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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARDEN STATE ISLAMIC CENTER, Plaintiff, v. CITY OF VINELAND, DALE JONES, GARY LUGIANO, CARMEN DI GIORGIO, and JOHN AND JANE DOES 1-20, Defendants.	HON. JOSEPH H. RODRIGUEZ Civil Action No. 17-1209 (JHR)(KMW)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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I. STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

This action involves allegations by Plaintiff Garden State Islamic Center ("Plaintiff" or "GSIC") that Defendant City of Vineland ("Defendant" or "the City") misapplied sewage regulation standards incorporated into its zoning code to prevent GSIC from occupying and using a mosque for religious worship in violation of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-(a)(1), (b)(1), and (b)(2).

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." This litigation implicates the proper interpretation and application of RLUIPA. The Department of Justice has authority to enforce RLUIPA and to intervene in proceedings involving RLUIPA. 42 U.S.C. § 2000cc-2(f). The United States thus has a strong interest in the issues raised in this motion and believes that its participation will aid the Court.

The scope of the United States' statement of interest is limited to the issue of whether the City's application of its sewage regulation in this case constitutes the imposition or implementation of a "land use regulation" that "limits or restricts a claimant's use or development of land" within the meaning of RLUIPA, 42 U.S.C.

§ 2000cc-5(5). The United States contends that it does. The United States takes no position in this Statement of Interest on whether the City has violated RLUIPA.

II. BACKGROUND[1]

A. Sewage Regulation Under the City's Land Use Ordinance.

N.J.A.C. § 7:9A sets out "Standards for Individual Subsurface Sewage Disposal Systems." Under that regulation, municipal bodies have the authority to implement standards and to issue permits under the standards for construction, installation, alteration, operation or repair of any system or systems where the "expected volume of sanitary sewage [is] less than or equal to 2,000 gpd [gallons per day]." *Id.* § 7:9A-1.2. Municipal bodies may not implement standards or issue permits for any system or systems that have an expected volume of sanitary sewage for any property that will exceed 2,000 gpd. *See* N.J.A.C. § 7:9A-3.1. Further, the regulation anticipates that municipal bodies will "adopt [the] chapter by reference" and incorporate its standards into their local law. *Id.*

The City's Land Use Ordinance specifies that the construction of a "church" with a congregation is a "conditional use." Vineland, N.J. Ordinances ch. 425, § 425-304(A)(3). Before the City's Planning Board may approve a site plan application for a conditional use, the Land Use Ordinance requires applicants to "[p]rovide an on-site disposal system or details of connection to the sewer main." §

[1] Because this matter comes before the Court on the City's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the United States treats the factual allegations in Plaintiff's complaint as true.

425-304(D); § 425-61(B)(6). In order to provide an on-site disposal system, an applicant must comply with the City's sewage standards, including those in N.J.A.C. § 7:9A, which the City has expressly incorporated into the City's Land Use Ordinance. § 350-2.

B. GSIC Received Site Approval and a Sewage Permit in 2011 for a Proposed Three-Level, 61,540 sq. ft. Mosque.

In 2009, GSIC sought a conditional use permit to build a house of worship on a parcel of land it owns in Vineland. Compl. ¶ 11. To do so, GSIC initially applied to the City's Planning Board for preliminary and final major site plan approval. *Id.* The City's Planning Board denied GSIC's original site plan application. *Id.* ¶ 16. GSIC filed a complaint in the New Jersey Superior Court, and that litigation subsequently was settled. *Id.* ¶¶ 17-18.

GSIC then submitted a new site plan application to the City's Planning Board. *Id.* ¶ 18. The site plan contemplated a seating capacity of 220 people in a three-level, 61,540 sq. ft. house of worship consisting of: a) a 9,563.25 sq. ft. basement level containing a bathroom, kitchen, mechanical room and storage space; b) a 30,304.45 sq. ft. first-floor level containing a men's prayer hall, women's prayer halls, multi-purpose hall, library, media rooms and various meeting rooms and offices; and c) a 21,670.45 sq. ft. second-floor level containing multiple lecture rooms, offices, a library, meeting room and other miscellaneous space on the property (the "2011 Site Plan Approval"). *Id.* ¶ 20.

