IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA-12-0484

LARRY COLEMAN,

Plaintiff/Appellant,

vs.

THE STATE OF MONTANA, acting by and through THE MONTANA DEPARTMENT OF TRANSPORTATION,

Defendant/Appellee.

APPELLANT'S BRIEF

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY,
THE HONORABLE KATHY SEELEY, PRESIDING

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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN APPLYING THE UNDISPUTED FACTS TO MONTANA LAW OR INCORRECTLY INTERPRET MONTANA LAW IN AFFIRMING THE ADMINISTRATIVE DECISION CONCERNING USE OF DYED FUEL.

STATEMENT OF THE CASE

This is an appeal from the district court's affirmation of an administrative finding that Appellant, rancher Larry Coleman, violated Montana law by operating a motor vehicle with dyed fuel upon the public roads and highways of the state without permit or exception.

Mr. Coleman was cited for violating Mont. Code Ann. § 15-70-330 and Admin. R. Mont. 18.10.110 based upon the operation of a 1999 International Harvester feed truck on U.S. Highway 212 near Charlo, Montana on November 28, 2008. Mr. Coleman has exhausted the administrative appeals process and appealed to the District Court of the First Judicial District, Lewis and Clark County which court affirmed the State Tax Appeal Board decision. Mr. Coleman now appeals to the Montana Supreme Court.

STATEMENT OF THE FACTS

Fortunately, the facts in this case are not contested as the record of testimony in the administrative hearing below appears not to have been preserved. The parties' uncontested facts found within the collective prehearing memorandum include the following:

Larry Coleman operates a fourth generation cattle ranching/farming operation near Charlo, Montana. On November 14, 2008, Mr. Coleman was operating a 1999 International Harvester feed truck on U.S. Highway 212 near Charlo, Montana. The design of the vehicle driven by Mr. Coleman, given the placement of a feedbox and hoist on the truck, was specifically for agricultural purposes and use on the farm. Mr. Coleman only utilized the truck for agricultural purposes with trips on public highways to obtain silage for use in feeding beef cattle. On November 14, 2008, Mr. Coleman was stopped by Motor Carrier Officer Lavadure while on a public road which road is the most direct path of travel between non-contiguous tracts of land on his ranch. Mr. Coleman admitted to Officer Lavadure that his feed truck was operating on dyed diesel fuel prior to Officer Lavadure testing the diesel fuel. (Findings of Fact, Conclusions of Law, Case No. MF-09-0008, before the Department of Transportation of the State of Montana, Uncontested Facts, p. 2, and Finding No. 2 (Feb. 16, 2010) (hereafter referred to as "Findings/Conclusions"), App. p. 11.)

In addition to the foregoing facts, the following facts are undisputed and have been found by the Hearing Examiner, Norman C. Peterson, in his February 16, 2010 decision. Mr. Coleman's 1999 International Harvester feed truck was not licensed or registered and was being driven by Mr. Coleman and was stopped pursuant to a "tip". (Findings/Conclusions, Finding No. 2, App. p. 11.) Mr. Coleman's ranch is not in one location but is divided into several noncontiguous sections. To get from one portion to another, Mr. Coleman, on occasion, has to use or cross the public highways. Generally speaking, this is to transport feed or to use the public highways to move equipment from one part of his ranch to another. (Findings/Conclusions, Finding No. 8, App. p. 12.)

The vehicle in question was a specially modified feed truck; a vehicle that Mr. Coleman paid to have converted. Exhibits A-1 through A-4 were admitted showing the modifications and manner of use in his ranching operations as an off-road vehicle used to collect feed and feed his cattle. (Findings/Conclusions, Finding No. 9, App. p. 12.) Mr. Coleman owned other trucks that were used on his ranch and he does not use the vehicle in question in this case for ranch trips to Ronan or other towns in the area. Mr. Coleman obtained the truck for agricultural purposes and used it for those purposes on his ranch. (Findings/Conclusions, Finding No. 10, App. p. 13.)

On the day of the citation, Mr. Coleman drove his vehicle to the railroad loading area near Charlo for purposes of loading corn and returning with the vehicle to a part of his ranch to feed. His only purpose for use of the vehicle on the day in question was to pick up material at the railroad area and transport it to his ranch. (Findings/Conclusions, Finding No. 12, App. p. 13.)

At the time of citation, Mr. Coleman was on a public road and was using dyed fuel in the feed truck. The feed truck's use that day was consistent with its **primary use** on the Coleman Ranch—feeding cattle. (Findings/Conclusions, Findings Nos. 12 and 13, App. p. 13.) (Emphasis added.)

