IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE POLAR BEAR ENDANGERED SPECIES ACT LISTING AND § 4(d) RULE LITIGATION	Misc. Action No. 08-764 (EGS) MDL Docket No. 1993
This Document Relates To: CONSERVATION FORCE et al. v. KEMPTHORNE et al., No. 09-245 (EGS)	

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES BY CONSERVATION FORCE; INUVIALUIT GAME COUNCIL; ARVIAT HUNTERS AND TRAPPERS ORGANIZATION; RESOLUTE BAY HUNTERS AND TRAPPERS ORGANIZATION; LOUIE NIGIYOK D/B/A/ ARCTIC HILLS TOUR COMPANY; NANUK OUTFITTING, LTD.; CANADA NORTH OUTFITTING, INC.; AMERI-CANA EXPEDITIONS, INC.; WEBB OUTFITTING NUNAVUT, LTD.; HENIK LAKE ADVENTURES, LTD.; AND JOSEPH VERNI D/B/A/ NATURA SPORT ET. AL. IN OPPOSITION TO FWS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF SUMMARY JUDGMENT

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I. INTRODUCTION

In their Cross-Motion for Summary Judgment FWS did not explain why it failed to "take into account" foreign programs when it listed the polar bear. The ESA only allows the FWS to list a foreign species "after taking into account those efforts . . . being made by any . . .foreign nation to protect such species." 16 U.S.C. 1533(b)(1)(A), *Basis for Determinations*. CF argued in the initial briefing that "taking into account" "requires the FWS to employ all measures to . . . allow[] for the existence of foreign conservation programs when it lists a species because the Act is not . . . a substitute for a nation's own program." *See*, Doc. 127; CF Sup. Br. at 2. The FWS said in response that "ESA does not allow the Service to consider the effects of listing in determining whether a species qualifies as endangered or threatened," and that the effectiveness of Canada' program is irrelevant because "there are no known regulatory mechanisms in place . . . that directly and effectively address . . . loss of sea-ice habitat within the foreseeable future." Doc. 138; Fed. Def.'s Br. at 139; 142. FWS has not addressed what "taking into account" *does* mean. The FWS's neglect of their obligation to "take into account" foreign programs is arbitrary and capricious, and their failure to adequately address CF's arguments effectively concedes the point.

II. ARGUMENT

a. Standing

CF addressed the basis of its standing in its initial brief. FWS has challenged CF's standing, based solely on the fact that CF did not attach declarations to its initial brief. CF has therefore provided a sworn declaration from a representative majority of plaintiffs.

i. Article III Standing

The first step in any standing analysis is to establish that the plaintiffs have Article III

standing. This "irreducible minimum" of standing requires "that [a plaintiff] has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Article III standing divides into two categories – organizational standing and individual standing. The plaintiffs in *Conservation Force et. al. v. Kempthorne* include 20 individuals and 12 separate organizations.

1. Individual Standing

The 20 individual plaintiffs each hunted a polar bear in Canada before the bear was listed and each has a trophy trapped there. Most of these plaintiffs "pre-applied to FWS for a permit to import [his or her] polar bear trophy", and later received a letter from FWS stating that, "we are writing to inform you that as of the effective date of the listing, May 15, 2008, importation of a polar bear from Canada as a sport-hunted trophy that was taken after February 18, 1997, is no longer an activity that can be authorized under the Marine Mammal Protection Act (MMPA)." Ex. 15, Sworn Declaration of Steve Smith at pg. 3; Ex. 1 to Smith Decl, Letter from FWS. Allyn Ladd, Bradley Pritz, Chris Hanks, Darwin Van der Esch, Don Hershey, Ethel Leedy, Everett Madson, Jeff Sevor, Larry Steiner, Mark Beeler, Robert Remillard, Roger Oerter, Ron Kreider, Steve Hornady, Steve Smith, Tim Decker, Tim Walters, William Keene, Kevin Reid, and Ted Stallings have all established in their Declarations and attached documents that they took their bear legally from FWS approved populations, and that their perishable, expensive and emotionally significant trophies remain in Canada and *continue to cost money* because they are in cold storage. *See*, Ex. 1-17, 28-30 and attachments.