On January 12, 2011, GSIC received approval for the site plan, *id.* ¶ 20, and on September 15, 2011, GSIC obtained an individual septic permit from the

Vineland City Health Department based on an estimated 1,500 gallons per day of sanitary sewage flow, *id.* ¶¶ 25-26.

C. GSIC Received Amended Site Plan Approval for a Smaller Mosque, and Ultimately Constructed an Even Smaller One-Level 8,393 sq. ft. Mosque.

In 2012, GSIC submitted an amended site plan that reduced the size of the proposed mosque building by 12,942 sq. ft. The amended site plan called for a structure with no basement, a 29,745 sq. ft. first-floor level, and an 18,853 sq. ft. second-floor level. *Id.* ¶ 23. On June 26, 2012, the amended site plan received administrative site plan approval from the City's senior planner. *Id.*

In 2012, GSIC ultimately constructed a mosque with only one level, which was 8,393 sq. ft. *Id.* ¶ 24. On November 15, 2012, Defendants sent a letter to GSIC's contractor advising that the septic system servicing the as-constructed GSIC building was "inspected and approved" as per the land use codes and regulations, *id.* ¶ 27, and shortly thereafter, the City's building department issued a *temporary* certificate of occupancy, *id.* ¶ 28 (emphasis added).

D. GSIC Was Denied a Sewage Permit for an 8,393 sq. ft. Second-Floor Addition to the Mosque, Had Its 2011 Septic Permit Rescinded, and Had Its Final Certificate of Occupancy Withheld.

In March 2016, GSIC began applying for permits to construct an 8,393 sq. ft. second floor over the existing first floor. Compl. ¶ 29. The second-floor construction consisted of lecture rooms and/or religious education classrooms, offices, a library, mechanical/storage space, and men's and women's restrooms identified as "locker rooms" and "toilet rooms." *Id.* ¶ 31. The men's and women's "locker rooms" did not

contain showers, and contained two toilets and two sinks each, similar to what a customary restroom would contain. *Id.* ¶ 32. All of the planned uses of the second floor included uses that were all approved as part of the original 2011 Site Plan Approval. *Id.* ¶ 33. As part of the permitting process for the second-floor construction, GSIC was required to obtain a new septic system permit evidencing that the existing septic system onsite could accommodate the new second-floor area. *Id.* ¶ 30. The total estimated gallons per day of sewage flow for the proposed use was less than 1,500 gallons per day – well below the 2,000 gallons per day threshold for the City's approval of the GSIC's septic system. *Id.* ¶¶ 39, 62, 71.

However, the City did not issue a new septic system permit. Instead, the City told GSIC that it believed that GSIC had exceeded the original septic system design capacity, and that the proposed second-floor construction plan included uses that were not part of the original septic system design and therefore, exceeded the permitted amount of sewage to be disposed of in the system. *Id.* ¶¶ 34, 38. As a result, the City rescinded the previously issued 2011 septic system permit and refused to issue a new septic system permit for the second floor. *Id.* ¶¶ 87-88. The City also refused to issue a final certificate of occupancy for the mosque. *Id.* ¶ 43. The City indicated that it would not take further action on GSIC's application, contending that the daily sewage flow would exceed 2,000 gallons per day, and that it was not authorized to issue a permit for a system exceeding 2,000 gallons per day under N.J.A.C. § 7:9A, which is incorporated into the City's municipal code. *Id.* ¶¶ 55, 87 § 350-2.

III. DISCUSSION: VINELAND'S APPLICATION OF THE SEWAGE REGULATION IS SUBJECT TO RLUIPA.

In its motion to dismiss, the City argues that GSIC's RLUIPA claims under Sections 2000cc-(a)(1), (b)(1), and (b)(2) should be dismissed because GSIC is challenging the City's refusal to issue a new sewage permit and its decision to rescind a previously granted permit – actions that, according to the City, do not involve the imposition or implementation of a "land use regulation" under RLUIPA, 42 U.S.C. § 2000cc-5(5). That argument, as discussed below, is not supported by the law and would permit municipalities to evade RLUIPA's broad protections.

