

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT,

Employer,

v.

No. 06-RC-080933

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC,**

Petitioner.

**MOTION TO WITHDRAW FROM STIPULATED ELECTION AND REQUEST FOR
EXPEDITED REVIEW**

COMES NOW the Employer, Duquesne University of the Holy Spirit (hereinafter referred to as “Duquesne” or the “University”), and files its Motion to Withdraw from the Stipulated Election and its Request for Expedited Review¹ in the above-captioned matter. In support of its Motion, Duquesne will show as follows:

I. Introduction and Factual Background

Duquesne should be allowed to withdraw from the Stipulated Election in this matter because the National Labor Relations Board (hereinafter referred to as the “Board”) cannot exercise jurisdiction over Duquesne. The Board cannot exercise jurisdiction over Duquesne

¹ A National Labor Relations Board election is scheduled to commence in the above-captioned matter on June 22, 2012. Duquesne respectfully requests an expedited review of this Motion in light of the impending election schedule to allow Duquesne time to seek special review from the Board, if necessary. Assuming *arguendo* that the election is allowed to proceed as currently scheduled, Duquesne requests that the ballots be impounded pending review of this Motion.

because Duquesne is a “church-operated school” as defined by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and its progeny.

Duquesne is a private, coeducational university located in Pittsburgh, Pennsylvania. Duquesne was founded on October 1, 1878, by the Reverend Joseph Strub and the Congregation of the Holy Ghost (the “Spiritans”).² Duquesne is the largest and most comprehensive Catholic University in Pennsylvania, and it is the only Spiritan institution of higher education in the United States.³

Duquesne initially opened as Pittsburgh Catholic College of the Holy Ghost. In 1911, the name was changed to Duquesne University of the Holy Ghost. The name was changed to Duquesne University of the Holy Spirit in 2002. Duquesne currently has over 10,000 graduate and undergraduate students, and its campus occupies 49 acres in Pittsburgh’s Bluff neighborhood. Duquesne maintains an associate campus in Rome, Italy, and encompasses ten schools of study.

On May 14, 2012, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (hereinafter referred to as the “Petitioner”), filed a petition in the above-captioned case, seeking to represent non-tenure track adjunct faculty in the McAnulty College and Graduate School of Liberal Arts. On May 25, 2012, the Regional Director approved a Stipulated Election Agreement executed by Duquesne and the Petitioner in a unit of “[a]ll part-time faculty employed by [Duquesne] in the McAnulty College and Graduate School of Liberal Arts located in Pittsburgh, Pennsylvania; excluding all full-time faculty, graduate students, staff and administrators, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and

² See Exhibit “1.”

³ See *id.*

all other employees.” The election in this matter is currently scheduled for a mail ballot with voting commencing on June 22, 2012 and ending on July 9, 2012.

II. Offer of Proof, Statement of Fact, and Applicable Legal Principles

A. Standard for Motion to Withdraw from Stipulated Election.

Under the National Labor Relations Act (the “NLRA”), the Board is authorized to approve consent agreements or stipulations that define appropriate bargaining units for purposes of an impending representation election. *See* 29 U.S.C. § 159(c)(4). The Board’s regulations authorize election agreements, subject to the approval of the Regional Director, and provide that such agreements “shall include a description of the appropriate unit.” 29 C.F.R. § 102.62(a). “When the parties have agreed to an appropriate bargaining unit in an election agreement, the Board will approve that agreement unless it determines the bargaining unit contravenes the NLRA or Board policy. This standard has been upheld—indeed, mandated—in numerous circuit court decisions.” *NLRB v. MEMC Electronic Materials, Inc.*, 363 F.3d 705, 708 (8th Cir. 2004).

The Board has a well-established rule that “once an election agreement has been approved, a party may withdraw therefrom only upon an affirmative showing of unusual circumstances or by agreement of the parties.” *First FM Joint Ventures, LLC*, 331 NLRB 238, 239 (2000) (citing *Sunnyvale Medical Center*, 241 NLRB 1156 (1979)). Under this standard, it is not enough to show that, absent the election agreement, the Board would have defined that appropriate bargaining unit differently. *See Micro Pac. Dev. Inc. v. NLRB*, 178 F.3d 1325, 1335 (D.C. Cir. 1999).

