered. That is not what we found in the 2012 enacted plan. But it is what we offer in our alternative plan.

c. An alternative plan was always available to ensure compliance with the one person, one vote rule.

As argued by Defendants counsel: "[W]e can only be diluting black and Hispanic voting power relative to diluting New York City power if the addition of the extra seat would enable the creation of another black or majority Hispanic district." Ex. C, Court Transcript, April 20, 2012, 70:4-17. Counsel posits that such a plan exists, further evidencing the vote dilution and equal protection violations argued to date. In fact, such a viable alternative was made known to LATFOR before it passed the Chapter 16 Senate Plan.

Accordingly, in further support of the arguments presented to date regarding the 63-seat Senate Plan violating the one person, one vote rule, we proffer an alternatice 63-seat Senate Plan to this Court and to Defendants to prove that it was indeed possible to craft a majority-minority district in Bronx County to reflect the past decade's sizable growth of Latinos downstate. While drafting papers, Ramos Intervenors, Drayton Intervenors and Lee Intervenors had collectively referred to this plan, which Ramos Intervenors labeled "New York Senate Alternative II" Ex. F. It is identical to the revised plan drawn by expert Todd Breitbart and electronically filed yesterday afternoon. ECF Doc 327-2. The Breitbart plan had adapted guidance and references from the 62-seat Unity Plan.

The Breitbart/ Senate Alternative II Plan provides the showing that it would have been possible to create one whole Senate district in Bronx County. The Senate Alternative II Plan improves upon the 2012 Senate Plan with total deviation of 6.33%. Our plan thus provides at least one more Hispanic-majority district than the enacted Senate Plan in which Latino voters can elect a representative of their choice.

By contrast, the new Senate seat was designed in the Albany-Syracuse area for a white-majority at the expense of a majority-minority Latino district in Bronx County. Furthermore, the Defendants' Senate Plan over-populated the downstate region consisting of New York City and Long Island, by 344,536 people which constitutes more than one whole Senate district.

The Senate Majority's assertion that "relative growth" criteria justified the creation of Senate District 46 is mere pretext. ECF Doc. 320, Deft Oppos to OTSC. Moreover, Senate Majority's "relative growth" criteria for forging the boundaries of Senate District 46 were neither accurate nor consistent in application .[5] Even if the "relative growth" criterion were acceptable as

[5] Excerpts of Sen. Gianiris and Sen. Nozollio colloquy on Senate Floor before the vote:

legitimate state policy, which we do not accept is so, it does not implement Article III, Section 4 of the New York Constitution. Defendants did not even annex the proper portion of the Hudson Valley into new Senate District 46. Ex G, 2012 Senate Map of SD 46.

Senate District 46 consists of a white majority base located in a less than robust growth area. Pretextual in its explanation, the State Senate Majority offers a faux-legitimate reason to justify a reward in the alleged growth of the upstate region. The 2010 census data and record testimony highlight the contradictions.

Their criterion that an alleged 3.36% "relative growth" in upstate counties outpaced New York City's alleged 2.8 percent relative growth does not add up. Court Transcript, April 20, 2012, 25:6 to 26:19, Ex H, Table- Actual-Relative Population Growth for NYC and SD 46 counties. Expert analysis further refutes the Defendants' rationale by demonstrating the patterns in demographic growth data. ECF Doc. 327, Affidavit of Todd Breitbart, dated April 26, 2012, ¶¶ 60-62, 66.

Absent the extensive regional malapportionment of senate districts, the unsupportable claims for the new senate district, the "theft" of a majority-minority district that was substituted by Defendants into the less-populated upstate districts, and Defendants failure to consistently adhere to traditional redistricting and constitutional principles, Plaintiffs have shown that the

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> Gianaris: The numbers make clear that it's in the Lower Hudson Valley where the growth has been experienced, the counties if Orange and Putnam, Westchester and Rockland. This new district doesn't touch any of those districts. It is [drawn] in the Capital region and in the Northern Hudson Valley....would it not make sense to place a new district where the population was the greatest? ...
> Nozollio: ....Saratoga County is by far one of the fastest-growing counties. I believe it is the fastest-growing county in the State of New York.....
> Ginaris: How much of Saratoga County is in the new 46th District? ...
> Nozollio: ...Saratoga County is not a component of the [newly created] 63rd Senatorial district.....
>
> NY State Senate Transcript, March 14, 2012, 68:19- 73:3

2012 Senate Plan was likely based on racial bias as well as regional discrimination tainted by acts of arbitrariness and *ultra vires* practices.

Ramos Intervenors prove that the deprivation of a new Senate seat to the growing Latino population is a constitutional harm.

Its significance can be concretely measured, in part, by noting the State Senate's exceptional set of powers under the N.Y. Constitution. Critical power is exercised in the Senate. to review and approve the numerous executive department's state commissioners of numerous public agencies; they designate and fill empty judgeships throughout the State's judiciary.[6]

The State's balance of power and regional choices are manifested through the instrumental exercise of these duties and powers on a regular basis. It is an inaccurate representation that both state chambers are co-equal and identical under the law. This conventional belief is simply misguided; its obfuscation is used conveniently by Defendants to argue to this Court that minority voters do not suffer any dilution of power.

In sum, voter access to their elected officials have political significance when viewing the distinct exercise of Senatorial privileges and powers that are not offset by the exercise of powers in the Assembly as suggested by Defendants. There is no *de minimis* population deviation that may permissibly justify voter dilution harm here. (See ECF Doc. 322, at 38, 44-45.) The loss of voting power by minority voters in this one full Senate seat is simply not comparable to the facts presented in *Rodriguez v Pataki*.

[6] The governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission, a person to fill the office of chief judge or associate judge, as the case may be, whenever a vacancy occurs in the court of appeals; provided, however, that no person may be appointed a judge of the court of appeals unless such person is a resident of the state and has been admitted to the practice of law in this state for at least ten years. The governor shall transmit to the senate the written report of the commission on judicial nomination relating to the nominee. N.Y. Const. Art. VI, § e.

CONCLUSION

For the foregoing reasons stated, the Ramos Intervenors' Motion, as supplemented, should be approved.

Respectfully Submitted,

s/ Jackson Chin

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of April, 2012, a true and correct copy of the foregoing submission was served on the following parties of record through the Court's CM/ECF system:

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