A. The Sewage Regulation is a "Land Use Regulation" Under RLUIPA Because the City's Zoning Law Expressly Incorporates the Sewage Regulation.

Under RLUIPA, a "land use regulation" is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land . . . if the claimant has . . . a property interest in the regulated land …" *Id.* § 2000cc-5(5). RLUIPA requires that this language be construed broadly to protect religious exercise. *See id.* § 2000cc-(3)(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted in terms of this chapter and the Constitution.").

The sewage regulation here is incorporated by reference into the City's Land Use Ordinance and thus is zoning law. § 425-1 to -371. It is thus a zoning law for RLUIPA purposes. Courts have held that when regulations that facially do not appear to be land use regulations are incorporated into the zoning process, such incorporation renders the regulations subject to RLUIPA. In *United States v. Cnty.*

of Culpeper, Va, --- F. Supp. 3d ---, No. 16-00083, 2017 WL 1169767 (W.D. Va. Mar. 29, 2017), the United States brought an action against the county after it refused to issue a pump and haul sewage permit to a religious group seeking to establish a place of worship. *Id.* at *1-2. The county's zoning law required that the group obtain a septic permit, and the United States alleged that the denial of the permit violated RLUIPA. *Id.* at *1-2, 7. The county moved to dismiss the United States' complaint arguing that its sewage regulation did not constitute a "land use regulation" under RLUIPA. *Id.* at *2. The district court rejected this argument, finding that because the county's zoning law required a building permit, and a building permit required a septic permit, the septic "permitting process is considered a 'zoning law' under RLUIPA." *Id.* at *7; *see also Fortress Bible Church v. Feiner*, 694 F.3d 208, 217 (2d Cir. 2012) (holding that approvals for site plans and those related to buildings "relate to zoning and land use").

The Fourth Circuit, like the court in *Culpeper*, has ruled in favor of plaintiffs impacted by similar sewage regulations. In *Bethel World Outreach Ministries*, 706 F.3d. 548, 557-59 (4th Cir. 2013), the Fourth Circuit held that the deferral of an application for a well and septic system, which limited a religious organization's ability to use its property for religious purposes, violated RLUIPA. 706 F.3d. at 557-59. In that case, a Christian church asserted a RLUIPA claim against a county that had adopted two sewer regulations after the church had purchased property for

the then-permitted purpose of constructing a large church.[2] 706 F.3d at 553-54. In response to the county's implementation of these regulations, the church modified its construction plans and proposed to build a smaller church that would operate on a private septic system. *Id.* at 553-54. Instead of approving the church's new plan, the county "deferred" consideration of it, and adopted another amendment to its code that effectively prohibited the construction of private institutional facilities, including churches, on the church's property altogether. *Id.* at 554. The Court of Appeals reversed summary judgment, holding that the church may have been substantially burdened by the county's actions in deferring consideration of the permit application and then imposing new regulations that would effectively bar the planned construction, in violation of RLUIPA. *Id.* at 559.

In a similar vein, the Fourth Circuit affirmed a district court ruling upholding a jury's verdict that a county's denial of a church's sewer and water reclassification violated RLUIPA. *See Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 784-87 (D. Md. 2008), *aff'd*, 368 F. App'x 370 (4th Cir. 2010). In *Reaching Hearts*, a Seventh Day Adventist congregation had purchased property in the local county on which it intended to build a church and related facilities. 368 F. App'x at 371. The property's zoning permitted churches as a matter of right. *Id.* However, to comply with the local sewage regulation, the

[2] The first regulation at issue in *Bethel* banned extension of public water and sewer services to the church's property. *Id.* at 553. The second regulation substantially restricted the size of permissible private well and septic systems that could be installed on the church's property. *Id.*

church applied to the county for a change in the property's sewage disposal classification. *Id.* By denying the sewage application, the county effectively prohibited the church's planned development of its worship center. *Id.* After a jury awarded the church nearly $4 million in damages and injunctive relief, the district court held, and the Fourth Circuit affirmed, that the county's denial of the church's sewer and water reclassification application, which prevented the church from building a worship center on its property, violated RLUIPA. *Id.* at 371-72.