For instance, in *NLRB v. Unifemme, Inc.*, 570 F.2d 230 (8th Cir. 1978), an employer and a union entered into an election agreement defining the appropriate bargaining unit. After the regional director approved the agreement, a second union filed a motion to intervene in the

election. The Board granted the motion to intervene. The employer then moved to withdraw from the election agreement, arguing that it wished to contest the proposed unit if the second union would participate in the election. After the Regional Director denied the motion to withdraw, the second union won the election and the Board entered an unfair labor practice order when the employer refused to bargain. The *Unifemme* court denied the Board's petition to enforce the unfair labor practice order, finding that the Board should have granted the motion to withdraw because allowing the second union "to intervene after the scope of the bargaining unit had been determined between other parties created changed circumstances and parties sufficient to require that Unifemme be allowed to withdraw from the election agreement." *Id.* at 233.

B. Duquesne is Exempt from the Jurisdiction of the NLRA pursuant to *Catholic Bishop*.

The Board cannot exercise jurisdiction over Duquesne because Duquesne is a church-operated school as defined by the United States Supreme Court decision in *NLRB v. Catholic Bishop of Chicago* and its progeny. The Board's lack of jurisdiction clearly constitutes an "unusual circumstance" that should allow Duquesne to withdraw from the stipulated election in this matter. The question of whether Duquesne is exempt from the NLRA under *Catholic Bishop* is the type of jurisdictional issue that is not subject to waiver. *See NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385 (1946); *Local 900, Int'l Union of Elec., Radio & Machine Workers v. NLRB*, 727 F.2d 1184, 1191 n.5 (D.C. 1984) ("A court can always invalidate Board action that is patently beyond the Board's jurisdiction, even if the jurisdictional challenge was never presented to the Board").

1. *Catholic Bishop*.

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) is the preeminent authority regarding the jurisdiction of the Board over church-operated schools. In *Catholic Bishop*, the

Supreme Court analyzed the NLRA in light of the Religion Clauses in the First Amendment to hold that the Board cannot maintain jurisdiction over church-operated schools. *Id.* at 507. In *Catholic Bishop*, the Board certified unions as bargaining agents for lay teachers in schools operated by the Catholic Bishop of Chicago. *Id.* at 494. After the Catholic Bishop of Chicago refused to bargain with the unions, the unions filed unfair labor charges. *Id.* The case eventually made its way to the Supreme Court where the Court found that there would be a significant risk of infringement on the Religion Clauses of the First Amendment if the Board could exercise jurisdiction over church-operated schools. *Id.* at 504.

The Supreme Court reasoned that the Board, in ordering collective bargaining at church-operated schools, could find itself inquiring “into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions” *Id.* at 502. The Court further opined that the “[g]ood intentions by government-or third parties-can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable” in other cases. *Id.* at 502. The *Catholic Bishop* Court “recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school.” *Id.* at 501. Therefore, the Supreme Court held that the NLRA must be construed in a manner to avoid constitutional questions arising out of the Religion Clauses of the First Amendment and, consequently, the Board lacks jurisdiction over church-operated schools. *Id.* at 504.

2. The Board's "Substantial Religious Character" Test.

In a series of decisions following *Catholic Bishop*, the Board created a framework for analysis that looked to whether a school has a "substantial religious character" to determine if it is exempt from jurisdiction. *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009). The Board weighs, among other factors, the involvement of the affiliated religious group in the school's day-to-day affairs, the degree to which the school has a religious mission, and whether religious criteria play a role in faculty appointment and evaluation. *See Livingstone College*, 286 NLRB 1308, 1309-10. The "substantial religious character" test allows the Board to consider "all aspects of a religious school's organization and function that [it deems] relevant." *St. Joseph's College*, 282 NLRB 65, 68 n.10 (1986).

