CERTIFICATE OF INTERESTED PERSONS

The following persons or entities, believed to be within the classes of persons set out in Cir. R. 28-2.1, have an interest in the outcome of this case.

1. Daniel Andersen, Co-defendant;

2. Robert E. Barnes, Esq., Attorney for Defendant-Appellant David Struckman;

3. Robert G. Bernhoft, Esq., Attorney for Defendant-Appellant David Struckman;

4. Carl H. Blackstone, Asst. U.S. Attorney, Attorney for Plaintiff-Appellee;

5. Helen J. Brunner, Asst. U.S. Attorney, Attorney for the Plaintiff-Appellee;

6. Sonja Chahin, Esq., Attorney for Co-defendant Kuldrip Singh;

7. Catherine Ann Chaney, Esq., Attorney for Co-defendant Lorenzo Lamantia;

8. William A Cohan, Esq., Attorney for Co-defendant Daniel Andersen;

9. Gregory V. Davis, U.S. Department of Justice Tax Division/Appellate Section, Attorney for the Plaintiff-Appellee;

10. Jeffrey A. Dickstein, Esq., Attorney for Defendant-Appellant David Struckman;

11. William H. Fligeltaub, Esq., Attorney for Co-defendant Dwayne Robare;

12. Carole A. Grayson, Esq., Attorney for Co-defendant Dwayne Robare;

13. Alan Hechtkopf, U.S. Department of Justice Tax Division/Appellate Section, Attorney for the Plaintiff-Appellee;

14. Lori A. Hendrickson, U.S. Department of Justice Tax Division, Attorney for the Plaintiff-Appellee;

15. Terrance Kellog, Esq., Attorney for Co-defendant Kuldrip Singh;

16. Lorenzo Lamantia, Co-defendant;

17. Robert Michael Leen, Esq., Attorney for Co-defendant Kuldrip Singh;

18. Christopher Maietta, U.S. Department of Justice, Attorney for the Plaintiff-Appellee;

19. Mark T. Odulio, U.S. Department of Justice Tax Division, Attorney for the Plaintiff-Appellee;

20. Dwayne Robare, Co-defendant;

21. Michelle Shaw, Esq., Attorney for Co-defendant Dwayne Robare;

22. Kuldrip Singh, Co-defendant;

23. David Struckman, Defendant-Appellant;

24. Jeffrey C. Sullivan, U.S. Attorney, Attorney for the Plaintiff-Appellee;

25. Robert M. Takasugi, U.S. District Judge;

26. Kathryn A. Warma, Asst. U.S. Attorney, Attorney for the Plaintiff-Appellee;

27. Michael J. Watling, U.S. Department of Justice Special Litigation Section, Attorney for the Plaintiff-Appellee;

28. Larry J. Wszalek, U.S. Department of Justice Tax Division/Appellate Section, Attorney for the Plaintiff-Appellee.

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ARGUMENT

I. THE GOVERNMENT SKEWS OR MISCHARACTERIZES THE DISTRICT COURT'S GOVERNMENT MISCONDUCT ORDER FINDINGS. (DOC. 449.)

Several of the government's many contentions require a response because they mischaracterize core factual issues on appeal as they relate to the United States Government's misconduct, both in Panama regarding the extradition process, and in the United States during the IRS' investigation. First, the government obfuscates the district court's factual findings regarding its misconduct by discounting them as Struckman's mere "characteriz[ations]," (Br. of Appellee at 29), or "claims," *id*. at 25. To the contrary, the "improper conduct by United States agents in Panama" was not Struckman's mere claim, but a fact the district court found in its misconduct order, based upon the testimony and evidence adduced at the evidentiary hearing on government misconduct.