Here, as set forth in Section II.A, above, the City's zoning law expressly incorporates the sewage regulation into it. The City's zoning law also requires that to obtain a conditional use permit to use land for religious worship, an applicant must comply with the sewage regulation. For these reasons, the City's sewage regulation is "zoning . . . law" and thus a "land use regulation" under RLUIPA.

B. Even If the Sewage Regulation Is Not a Zoning Law, It Falls Within RLUIPA's Definition of "Land Use Regulation" Because It Is Part of the "Application Of" the City's Zoning Law Which Can "Limit[] Or Restrict[] . . . Use or Development of Land."

Even if the City's sewage regulation is not, by itself, deemed a zoning law, it implicates RLUIPA because it is part of the "application of" of the City's Land Use Ordinance and has the potential to "limit[] or restrict[] a claimant's use or development of land." 42 U.S.C. § 2000cc-5(5). It therefore falls under RLUIPA's definition of "land use regulation." *See id.* § 2000cc-5(5).

A law that is not, by itself, a zoning or landmarking law, can nonetheless implicate RLUIPA where it is applied as part of the application of a zoning or landmarking law and can limit or restrict the use or development of land. In

Albanian Associated Fund v. Township of Wayne, a court in this District found that eminent domain law implicated RLUIPA when it was applied as part of a landmarking law. No. 06-cv-3217, 2007 WL 2904194 (D.N.J. Oct. 1, 2007) (Sheridan, J.). In that case, the plaintiff owned land designated as open space under the township's Open Space Ordinance, which was deemed to be a "landmarking law" for purposes of RLUIPA. 42 U.S.C. § 2000cc-5(5). While the plaintiff had a conditional use application pending with the township to use its land as a mosque, the township sought to restrict the use of plaintiff's land by instituting eminent domain proceedings. *Id.* The plaintiff then challenged the township's use of eminent domain under RLUIPA. The district court found that while the eminent domain law itself may not have constituted a zoning or landmarking law, the township's use of eminent domain as part of its application of the open space law implicated RLUIPA. *Id.*, *see Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002) (RLUIPA applies to eminent domain law where "authority to exercise eminent domain . . . is based on a zoning system developed by the City."); *see also Anselmo v. Cty. of Shasta, Cal.*, 873 F. Supp. 2d 1247, 1257 (E.D. Cal. 2012) (holding that building code making "explicit reference to the county's zoning laws," which in practice "makes obtaining a permit contingent upon compliance with zoning laws," fell within RLUIPA).

Similarly, the Second Circuit and a district court within that circuit have found that review processes under health or environmental regulations can be part of the "application of" a zoning law for purposes of RLUIPA, even if the regulations

themselves may not constitute a zoning or landmarking law. *See, e.g.*, *Fortress Bible Church*, 694 F.3d at 216, 218 (holding that "when a government uses a statutory environmental review process as the primary vehicle for making zoning decisions, those decisions constitute the application of a zoning law and are within the purview of RLUIPA"); *Congregation Rabbinical Coll. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 432-33 (S.D.N.Y. 2015) (holding, among other things, that plaintiff had shown an issue of material fact as to whether several challenged municipal code provisions, including wetlands protection provisions, placed a substantial burden on plaintiff's religious exercise in violation of RLUIPA).