After the Supreme Court's *Catholic Bishop* decision, the Board initially ruled that the *Catholic Bishop* opinion only applied to elementary and secondary parochial schools. *Barber-Scotia College, Inc.*, 245 NLRB 406 (1979). Now, the Board considers the application of *Catholic Bishop* to educational institutions on all levels of education "on a case-by-case basis." *St. Joseph's College*, 282 NLRB 65, 68 (1986). In conducting its inquiry, "[t]he Board has not relied solely on the employer's affiliation with a religious organization, but rather has evaluated the purpose of the employer's operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction." *Univ. of Great Falls*, 331 NLRB 1663, 1664-65 (2000), enforcement denied, 278 F.3d 1335 (D.C. Cir. 2002).

The Board has held that the *Catholic Bishop* decision precluded it from exercising jurisdiction over a school "whose purpose and function in substantial part are to propagate a religious faith." *Jewish Day School*, 283 NLRB 757, 761 (1987). In *Jewish Day School*, the Board declined to exercise jurisdiction where religious instruction was mandatory for all grade

levels, the schools adhered to Jewish dietary laws, and the school held mandatory prayer sessions. *Id.* at 761-62.

The Board has also declined to exercise jurisdiction over a religiously-affiliated college which was financially dependent on the Sisters of Mercy of Maine (the “Order”), all members of the Board of Trustees were required to be members of the Order, the Bishop of Portland was authorized to remove faculty whose conduct was not in harmony with the Church, and faculty members were prohibited from knowingly presenting ideas which are contrary to the position of the Catholic Church. *St. Joseph’s College*, 282 NLRB at 68.

In most of the cases before the Board examining the religious exemption issue, the Board has determined that the exercise of jurisdiction over colleges and universities would not create the sort of risk contemplated by *Catholic Bishop*. For example, in *Livingston College*, 286 NLRB 1308, 1309 (1987), the Board concluded that the church was not involved with the college at issue “in a manner that creates a significant risk of constitutional infringement.” The Board based its decision on its findings that the college was not financially dependent on the church, the college’s stated mission was not religious, faculty members were not required to conform to church doctrine or promote church teachings, and neither students nor faculty were required to engage in worship. *Id.* at 1309-10. The Board ignored the fact that the AME Zion Church owned the church’s property, appointed half of the board of trustees, and provided financial support to the college. *Id.* at 1310.

Also, in *University of Great Falls*, the Board concluded that a university was not church-operated within the meaning of *Catholic Bishop* where no religious entity was directly involved in day-to-day administration of the school, the university was not financially dependent on the church, and “[m]ost significantly, . . . propagation of a religious faith is not the primary purpose

of the [university], but rather . . . the University’s purpose and function are primarily secular.” 331 NLRB 1663 (2000). The Board opined that the university did not “have a ‘substantial religious character.’” *Id.*

3. Duquesne Satisfies the “Substantial Religious Character” Test.

Based on the principles from the various Board cases cited in Part II.B.2 above, Duquesne meets the Board’s “substantial religious character” test. Duquesne was founded in 1878 by Reverend Joseph Strub and the Congregation of the Holy Ghost (now known as the “Congregation of the Holy Spirit”). Duquesne was initially named Pittsburgh Catholic College of the Holy Ghost until 1911, when its name was changed to Duquesne University of the Holy Spirit. Duquesne, in its Statement of Mission, demonstrates that the propagation of the Catholic faith is one of its primary purposes:

Duquesne University of the Holy Spirit is a Catholic University, founded by members of the Congregation of the Holy Spirit, the Spiritans, and sustained through a partnership of laity and religious. Duquesne serves God by serving students through commitment to excellence in liberal and professional education, through profound concern for moral and spiritual values, through the maintenance of an ecumenical atmosphere open to diversity, and through service to the Church, the community, the nation and the world.⁴

See Great Falls, 331 NLRB 1663 (2000). Duquesne’s motto is “Spiritus est qui vivificat”, which means “It is the Spirit who gives life.” Duquesne’s website states that “[t]he words of our motto reflect our faith that Duquesne University is directed in its course and sustained in all its efforts by the Holy Spirit of God.”⁵ Several other aspects of Duquesne’s organization further establish that the propagation of the Catholic faith is part of the fabric of Duquesne.