For example, the district court determined that RSO O'Brien "interfere[d] with Defendant's communications with counsel," (R. 449, at 68), and deceived the Panamanians by "misinterpret[ing] defendant's status as an already sentenced individual who was a fugitive from federal authorities and was awaiting to serve his sentence." *Id*. at 70. Furthermore, the "improper surveillance" and "laundering of illicitly obtained information" were not Struckman's mere "characteriz[ations]." (Br. of Appellee, at 29.) Contrary to these government urgings, the district court

found that "by suppressing the source of the information attributed to AI-1/Ted, information that would be material to a defense of government misconduct, the government has committed a *Brady* violation that would result in a due process violation at trial." (R. 449, at 77.) The district court found a "pattern of misconduct in this case" that cannot, and should not, be disparaged on appeal as mere claims or characterizations. *Id*. at 82.

Second, the record is wholly bereft of even a scintilla of evidence that Struckman was served with the deportation order (Resolution 10886) prior to January 13, 2006. In fact, the *only* evidence in the record of Struckman's notification is the official endorsement of a Panamanian authority on Resolution 10886, signed at 9:15 a.m. on the morning of January 13, 2006: "Today, January 13, 2006, I **notified** David Alan Struckman of the previous resolution at 9:15 a.m. of the Deportation Resolution." (Def's. Rec. of Excepts, Vol. I at 86 and Def's Ex. 57(k)) (emphasis added). Struckman was whisked out of Panama at approximately 10:20 a.m. that same morning, giving him just over an hour to assert "the recourses of Reconsideration and Appeal" the government concedes were found within the Resolution. (Br. of Appellee at 13-14.) Nor did RSO O'Brien, who met Struckman thirty minutes after he was served Resolution 10886, inform Struckman of his right to appeal nor assist in the translation of the documents as they were presented to

Struckman in Spanish[1], a language Struckman does not speak and a language RSO O'Brien pretended not to understand. (R. 449 at 70, n.21).

The government had ample opportunity to present evidence at the misconduct hearing that Struckman was served the Deportation Order prior to January 13, 2006, but could not do so.[2] Furthermore, RSO O'Brien had been working with the Panamanian authorities from July of 2004 until Struckman's arrest on January 11, 2006. If Struckman had been served Resolution 10886 (or Resolutions 10885 and 10887 for that matter) at any time prior to January 13, 2006, why did it take the Panamanians (after multiple requests from RSO O'Brien) so long to locate him? (*See* R. 437 at 17-31 for a complete outline of RSO O'Brien's testimony regarding his extensive contacts and requests to Panamanian authorities; *see also* Def's Ex. 89(c).) Wouldn't RSO O'Brien have been aware of that service and therefore Struckman's location? And if service was perfected earlier, why didn't RSO O'Brien provide this information to the defense in his State Department file discovery disclosures? Why didn't the government bring

[1] Struckman's was originally served this document in Spanish. (R. 433 at 179:8-9.)
[2] At the evidentiary hearing the government chose to call only a single witness, Gary D. Moritz, whom they asserted was the ubiquitous AI-1/Ted, and further, was unrelated to any of the Panamanian extradition issues. As the court found relating to the false attributions: "While in isolation these discrepancies could well be attributed to sloppy record keeping, faulty memories, simple misstatements or minor omissions, in the aggregate, they add to nothing more than a house of cards built to support the illusion of the existence of AI-1." (*See* Doc. 449 pp. 72-77 for a complete discussion regarding "Misconduct in connection with Anonymous Informant No. 1.")

this evidence to the hearing? Because there was none. Based on RSO O'Brien's perjurious testimony at the evidentiary hearing, contempt for the "sacred tradition" of habeas corpus and Struckman's right to counsel, and his further willingness to lie and deceive Panamanian authorities, the only reasonable conclusion is that Struckman *was not noticed* of the Resolutions prior to January 13, 2006. The record speaks for itself on this critical issue.

The government ignores both the evidence and basic logic, and baldly asserts that Struckman's "time to move to reconsider or appeal from the order of deportation had expired in 2004." (Appellee's Br. at 14.) One cannot appeal something one has no knowledge of. Nor was Struckman's retained counsel, Attorney Renaldo Milwood, aware of the Resolutions prior to January 13, 2006. (R. 449 at n.19.) Struckman, therefore, did not have the opportunity to appeal the deportation order before his time to appeal had expired. Struckman was served Resolution 10886 at 9:15 a.m. on January 13, 2006, while in custody at Tocumen International Airport, and was promptly removed from Panama approximately one hour later without any opportunity to challenge the Resolution orders. We address these factual mischaracterizations at the outset because they bear directly on the critical legal issues this complex record presents on appeal.