In order to have standing, a plaintiff must suffer an injury that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Am. Chemistry*

Council v. DOT, 468 F.3d 810, 814 (D.C. Cir. 2006). The listing deprives plaintiffs of valuable personal property, which is a "concrete and particularized" economic and emotional injury, that is "actual" and will only cease if the listing is overturned; there is nothing conjectural or hypothetical about losing an expensive piece of personal property. An injury is "fairly traceable" to the actions of the Defendant if there is "a causal connection between the injury and the conduct complained of." *Id*. The Individual Plaintiffs received letters, accompanied by their import permit application checks, telling them that the reason they cannot import their trophies is because the FWS listed the polar bear. FWS has conceded that the listing forbids importation of plaintiffs' polar bear trophies. Finally, a plaintiff must prove that "it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Am. Chemistry Council*, 468 F.3d at 814.. In this case, a favorable decision will permit plaintiffs to again import their trophies.

2. Organizational Standing

In this case, 12 plaintiffs are organizations that participate in polar bear conservation and/or "conservation hunting". Where one plaintiff "has Article III standing, we need not consider" whether its co-plaintiffs have standing. *Tozzi v. HHS*, 271 F.3d 301, 310 (D.C. Cir. 2001); *see also*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981). Due to space constraints, CF and the Inuvialuit Game Council, ("IGC"), will establish organizational standing as a representative sample of Plaintiff organizations.

The Supreme Court has acknowledged that "there is no question that an association may have standing . . . to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The Supreme Court established Organizational Standing in *Havens Realty Corp. v. Coleman*. 455

U.S. 363 (1982). In *Havens* an organization offering counseling to low-income homeowners brought suit against a realty company for violations of the Fair Housing Act. The Supreme Court held that that organization had standing because it had to "devote significant resources to identify and counteract the defendant's 'unlawful housing practices'" and that this "perceptibly impaired" the organization's ability to achieve its goals. *Id*. at 379. The Court held that "such concrete and demonstrable injury to the organization's activities--with the consequent drain on the organization's resources--constitutes far more than simply a setback to the organization's abstract social interests." *Id.* The polar bear listing has similarly impaired the activities of CF and the Inuvialuit Game Council.

CF is primarily "a wildlife conservation organization that was formed to better direct hunting to be an even greater force for conservation." Ex. 20, Declaration of John Jackson, at pg. 6. CF "is committed to and is directly participating in the conservation of polar bear." Id. at pg. 11. CF filed or caused to be filed more than 1,000 pages of substantive comments. Id at pg. 3. CF spent in excess of $30,000 for those comments, for additional reports, and for presentations at polar bear management meetings to try to combat the listing. Ex. 20 at pg. 4. "CF's officers pioneered the U.S. importation of polar bear hunting trophies", which has been stopped by the listing of the polar bear. Id. at 12. Through its pioneering efforts, CF helped increase "polar bear value from sale as a pelt (for a price of $400.00 to $1,200.00) to sale as a sport hunted trophy (for a price of $40,000.00 to $50,000.00)." Id. at 13 . CF is a 501(c)(3) nonprofit foundation and the inability to promote imports, advocating against this listing, paying for comments, and bringing lawsuits has substantially impaired the organization's operations. CF has been directly injured by the listing.

The Inuvialuit Game Council ("IGC") is more involved in Canadian polar bear

management than any other party in the consolidated multidistrict litigation. Under NWT law, the IGC represents "the collective Inuvialuit interest in wildlife, including but not limited to, all matter pertaining to the management of wildlife and wildlife habitat in the Inuvialuit Settlement Region ("ISR"), harvesting rights, renewable resource management, and conservation." Ex. 27, Declaration of Frank Pokiak, at pg. 3. The IGC is tasked with providing "advice on policy, legislation, proposed regulations, and on any proposed Canadian international position that concerns wildlife in the ISR." Ex. 27 at pg. 5. IGC "both consists of and represents the most active stewards of the polar bear, polar bear prey, and polar bear habitat in the northwest Canadian Arctic region." Ex. 27 at pg. 9. IGC "filed its own opposition to the polar bear listing determination." Ex. 27 at pg. 12. This listing has devalued the polar bear as a natural resource. The IGC is the primary management authority for the polar bear in a large portion of Canada.