⁴ Duquesne’s Statement of Mission is attached hereto as Exhibit “2.”

⁵ Duquesne’s Mission and Identity section of its website is attached hereto as Exhibit “3.”

a. Articles of Incorporation.

Article I of the Articles of Incorporation provides that Duquesne’s corporate name “shall be ‘Duquesne University of the Holy Spirit.’”⁶ Article IV provides that the “purpose of the University is to support and maintain educational programs in all branches of a thorough, moral and secular education, including languages, and also for the preparation and education of individuals destined for the Catholic Priesthood.” Article VII provides that Duquesne shall have “Members.” Duquesne is a “membership corporation” under the laws of the Commonwealth of Pennsylvania. “The Members of the University [corporation] shall be the Provincial Superior, the Provincial Councillors, and such other vowed members of the Congregation of the Holy Spirit Province of the United States as are appointed by the Provincial Superior with the consent of the Provincial Council” As such, Spiritan Fathers (members of the Congregation of the Holy Spirit) are the owners of the University.

Article IX provides that the Members have several exclusive powers, including but not limited to: (1) the power to determine or change the mission, philosophy, objectives or purpose of the University; (2) the power to elect or remove, with or without cause, any individual to and from the University’s Board of Directors; (3) the power to make change to the University’s By-Laws and Articles of Incorporation; (4) the power to sell or purchase real property; (5) the power to liquidate and dissolve the University; (5) the power to issue to the Board of Directors a statement of policy and mission of the University; (6) the power to approve the annual budget, (7) the power to approve the appointment of officers of the University; and (8) the power to approve indebtedness in excess of one million dollars. Article XV provides that “[u]pon the dissolution of the University, . . . any remaining assets . . . shall be distributed to Congregation of the Holy Spirit Province of the United States (‘Congregation’).”

⁶ Duquesne’s Articles of Incorporation are attached hereto as Exhibit “4.”

b. Executive Resolutions of the Board.⁷

The Executive Resolutions of the Board, in pertinent part state that: faculty members, by contracting for employment with the University, “shall be deemed to uphold the purpose of the University” Additionally, Duquesne’s faculty “is entitled to full freedom in the classroom, subject to the principles and values expressed in the Duquesne University Mission Statement.” (emphasis added). To insure the faculty’s understanding of this obligation related to the Mission, when prospective faculty are interviewed during the hiring process, the Office of the Provost discusses in detail the Mission and Catholic identity of the University. Further, all advertisements for full-time faculty positions make reference to the Mission and Catholic identity of the University, and the annual performance appraisals include a discussion concerning compliance with the Mission.

c. Faculty Senate Constitution and Faculty Handbook.

The Faculty Senate Constitution and the Faculty Handbook provide guidance to Duquesne’s faculty members regarding Duquesne’s adherence to the principles of the Catholic Church. The Mission of the Faculty Constitution provides that “[t]he Faculty Senate subscribes to the statement of missions and goals of the University and elaborations thereof as promulgated by the Board of Directors.”⁸ The introduction to the Faculty Handbook provides:

Duquesne University is a Catholic University in the charism of the Congregation of the Holy Spirit. As a Catholic University, Duquesne manifests a commitment to ecumenism. We welcome; we do not exclude. At the same time, we take great pride in our Catholic character and ambience, and we subscribe to the teachings of the Roman Catholic Church. As a University, we are compelled to search for truth. Our Catholic character demands an unfettered search for truth as a first loyalty of the mind in accordance with the teaching of St. Augustine, *Whatever is true, is ours.* Our teaching

⁷ Duquesne’s Executive Resolutions of the Board are attached hereto as Exhibit “5.”