II. THE GOVERNMENT'S CONTENTION THAT THE SIXTH AMENDMENT DOES NOT APPLY TO U.S. OFFICIALS' CONDUCT IN FOREIGN JURISDICTIONS IS FLATLY WRONG, AND CONSEQUENTLY, RSO O'BRIEN VIOLATED STRUCKMAN'S SIXTH AMENDMENT RIGHTS IN PANAMA.

Struckman's Sixth Amendment right to counsel uncontroversially attached upon his 2004 indictment by a federal grand jury in the Western District of Washington. *See United States v. Pace*, 833 F.3d 1307, 1310 (9th Cir. 1987) (Sixth Amendment right to counsel attaches upon "(1) formal charge, (2) preliminary hearing, (3) indictment, (4) information, or (5) arraignment") (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). In turn, Struckman carried his vested Sixth Amendment right to counsel with him in Panama. *United States v. Dolack*, 484 F.2d 528 (10th Cir. 1973). The *Dolack* defendant was a U.S. citizen imprisoned in Canada when an indictment issued against him in the District of Kansas. *See id.* at 528. When Dolack learned of the indictment he wrote to the district judge and requested an attorney. *See id.* at 529. The district court held the right to counsel didn't attach to Dolack in Canada, and denied the motion until he was brought into the district court's jurisdiction in Kansas. *See id.* Dolack was not released from Canadian custody for thirteen months following his request, and in the meantime, no counsel was appointed. *See id.* Upon his release from Canadian prison, Dolack was transferred to the United States, tried, and convicted. On appeal, however, the Tenth Circuit reversed, holding that the defendant's Sixth

Amendment right to counsel attached and was violated while in Canada, and both vacated the trial conviction and dismissed the indictment. *See id*.

Whereas Dolack petitioned the district court for counsel based upon his indigency, Struckman had actually *retained* Panamanian counsel – a fact specifically known to RSO O'Brien immediately after Struckman's arrest in Panama, in spite of his initial denials at the evidentiary hearing on government misconduct:

> Q. Were you aware that Mr. Struckman had an attorney in Panama concerning his detention on January 12, 2006?
> A. No, not that I know of. I can't remember.

(R. 433, at 153:2-4.)

That testimony was belied by O'Brien's own email to DOJ Trial Attorney Mark Odulio dated January 12, 2006 – just one day after Struckman's arrest and one day before Struckman was extradited: "***A lawyer for Struckman came sniffing around police headquarters this morning. The race has begun***. The PNP turned Struckman over to immigration so they'll refer the lawyer to them sometime today." (R. 433, at 153:24-154:2; quoting Ex. 89-W) (emphases added). When presented with this email, O'Brien finally conceded his specific knowledge that Struckman had retained counsel – albeit grudgingly and obstreperously:

> Q. What did you mean "the race has begun"?
> A. Well, as terms of whether he will be deported before any legal –
> Q. The lawyer gets involved?

A. Before any legal action is initiated.
Q. Precisely.

(R. 433, at 154:3-8.)

Any doubt left by O'Brien's email and recalcitrant testimony that he intentionally violated Struckman's right to counsel was put to rest by the following colloquy with defense counsel immediately prior to being shown his January 12th facsimile. O'Brien was asked to read his email to IRS Special Agent Hardaway dated June 23, 2005, titled "Past Fugitive Experiences":

> A. "Based upon past fugitive experiences we've done a turnaround in less than 24 hours. PNP nabbed him [a different defendant] at 1630, 4:30 on afternoon. He was on a plane out of the country by 2:00 the next. That's why I'm trying to get as much lineup as possible. There is a lot of Jokers in that deck that can derail it . . . . he may be able to get a lawyer to slow things down. That is why we want to move quickly and nab him. We don't want to give him a chance, especially with that much money available to him - -"
> Q. Stop right there. So you said that you did not want to give Mr. Struckman a chance to have his attorney involved in the process; is that correct?
> A. That's my statement on the e-mail, yes.