ii. Prudential Standing

For those claims brought under the APA, a plaintiff must also prove prudential standing. *See Bennett*, 520 U.S. at 163. To have prudential standing parties may not litigate "the legal rights or interests of third parties", and must allege particular rather than "generalized grievances." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982). Prudential standing also requires "that a plaintiff's grievance must *arguably* fall within the zone of interests protected or regulated by the statutory provision.'" *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1287 (D.C. Cir. 2005) [emphasis added]. To determine whether plaintiffs have standing under the zone of interests test, "we look not to the terms of the ESA's citizen-suit provision, but to the substantive provisions of the ESA, the alleged violations of which serve as the gravamen of the complaint." *Bennett*, 520 U.S. at 175. Notably, the zone of interests standard "is intended to 'exclude only

those whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Muir v. Navy Fed. Credit Union*, 529 F.3d 1100, 1106-1107 (D.C. Cir. 2008).

As demonstrated above, plaintiffs are defending their own rights either to personal property, to advocacy and conservation investment, or to management of the polar bear. None have alleged "general grievances". Plaintiff hunters seek to import their trophies, which is prohibited due to the listing. CF is an organization that "was formed to better direct hunting to be an even greater force for conservation," particularly "conservation hunting" of the polar bear. Finally, the IGC is an organization of stakeholders who bear the local responsibility for managing the polar bear. Sections of the ESA affirmatively direct the FWS to engage with the stewards of a listed species, including 16 U.S.C. 1533(b)(1)(A), "taking into account", and §1538, which mandates international cooperation and encouragement of foreign programs. All of the plaintiffs have a vested economic, professional, and organizational interest in the management, conservation, and the hunting of the Canadian polar bear and all have standing because the listing has demonstrably disrupted the conservation management and related "conservation hunting" of the Canadian Polar Bear.

iii. Associational Standing

CF and IGC have representational standing. An organization has representational standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Abigail Alliance for Better Access to Dev. Drugs v. Von Eschenbach*, 469 F.3d 129, 134 (D.C. Cir. 2006). CF "represents many constituent United States polar bear hunters, supporting

conservation organizations, and Canadian Conservation partners". Ex. 20. at pg. 2. The hunter plaintiffs are a sampling of those CF members, and their standing has already been established. The President of CF has sworn to the fact that conservation hunting, particularly the hunting of polar bears, is central to CF's mission. *See* Ex. 20 at pg. 5. The claims CF and IGC have brought are legal challenges to the way in which the listing decision was concluded, rather than factual challenges based on what has happened to their members and it is therefore not necessary for their members to participate.

b. In Listing Determinations FWS must Consider all Avenues to Ensure the Continued Existence of Foreign Programs

A substantial portion of CF's supplemental memorandum in support of summary judgment was given over to FWS' failure to "take into account" Canadian conservation programs before the listing. Under 16 U.S.C. 1533(b)(1)(A), entitled "basis for determinations", FWS may only list a species "after taking into account those efforts, if any, being made by any . . . foreign nation. . . to protect such species." Nowhere in the Final Rule is this threshold requirement to take into account foreign conservation efforts mentioned, much less addressed directly or in detail. In their cross-motion, FWS attempt to justify their decision to ignore a congressionally mandated listing requirement by saying they are not permitted to consider economic factors (such as how the Canadian conservation management program is funded), and that they have already addressed conservation efforts in their "inadequacy of existing regulatory measures" analysis under 16 U.S.C. 1533(a)(1), which enumerates the listing factors. Federal FWS have failed to adequately respond.