⁸ Duquesne’s Faculty Senate Constitution is attached hereto as Exhibit “6.”

of the moral and ethical foundations of thought and action reflect our Catholic heritage and should pervade the University.⁹

One goal of Duquesne University is to “seek truth and to disseminate knowledge within a moral and spiritual framework.”¹⁰ The Faculty Handbook further provides that “Duquesne is dedicated to fostering an environment that invites, but does not conscript, participation in its spiritual life.”¹¹

d. Code of Student Rights, Responsibilities and Conduct.

Students at Duquesne are required to adhere to the Code of Student Rights, Responsibilities and Conduct (hereinafter referred to as the “Code”).¹² The very first page of the Code recites Duquesne’s Mission Statement. Also, the first expectation of Duquesne’s students is to “[r]ead, understand and accept the values contained in the Mission Statement.” Other expectations for students are to “[g]row spiritually, preparing for life, not just a career” and to “[b]e at peace with God and with yourself.”

The President’s Message and the Executive Vice President’s Message to students, which are contained in the Code, further indicate that religion and, specifically, the Catholic faith, are part of the life of any student attending Duquesne. Duquesne’s President, Dr. Charles J. Dougherty, urges students to “[a]ttend religious services and programs. Serve God by serving others.” Duquesne’s Executive Vice President, Reverend Sean Hogan, stated in his message to students that “[o]ne hundred and thirty-three years ago, the members of the Congregation of the Holy Spirit Fathers and Brothers, a Catholic religious community, founded a school so that women and men of every race, creed, and class would have the opportunity to fulfill their aspirations, to enrich their society, and to serve God through professional leadership inseparably

⁹ Duquesne’s Faculty Handbook is attached hereto as Exhibit “7.”

¹⁰ See Exhibit “7” at page 3.

¹¹ *Id.* at page 4.

¹² Duquesne’s 2011-12 Code of Student Rights, Responsibilities, and Conduct is attached hereto as Exhibit “8.”

linked to high personal values.” Reverend Hogan, the Vice President for Student Life, requires the students to review, with him, the University’s Mission and Expectations during their orientation, and the students are expected to comply with the values and conduct set forth in the Mission Statement. Further, every student and parent is given a wallet-size card containing the University’s Mission Statement.

Other information distributed to prospective students and available on Duquesne’s website reflects the University’s Catholic heritage.¹³ Many pages in the University’s website include the phrase, “A Catholic University in the Spiritan Tradition.”

III. Duquesne is Exempt from the Jurisdiction of the Board under the Bright-line Test of the United States Court of Appeals for the District of Columbia

Assuming *arguendo* that Duquesne does not satisfy the Board’s current “substantial religious character” test, we contend that the Board should adopt the bright-line test provided in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In *Great Falls*, the D.C. Circuit, in construing *Catholic Bishop*, opined that the Board is not allowed to engage in an “intrusive inquiry” into the religious aspects of a university by “trolling through the beliefs of [universities], making determinations about [a university’s] mission, and the mission’s centrality to the ‘primary purpose’ of the [university].” *Id.* at 1341-42. The *Great Falls* court developed a three-part test to determine if a university is exempt from the Board’s jurisdiction. A university is exempt from the Board’s jurisdiction if it: (1) holds itself out to students, faculty and the community as providing a religious educational environment, even if its principal academic focus is on “secular” subjects; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. *Id.*

¹³ See Exhibit “9.”

at 1343. This test creates a bright-line rule for determining jurisdiction “without delving into matters of religious doctrine or motive.” *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009) (citing *Great Falls*, 278 F.3d at 1345).¹⁴