For purposes of this case, even if *arguendo* the City's sewage regulation is not deemed a zoning law, it nonetheless was applied as part of the City's zoning process, and that application restricted the use of land. Here, GSIC was required to comply with the City's sewage regulation as part of the conditional use application process under the City's Land Use Ordinance. As part of that process, a site plan approval and septic permit were granted in 2011. Under the very same sewage regulation, the permit was later rescinded, and the lack of a sewage permit caused the City to refuse to issue a final certificate of occupancy to GSIC to use its property as a mosque. Thus, the sewage regulation, even if the Court found it not to be a zoning law itself, is nonetheless a part of the "application of" a "zoning . . . law" that "limit[] or restrict[] the use or development of land." It therefore falls within RLUIPA's definition of "land use regulation." 42 U.S.C. § 2000cc-5(5).

C. The City Points to No Authority Preventing this Court from Applying RLUIPA in this Case.

Similar to the foregoing cases, here the City applied the sewage regulation in a manner that restricted GSIC's use or development of its land 1) by rescinding the original septic permit issued as part of GSIC's request for a conditional use permit and making it a basis to withhold a final certificate of occupancy for the mosque; and 2) by refusing to issue a new septic permit for the second floor to be used for religious instruction. RLUIPA's prohibitions should apply to these actions by the City, and the City points to no authority which compels a different result.

The Court should not credit the City's argument regarding the unpublished decision in *Second Baptist Church of Leechburg v. Gilpin Township, Pennsylvania*, 118 F. App'x 615 (3d Cir. 2004). This case is only similar to this case in that both involve the subject of waste water. *Second Baptist Church* involved the simple and straightforward issue of a church that claimed a right based on RLUIPA not to tap into the municipal sewage system, as required by local regulations, because it would be more expensive than other alternatives. *Second Baptist Church* did not, however, present the issue here: the use of sewage regulations, incorporated into a zoning code by reference, as a means to evaluate and deny approval for the building of a place of worship. We also note that the *Second Baptist Church* opinion, in any event, is not precedential and does not constitute binding law on courts in the Third Circuit. *See* 3d Cir. I.O.P. 5.3, 5.7 (2015).

The other cases cited by the City in its motion similarly lack an analysis of whether the regulations at issue in those cases served as the basis for evaluating

proposed uses and making zoning decisions. *See Salman v. Phoenix*, No. 12-cv-1219, 2015 WL 5043437 (D. Ariz. Aug. 27, 2015) (finding that second amended complaint failed to specify the regulations being challenged, but that the categories of regulations referenced were not zoning laws); *see also Affordable Recovery Hous. v. City of Blue Island*, No. 12-cv-4241, 2016 WL 5171765 (N.D. Il. Sept. 21, 2016) (finding that municipality's denial of relief from enforcement of sprinkler-system requirements was not action taken pursuant to zoning law). Where the regulation at issue serves as the basis for evaluating proposed places of worship and deciding whether to approve them, then courts have considered the regulation as a "zoning law" for RLUIPA purposes. *See, e.g.*, *Cnty. of Culpeper*, 2017 WL 1169767, at *7; *Reaching Hearts*, 369 F. App'x 371-72.

D. New Jersey State Law Does Not Preclude the Application of RLUIPA to Environmental Regulations.

The City points to *In re Adoption of N.J.A.C. 7:15-5.24(b)*, 420 N.J. Super. 552 (App. Div. 2011), to argue that environmental regulations, including those in N.J.A.C. § 7:9A-3.1, cannot be considered land use regulations. However, that authority is unavailing. In that case, the New Jersey Appellate Division was asked to find that two regulations promulgated by the New Jersey Department of Environmental Protection ("DEP") – one concerning the extension of public sewer lines and one concerning the maximum nitrate level for septic system discharges – were illegal and *ultra vires* land use regulations that the State lacked authority to impose. *Id.* at 565. The question before the Appellate Division was not whether the challenged regulations had the effect of regulating land use, but whether the DEP

had the authority to promulgate those environmental regulations. *See id.* The court found that the DEP was authorized to promulgate the regulations pursuant to multiple state environmental statutes and the DEP's enabling legislation. *Id.* at 574. The court did not hold that the DEP's sewage regulations were not land use regulations subject to RLUIPA. Indeed, the court found that the regulations may have the effect of limiting land uses, but held that while the regulations "may have the collateral effect of limiting the density of development," that "does not transform the rule into an unauthorized land use regulation." *Id.* at 565.