The FWS entirely failed to address several of the points raised in CF's Supplemental Brief. Those points are as follows:

1. In the initial briefing, CF stated that "most of the key conservation provisions of the ESA do not apply to foreign species" and cited to *Draft policy for enhancement-of-survival permits for foreign species listed under the ESA*, 68 Fed. Reg. 49512 (Aug. 18, 2003). FWS have not addressed their own statement to this effect anywhere in their cross motion and supporting memorandum.
2. CF raised the point that FWS "ha[ve] never defined the phrase "take into account" so that it may be applied in a consistent, objective manner." Doc. 127; J. Pl.'s Br. at 24. FWS have not addressed their failure to define or undergo rulemaking procedures to implement their obligation to take into account foreign conservation efforts.
3. CF included a significant analysis of the legislative history of the ESA in their Supplemental Brief. This analysis included the House of Representatives' explanation of "taking into account" which says that "there is provided ample authority and direction to the Secretary to consider the efforts of such countries in encouraging the maintenance of stocks of animals for purposes such as trophy hunting." Doc 126; CF's Supp. Br. at 9. CF also included Congressman John Dingell's statement that the ESA has "been carefully drafted to encourage . . . foreign governments to develop healthy stocks of animals occurring naturally within their borders. If these animals are considered valuable as trophy animals . . . they should be regarded as a potential source of revenue to the managing agency and they should be encouraged to develop to the maximum extent compatible with the ecosystem upon which they depend." Doc. 26; CF's Supp. Br. at 10. FWS' only response to CF's demonstration that Congress intended trophy hunting to be considered as an "effort" under 16 U.S.C. 1533(b)(1)(A) was to say that "Congress did not define the term "efforts" or the phrase "taking into

account," and there is nothing in the legislative history to explain the intended relationship between this requirement and the listing factors in [16 U.S.C. 1533(a)(1)]." This statement is blatantly wrong, and FWS cite no authority to refute CF's legislative history because there is none.

i. Meaning of "taking into account"

FWS has failed to define what it means to "take into account" foreign conservation programs. Conspicuously, in the Final Rule, they do not mention this listing determination requirement of at all. In their Cross-Motion, they merely note "some overlap of analysis" with consideration of listing factors B and D under 16 U.S.C. 1533(a)(1), and that they coincidentally "considered past and present harvest management practices" in the range countries. Doc. 138; Fed. Def.'s Br. at 140. In reality, the requirement to "take into account" is clearly distinct from listing factors B and D. It is in a separate section, under "Basis for Determinations". In fact, the duty to take into account range nation programs permeates the entire listing process of foreign species because ultimately those are the managers of the species. FWS should have weighed all other options before destroying Canada's programs through listing, instead of stating that "the effect of the listing . . . is not one of the listing factors." ARL 117246. This includes considering utilizing Distinct Population Segments to preserve the species in Canada, whether the Canadian Archipelago and Convergent Ice ecoregions should not be listed, whether the listing would destroy a successful program prematurely, and whether there is threat that is quantifiable and that the listing is necessary before it knowingly guts the indispensable management program throughout all of Canada. It should have considered the interruption of the warming trend and wind due to weak solar cycles 23 and 24 forecasted for 22 of the next 45 years. *Climate Change 2007: the Physical Science Basis*, IPCC Working Group 1, ARL 151420 (solar cycles affect

temperature and wind); Conservation Force Comments, ARL 124343 (solar radiation can account for 71% of global surface air temperature from 1880 to 1993); *See* NASA Solar Cycle Chart, Report by Dr. Timothy Ball, ARL153242-3. At the very least, FWS should have quantified the measure of the negative impact of loss of habitat for each area and population – without this quantification, it is impossible for the FWS to truly take into account foreign programs and ensure their continued existence.

ii. FWS should not have listed the polar bear throughout the Canadian Portion of its Range, specifically the Archipelago and Convergent Ice Ecoregions