(R. 433, at 152:7-21.)

RSO O'Brien intentionally misled the Panamanian officials about Struckman's legal status, intentionally made certain Struckman's attorney was kept in the dark about Struckman's physical whereabouts upon his arrest, and schemed and designed the now-infamous "habeas grabbus" with the specific intent to extract Struckman from Panama before he could consult with his retained counsel or have

that attorney institute legal proceedings to review the veracity of O'Brien's false claims that Struckman was a fugitive from justice waiting to serve his sentence in the United States. O'Brien's lies and deceptions violated Struckman's right to counsel. As the Supreme Court held over fifty years ago:

> At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.
> . . .
>
> The language of Art. III, s 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home.

Reid v. Covert, 354 U.S. 1, 5-6 (1957).

See also Boumediene v. Bush, 128 S.Ct. 2229 (2008) (holding as recently as last June that *habeas corpus* relief is available to Guantanamo Bay detainees notwithstanding the fact that the Executive Branch labeled those prisoners "enemy combatants," again stressing substance over form).

With this factual and legal background, the government's contention that Struckman had no Sixth Amendment right to counsel does much more than strain credulity. Nevertheless, the government cites four cases, all of which are easily

distinguishable on the facts and legal issues presented by those cases. Two of the cases, *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007) and *Anderson v. Alameida*, 397 F.3d 1175 (9th Cir. 2005), involved denial of effective assistance of counsel claims that are wholly irrelevant here. Struckman did not allege that his counsel was ineffective in any way. Moreover, the government's citation to *Anderson* includes the parenthetical: "right to counsel did not attach at extradition hearing because such hearing is not inception of adverse criminal proceedings." (Gov. Br. at 26.) The *Anderson* defendant, however, had not yet been officially charged under California law when a police officer issued a "complaint" for an arrest warrant. *Anderson*, 397 F.3d at 1178. Rather, the "complaint" was merely an affidavit for the arrest of the defendant and constituted the basis for a probable cause foundation supporting the arrest. *Id*. at 1180. The filing of "a complaint for an arrest warrant did not commit the San Francisco District Attorney under California law to prosecute petitioner." *Id*. Therefore, there was no "adversarial judicial proceeding" initiated against the defendant as required by *Kirby v. Illinois*, 406 U.S. at 688 in order for the Sixth Amendment right to counsel to attach.

Next the government argues that the Sixth Amendment is not binding on foreign courts, citing *Flynn v. Shultz*, 748 F.2d 1186 (7th Cir. 1984). This argument misses the mark entirely, because Struckman does not argue for any such proposition. Instead, Struckman clearly set forth in his opening brief that RSO

O'Brien violated his right to counsel by interfering with his communication with retained counsel, and using the illicit "habeas grabbus" scheme to prevent Struckman's retained counsel from filing an appeal of the deportation order or cognizable habeas corpus petition before he was whisked out of Panama. For RSO O'Brien knew that his critical lies and deceptions would be exposed in any Panamanian legal proceeding. Moreover, *Flynn* is easily distinguished on the facts, because Flynn was the defendant in a *Mexican* criminal proceeding; there was no pending proceeding in the United States. *Id*. at 1187. Indeed, the case before the Seventh Circuit involved a writ of mandamus Flynn filed to require a State Department officer to testify in the Mexican criminal proceeding pursuant to both the Hostage Act and the Sixth Amendment. *Id*. The Seventh Circuit correctly held that the Sixth Amendment did not require the Executive Branch to authorize the testimony of one of its officers in the Mexican criminal proceeding. *Id*. at 1197.