In *Carroll College*, the college raised the issue that it was exempt from the Board’s jurisdiction pursuant to the Religion Clauses of the First Amendment for the first time before the D.C. Circuit. *Carroll College*, 558 F.3d at 571. The *Carroll College* court, relying on the *Great Falls* test, held that the college was exempt from the Board’s jurisdiction. *Id.* at 570. The *Carroll College* court found that the college satisfied the first element—holding itself out as providing a religious educational environment—as the college’s articles of incorporation provide that the college was incorporated “for the purpose of maintaining [itself] as a Christian liberal arts college dedicated to God.” *Id.* at 572. The court also relied on the college’s mission, which is to provide “a learning environment devoted to academic excellence and congenial to the Christian witness.” *Id.* The college satisfied the second element—nonprofit institution—because its articles of incorporation state the college is a nonprofit college. The court further found that the college satisfied the third element—relationship/affiliation with a religious organization—because Carroll College’s articles of incorporation provide that it is “related” to the Synod of Lakes and Prairies of the United Presbyterian Church. *Id.* at 573.

Duquesne satisfies the D.C. Circuit’s three-part test for religious exemption as set forth in its *Great Falls* decision.

First, Duquesne holds itself out to faculty, students, and the community as providing a “religious educational environment.” The “Message from the President” states, “We are a Catholic university in the Spiritan tradition, dedicated to education for the mind, heart and

¹⁴ While the Board has yet to adopt the *Great Falls* test, it has applied the test on at least two occasions. See *Catholic Social Services*, 355 NLRB No. 167 (2010) and *Salvation Army*, 345 NLRB 550 (2005).

spirit.” He adds, “Today Spiritans continue to serve the University as faculty and administrators, in a spirit of partnership with their lay collaborators,” and that “they help keep Duquesne’s legacy alive.”

The actual name of the University, as provided in the Articles of Incorporation and reflected in the Mission Statement, is Duquesne University of the Holy Spirit. In keeping with its name, Duquesne espouses that it is “The Spirit Who Gives Life.” The imposing crucifix rising in the middle of the campus underscores its motto that “the University is directed in its course and sustained in all its efforts by the Spirit of God.” This dedication to the Holy Spirit is reflected in Duquesne’s Statement of Mission.

Significantly, the Undergraduate course catalog states that “the Dimensions of a Duquesne Education provide a framework for linking mission to student learning outcomes.” Also, the Code, after reciting the mission in its entirety, sets forth certain expectations beginning with (1) “Read, understand and accept the values contained in the Mission Statement.”

The introduction in Duquesne’s Faculty Handbook provides that “Duquesne is a Catholic University in the charism of the Congregation of the Holy Spirit. As a Catholic University, Duquesne manifests a commitment to ecumenism. . . . [W]e subscribe to the teachings of the Roman Catholic Church.” Furthermore, Duquesne’s articles of incorporation provide that “[t]he purpose of the University is to support and maintain education programs in all branches of a thorough, moral and secular education, including languages, the liberal arts and sciences, and also for the preparation and education of individuals destined for the Catholic priesthood.”

Second, Duquesne is organized as a nonprofit. Article II of Duquesne’s Articles of Incorporation provides that Duquesne “is governed under the Pennsylvania Nonprofit Corporation Law of 1988, as it may be amended from time to time The University is

organized, and shall be operated, exclusively for religious, charitable, scientific, literary and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986.”

Third, Duquesne is affiliated with a recognized religious organization—the Roman Catholic Church. As stated above, the Faculty Handbook clearly states that Duquesne is a Catholic University which subscribes to the teachings of the Roman Catholic Church. Also, Duquesne is owned by the Spiritan Fathers.

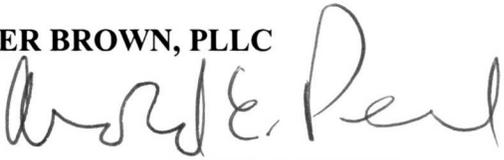
IV. CONCLUSION

For the reasons stated above, Duquesne respectfully requests that its Motion to Withdraw from the Stipulated Election and for Expedited Review be granted.

Respectfully submitted,

GLANKLER BROWN, PLLC

By: _____


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CERTIFICATE OF SERVICE

The undersigned hereby certified that a true and correct copy of the foregoing was served via FedEx on the following on this 14th day of June, 2012:

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