To satisfy its duty to "take into account" foreign programs, FWS should have separately considered not listing the bear throughout part of its range. CF raised the fact that in 1982, Congress noticed that "the Secretary has listed some foreign species as endangered throughout their entire range without considering whether their population status varies from country to country." Doc. 126; CF's Supp. Br. at 13. Congress went on to note that "*there may be nations where a combination of a healthy population and effective management programs permit sport hunting of such species without adversely affecting its status. The failure to recognize this may result in the foreign nations being denied much-needed revenues derived from license fees that are used to fund their wildlife conservation and management programs*." Congress instructed the Secretary to "take [this] into account in future listings of game species." Doc. 126; CF's Supp. Br. at 13. FWS have not addressed this direct congressional instruction at any point in their brief, nor have they referenced the criteria noted above either in the Final Rule. Listing part of the range as "endangered" was considered but excluding part of the range in consideration of Canada's program has been conspicuously omitted.

iii. FWS should should have screened out the Distinct Population Segments in Canada

In accordance with its duty to "take into account" foreign programs, FWS should have separately considered listing Canadian and other foreign populations as distinct population segments. It is necessary for FWS to make this analysis because before destroying a program which it cannot replace, FWS must find ways to allow for its existence, and not make their listing too onerous on the range nation. It is obvious that FWS see no duty to help preserve the polar bear as Canada's natural resource. In the Proposed Rule, FWS said that

> *the scientific data used in this analysis and projections based on these data are subject to constant change. A delay in the proceeding would result in significant expenditures of fiscal and other resources to collect additional data and conduct analyses. As such, we have (FWS) determined that proceeding with the listing of the polar bear (including all populations in Canada) at this time is a responsible use of our fiscal and other resources. ARL 053598*

What about Canada's conservation interests? FWS did not address why they felt it was a waste of money to examine whether certain Canadian populations should not be listed, nor did they justify the amount of money premature listings would cost Canadian conservation. Even scientists who supported the listing recommended that FWS find a way "to continue conservation benefits derived from allowing importation of sports taken polar bear trophies by U.S. hunters." Peer Review by Dr. Tim Ragen, Marine Mammal Commission, ARL000350; *see also,* Peer Review by Dr. Ian Stirling, ARL000266 ("if it is decided to list polar bears as threatened within the foreseeable future under the US Endangered Species Act, part of the response plan should include measures to ensure not losing the benefits of existing conservation programs.") Delay would not have compromised the species but premature listing certainly has compromised it.

In FWS's Cross-Motion, they maintain that the polar bear does not have "discrete"

populations because polar bears are neither "markedly separated . . . as a consequence of physical, physiological, ecological, or behavioral factors," nor "delimited by international governmental boundaries, within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist." This conclusion is not supported by the record. In Appendix A to the Final Rule, reporting on the status of Canadian Polar Bears, FWS acknowledged that "a genetic study of polar bears . . . indicated significant differences between bears from Davis Strait and both Baffin Bay and Foxe Basin." ARL 000140. Moreover, the study cited by FWS in the above quotation concluded that "all but 4 of the world's 29 polar bear populations meet the behavioral and genetic criteria necessary to be designated as Management Units (MUs)" or populations which may be managed distinctly. Doc. 126; CF's Supp. Br. at 14; Paetkau, Amstrup et. al. *Genetic Structure of the World's Polar Bear Populations*, ARL 155964. The ways in which polar bears are "delimited by international governmental boundaries" are even more demonstrable. There is a very real difference between how Canada and its territories manage and fund their polar bear conservation programs and how the United States, Russia and Greenland fund theirs. Canada uses sustainable harvest for funding and incentives as an integral part of their management program, and they use sport hunting to fund their programs. Canada is responsible for managing the vast majority of the world's polar bear, and if listing the bear throughout its range produces a negative effect for the majority of the world's bear, it is safe to say that there are differences in "control of exploitation, management of habitat, conservation status, or regulatory mechanisms." Doc. 138, Fed. Def.'s Br. at 103.