Finally, the government unavailingly urges that a Second Circuit case supports it's contention that Struckman had no Sixth Amendment rights in Panama. *See United States v*. *Yousef*, 327 F.3d 56, 142, n.66 (2nd Cir. 2003) (extradition proceedings "do not independently trigger any Sixth Amendment protections.") Even assuming that an extradition proceeding does not *independently* trigger right to counsel protections, controlling Supreme Court

authority declares that Struckman's federal indictment *did*. *See Kirby*, 406 U.S. 682. Moreover, the *Yousef* opinion actually supports Struckman's contention that United States officials must respect Struckman's right to counsel, even overseas:

> Although Yousef's counsel asserts that Yousef invoked his right to counsel during his extradition proceedings before a Pakistani judicial officer . . . there is no evidence that any United States official was aware of this request, and therefore, Youself has failed to establish that his request had any cognizable legal effect under American law or the Sixth Amendment thereunder.

Yousef, 327 F.3d at 142.

Yousef actually implies that a U.S. official might violate a defendant's right to counsel before a foreign judicial proceeding, but only if that official is aware of the invocation. Here, O'Brien was specifically aware that Struckman had retained counsel.

Although RSO O'Brien was certainly "not required to 'monitor the conduct of representatives of [Panama] to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards,'" *id*. at 142 (quoting *United States v*. *Lira*, 515 F.2d 68, 71 (2nd Cir. 1975)), he *was* most certainly required not to deliberately obstruct Struckman's retained counsel from interposing Panamanian judicial process with his "habeas grabbus" scheme, and otherwise interfering with Struckman's communication with retained counsel. United States Executive Branch officers were obliged not to deliberately interfere with Struckman's right to counsel in Panama, and having done so, the district court

should have exercised its supervisory jurisdiction and dismissed the indictment to deter the "habeas grabbus" misconduct that O'Brien's own email admits is the ordinary course of business for U.S. Regional Security Officers in Panama.

III. THIS CIRCUIT DOES NOT LOOK THE OTHER WAY AT GOVERNMENT MISCONDUCT, ESPECIALLY WHEN THAT MISCONDUCT MOCKS THE FEDERAL JUDICIAL PROCESS IT SEEKS TO ENFORCE, AND VIOLATES BASIC FIFTH AMENDMENT RIGHTS.

The government disingenuously asserts that Struckman was deported from Panama, notwithstanding the State Department's repeated requests through RSO O'Brien for Struckman's arrest and transfer to United States custody. The treaty clearly was invoked by the actions of RSO O'Brien and the State Department: "Requisitions for the surrender of fugitives from justice shall be made by the diplomatic agents of the contracting parties." Treaty Between the United States of America and the Republic of Panama, Providing for the Extradition of Criminals, 34 Stat. 2851, Treaty Series 445, Art. III. Furthermore, the treaty governs the delivery of "persons who, having been charged with . . . any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the contracting parties, shall . . . be found with the territories of the other." *Id.*, Art. I.[3]

[3] For a full discussion of this Treaty, please refer to Struckman's Opening Brief, pp. 39-40.

Here, RSO O'Brien made repeated requisitions to Panama, and misrepresented Struckman as someone convicted of a crime and a fugitive awaiting sentencing – someone plainly covered by Art. II of the treaty. (R. 449, at 70.) (*See* R. 437 at 17 for a factual chronology of RSO O'Brien's interaction and correspondence with Panamanian authorities.) The treaty was invoked no matter how the government chooses to denominate Struckman's Panama extraction.

The Supreme Court has defined the difference between deportation and extradition:

> "Extradition" is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. "Deportation" is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, ***and without any punishment being imposed or contemplated***, either under the laws of the country out of which he is sent or under those of the country to which he is taken.

Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) (emphases added). Even assuming, though, that the government was not required to extradite Struckman – based on the treaty with Panama and pursuant to *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) and its progeny[4] – the government cannot argue that their conduct was any less outrageous because they had no treaty

[4] As the Government stated, three district courts have interpreted the United States-Panama treaty as not requiring extradition. *See United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981); *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997); and, *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006). The treaty, however, has not been considered by the Ninth Circuit.

obligations to Struckman. And the government certainly cannot argue convincingly on these facts and under these circumstances that somehow Panama unilaterally deported Struckman.