Unlike *In re Adoption of N.J.A.C. 7:15-5.24(b)*, the authority under which the sewage disposal regulations were enacted is not at issue here. Moreover, contrary to the City's argument, the New Jersey Appellate Division's observation that sewage regulations may affect land use decision-making, in fact, further supports that RLUIPA applies to such regulations.

E. Excluding the City's Actions Under Its Sewage Regulations from RLUIPA Would Undercut the Congressional Intent Behind the Statute.

RLUIPA's legislative history similarly supports the conclusion that regulations incorporated into zoning laws that functionally drive land use decisions are "land use regulations" within the meaning of the statute. RLUIPA was Congress' response to its concern with the creative use of zoning laws by local governments to deprive religious institutions the use of their property in favor of other, nonreligious preferred uses. *See*, *e.g.*, 146 Cong. Rec. S7774 (2000) (joint statement of Sens. Hatch & Kennedy) ("Churches in general, and new, small, or

unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and in the highly individualized and discretionary process of land use regulation."). Congress conducted nine hearings over a period of three years and compiled "massive evidence" documenting the need for the legislation. *Id.* The congressional hearings confirmed widespread discrimination against various religious institutions because of facially discriminatory land use regulations and the application of facially neutral regulations "in the highly individualized and discretionary processes of land use regulation." *Id.* Since RLUIPA's passage, the case law is replete with examples of governmental land use regulations that burden the free exercise of religion, suggesting that Congress' concern has been borne out in practice.

In response to the widespread evidence of discrimination, Congress painted with a broad remedial brush and expressly included a statutory provision instructing that RLUIPA should be construed broadly. *See* 42 U.S.C. § 2000cc-3(g). Firmly established canons of statutory construction likewise counsel that "[r]emedial legislation" – such as RLUIPA – "should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *RNS Servs., Inc. v. Sec'y of Labor, Mine Safety & Health Admin. (MSHA),* 115 F.3d 182, 187 (3d Cir. 1997). Accordingly, to implement the intent of the statute, the interpretation of the term "land use regulation" in RLUIPA must include regulations that limit the use or development of land, including regulations that are

incorporated into the local zoning regulations or that are used to make *de facto* zoning decisions.

In this case, the City's sewage regulations do just that. Not only did the City's application of the sewage regulations limit GSIC from using its land for a house of worship, the sewage regulations were incorporated into the City's Zoning Ordinance, as explained above. If the Court finds that the application of the sewage regulations are exempt from RLUIPA, then the City is free to discriminate against any religious institution because it effectively controls the outcome of zoning proceedings through the sewage disposal permitting process. That result is contrary to the operative language of RLUIPA and its broad remedial purpose – curtailing discriminatory abuse of local land use authority. *See, e.g.*, *Cnty. of Culpeper*, 2017 WL 1169767, at *6 ("To hold otherwise would disregard RLUIPA's rule of broad construction, elevate form over function, and cut against case law indicating that laws applied in a manner akin to zoning laws should be understood as such."). This Court should reject the City's attempt to circumvent RLUIPA's remedial purpose by applying sewage regulations – that functionally operate as land use regulations – in a discriminatory manner.

IV. CONCLUSION

For the reasons stated here, the United States respectfully requests consideration of this Statement of Interest in this litigation.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARDEN STATE ISLAMIC CENTER, Plaintiff, v. CITY OF VINELAND, DALE JONES, GARY LUGIANO, CARMEN DI GIORGIO, and JOHN AND JANE DOES 1-20, Defendants.	HON. JOSEPH H. RODRIGUEZ Civil Action No. 17-1209 (JHR)(KMW) CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2017, I caused a copy of the Statement of Interest of the United States of America and this Certificate of Service to be filed electronically with the Clerk of the United States District Court and that copies of these documents have been sent in conformance with the electronic filing rules to the following:

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