FWS attempts to rebut CF's argument that polar bear populations are "delimited by international boundaries" by raising the same tired explanation that "the primary threat to the species – loss of sea ice due to climate change – is a problem that no individual country's

regulatory mechanisms can address," and claiming that "international boundaries" are therefore "not meaningful or significant here." Doc. 138; Fed Def.'s Br. at 108. The DPS policy created by FWS does not mention whether the differences between populations are pertinent to the threat for which the populations were listed. *See,* Doc. 138; Fed. Def.'s Br. at 103. It merely suggests that they have differences in "control of exploitation, management of habitat, conservation status, or regulatory mechanisms" that are significant in light of the "inadequacy of existing regulatory mechanisms" listing factor. FWS appear to be suggesting that no factor is relevant to the adequacy of regulatory mechanisms other than sea-ice recession. This is nonsensical, for if FWS take actions which remove funding for Canadian programs, Canadian programs will become demonstrably less adequate. It is necessary to maintain the most successful conservation program in the world.

FWS states that "the Service considered the science and data regarding [range] and reasonably decided to list the species as threatened range wide." Doc. 138; Fed. Def.'s Br. at 115. When SCI pointed out that "there is a separate section of the rule regarding whether the polar bear is endangered in any DPS or SPR, but no similar separate section dealing with whether the polar bear is not threatened somewhere," FWS retorted that "the absence of a separate section does not mean that the Service did not consider this issue." *Id.*

The record suggests otherwise. FWS expended significant resources to establish that they considered listing certain DPSs as "endangered". *See* Final Rule, ARL117299-01; Letter from FWS to Dr. Timothy Ragen, Director of the Marine Mammal Commission, AR4D 007004-007012. In contrast, the only mention of *not* listing any recognized management units as "threatened", was when FWS determined in the Proposed Rule that "a delay in the proceeding would result in significant expenditures of fiscal and other resources to collect additional data

and conduct analyses. As such, we have determined that proceeding with the listing of the polar bear (including all populations in Canada) at this time is a responsible use of our fiscal and other resources." Proposed Rule, ARL 053598. FWS have not met their burden to explain why it is rational to disrupt indispensible components of the Canadian management program because FWS do not wish to expend their own resources to establish that they need not list portions of a species that largely occurs outside of the United States.

ii. The FWS has listed most if not all Polar Bear Prematurely

In order to properly "take into account" range nations' programs, FWS must consider the negative impact of their actions, including an elementary weighing of the benefits of listing against the detriments. In this case, there will be no current benefits to listing the Canadian polar bear, and even the direst of FWS predictions estimate that there will still be polar bears in Canada in 45 years. FWS concedes that in both of its models, "polar bears within the four ecoregions were not uniformly impacted", and that the bears in the areas which will be least impacted are in Canada. Doc. 138; Fed. Def.'s Br. at 36. Indeed FWS's carrying capacity model indicated that the polar bears in the Convergent Ice ecoregion may have up to a 4% increase in population within the 45 year foreseeable future. *Id.* In the Archipelago region, FWS's models merely predicted that there will be a "smaller population". Doc. 138; Fed. Def.'s Br. at 36. Of the five populations identified as "declining" only *one* of them has "a statistically significant population decline based on reliable data." Doc. 138; Fed. Def.'s Br. at 41. Eight populations, all of which occur in Canada, are either stable or increasing. *Id*. There can be no question that FWS has listed the polar bear before the health and status of the bear are problematic. The listing has cut funding to the Canadian polar bear management program. Given that even FWS agrees that there will be a notable (not "rare") number of polar bears in Canada in 45 years, it

stands to reason that FWS should avoid damaging the program designed to preserve and manage them.

III. CONCLUSION

In their cross-motion, FWS has challenged CF's self-evident standing and skirted CF's arguments in an effort to avoid admitting that they are required to respect the management programs and authority of foreign nations during the listing process for the good of the species. That is nonsensical. CF represents the individuals, be they hunters, wildlife management organizations, or guides and outfitters, who are most closely involved with the conservation hunting program which has been destroyed by FWS' listing. There is little question that in order to justify the exceedingly detrimental impact of their decision to list, FWS will need to do better than to ignore the arguments presented by the individuals who have lost the most through this listing.

DATED this 4th day of March, 2010,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2010, I electronically filed the forgoing with the Clerk of Court via the CM/ECF system, which will send notification of such to the attorneys of record.

_____/s/_____
John J. Jackson, III