RSO O'Brien's intentional and well-orchestrated efforts to keep Struckman separated from his attorney – coupled with RSO O'Brien's lies which deceived the Panamanians into believing Struckman was a convicted fugitive from justice – violated not only Struckman's Sixth Amendment right to counsel, but fundamental Fifth Amendment due process rights, as well. For notably, the due process clause includes the defendant's right to an attorney merely for being "detained on suspicion of crime." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006).

> A foreign national detained on suspicion of crime, like anyone else in our country, enjoys under our system the protections of the Due Process Clause. Among other things, he is entitled to an attorney, and is protected against compelled self-incrimination.

Id.

The government apparently believes it can deliberately interfere with an existing attorney-client relationship, because upon discovery that "a lawyer is sniffing around", (R. 433, at 153:24), the government obstructed access to Struckman's counsel and participated in deceiving that counsel and foreign officials. This is a case of deliberate government interference with an attorney-client relationship through the deception of Struckman, his counsel, and a foreign nation. Even if Struckman had not been indicted and even if he had not been

arrested in a foreign nation on suspicion of a crime, as the Supreme Court declared in *Moran v. Burbine*, 475 U.S. 412, 523-24 (1986), "the deliberate or reckless withholding of information" from a defendant concerning counsel during any detention, even pre-indictment, violates Constitutional rights when it "deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." The mere interference with Struckman and his counsel's relationship was sufficient grounds to find a Fifth Amendment violation.

Moreover, any government assertion that this court is supervising foreign conduct by holding United States government officials to task is nonsense; the whole point of the government's actions was to *prevent* Panama law from being applied and *prevent* the proper Panama officials, including and especially the courts, from reviewing the matter and making its decision. This case is similarly not about supervising a foreign nation's judicial process; it is about preventing United States agents from using their authority to deliberately undermine a foreign nation's legal protections and judicial process with an act of American official misconduct, misconduct that violated rights protected by our own Constitution and our own treaties, misconduct impugning the integrity of federal courts, and misconduct recurrent and likely to recur again without this court's exercise of supervisory power.

The government does correctly cite the standard for a district court to exercise its supervisory powers. "To justify exercise of the court's supervisory powers, the prosecutorial misconduct must be flagrant and must cause 'substantial prejudice' to the defendant." (Appellees Br., p. 26 (citing *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991)). The Government's conclusion, however, that no constitutional rights were violated because the Panama proceedings were a unilateral act of "deportation," is meritless. As the district court noted in its misconduct order, *see* R. 449, the government's misconduct in transferring Struckman to United States' custody and the illegal activities related to AI-1/Ted in the United States, both were extensive and outrageous. And the only thing restraining the district court from dismissing the case on the Panama misconduct grounds was the district court's unfortunate misinterpretation of the Panama Supreme Court Order.

The district court concluded that the Panama Supreme Court held that Struckman was validly deported, when in fact the Panama Supreme Court dismissed the case only because Struckman was no longer within Panama's jurisdiction. (R.434, at 245:2-18.) The *habeas corpus* case was moot because the *corpus* was not within the jurisdiction. Furthermore, the district court also held that it would have ruled differently, "Had there not been a valid deportation Resolution which the Supreme Court of Justice of Panama found to have properly

issued, and had there been evidence that Struckman had **not** been notified of the August 25, 2004 resolution, the repercussions of RSO O'Brien may have been different. That issue, is not before the court." *Id*. at 70, n.22 (emphasis added). This important footnote clearly shows that the district court would have likely exercised its supervisory jurisdiction and dismissed the indictment, but for its unfortunate misconstruction of both the Panama Supreme Court's *habeas corpus* order and the deportation order service facts.

CONCLUSION

This Court should cure those unfortunate factual misapprehensions, vacate the judgment, and remand the case with instructions to dismiss the indictment with prejudice.

Dated at Milwaukee, Wisconsin, on this the 9th day of March, 2009.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. R. 32(a)(7)(B) because this brief contains 4,031 words, excluding the parts of the brief not mentioned in Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportional spaced typeface in Times New Roman font, 14-point for text and footnotes.

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Dated: March 9, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was sent to the Respondents, by sending a copy via the Court's ECF system:

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