STATEMENT OF THE STANDARD OF REVIEW

The facts being essentially undisputed in this matter, the standard of review is a *de novo* review of the district court's legal interpretation of the law. "A district court reviews an administrative decision in a contested case to determine whether the findings of fact are clearly erroneous and whether the agency correctly interpreted the law." *Ostergren v. Department of Revenue*, 2004 MT 30, ¶ 11, 319 Mont. 405, 85 P.3d 738. We employ "the same standards when reviewing a district court's order affirming an administrative decision." *Ray v. Montana Tech of the University of Montana,* 2007 MT 21, ¶ 24, 335 Mont. 367, 152 P.3d 122 (citing *Ostergren*). We review *de novo* the district court's legal interpretations. *Pickens v. Shelton-Thompson*, 2000 MT 131, ¶ 7, 300 Mont. 16, 3 P.3d 603 and *Clouse, et al. v. Lewis and Clark County*, 2008 MT 271, ¶ 23, 345 Mont. 208, 190 P.3d 1052.

SUMMARY OF THE ARGUMENT

The district court erred in inserting language into the dyed fuel penalty statute via the Montana Department of Transportation Regulations not intended by the legislature in adopting this legislation. Specifically, Mont. Code Ann. § 15-70-330(3)(b) required the Montana Department of Transportation to "adopt and enforce reasonable rules for the movement of off-highway vehicles traveling from one location to another on public highways, public roads, or streets when using dyed fuel or nontaxed fuel." Admin. R. Mont. 18.10.110 adopted in response to this legislative instruction, stated, in relevant part:

> (1) For the purpose of this rule, an "off-highway or off-road vehicle" is defined as a vehicle not designed to transport persons or property upon the public roads and highways of this state, including special mobile (SM) plated vehicles and vehicles with physical characteristics intended for primary use in an off-road manner which may or may not be licensed as special equipment. These vehicles may occasionally move on the public road for purposes such as movement between job sites or repair.
>
> (2) There will be no restriction for miles traveled on the highway from location to location, so long as such travel is occasional and for those purposes listed above.

The district court erred in affirming prior administrative rulings holding that only the "original design" of the feed truck could be considered in determining whether the vehicle in question was "not designed to transport persons or property upon the public roads and highways of this state . . .". [Findings/Conclusions, App. p. 16.) Neither the enabling statute nor the adopted regulation limits design

consideration of "off-highway vehicles" to the vehicle's original design but rather looks to the "physical characteristics" of the vehicle demonstrating "primary use in an off-road manner". The district court's decision eliminates consideration of the present configuration and primary use of a farm vehicle modified for primary off-road purposes while focusing on the original design. Nowhere is such a limitation found in either the statute or regulation giving effect to the legislative intent.

ARGUMENT

I. THE DISTRICT COURT AND THE PRIOR ADMINISTRATIVE BODIES ERRED IN APPLYING THE FACTS OF THIS CASE TO MONTANA LAW CONCERNING USE OF DYED FUEL.

There is no factual dispute that Larry Coleman's feed truck was designed and purchased expressly for feeding cattle and hauling feed, such as corn silage, from one point on his ranch to another. The feed truck box and associated equipment was permanently mounted on the frame of a 1999 International Harvester truck which consisted of a motor, cab, and box rails. There is no factual dispute that the feed truck was not registered as a motor vehicle in the State of Montana. The vehicle was not required to be registered due to its configuration as an "implement of husbandry". An implement of husbandry is defined under Mont. Code Ann. § 61-1-101(29) as "a vehicle that is designed for agricultural purposes and exclusively used by the owner of the vehicle in the conduct of the owner's agricultural operations." Not a single witness refuted Mr. Coleman's testimony that his feed truck was designed for agricultural purposes and exclusively used by him in the conduct of his cattle feeding operation. Pursuant to Mont. Code Ann. § 61-3-431(5), as an implement of husbandry "used exclusively by an owner in the conduct of the owner's farming operations" this feed truck was exempt from registration requirements, certificates of title, and taxation. While "special mobile equipment" is separately defined in Mont. Code Ann. § 61-1-101(66), Mont. Code Ann. § 61-3-431(5) makes it clear that

whether or not Mr. Coleman's feed truck was considered "special mobile equipment", as an implement of husbandry, it was exempt from registration.

In addition, Mr. Coleman's feed truck was uninsured and exempted from mandatory liability protection statutes under Mont. Code Ann. § 61-6-303(4) as an exempt vehicle having status of an "implement of husbandry". Likewise, the operator of Mr. Coleman's feed truck was not required to be licensed under the State of Montana. Mont. Code Ann. § 61-5-104(1)(d) provides an exemption for implements of husbandry.

The purpose of these exemptions is to give special consideration to the ranchers and farmers operating and maintaining agricultural operations in Montana. Those are individuals who spend virtually all of their working time off-road but at times are required to cross roads or utilize roads to connect portions of their operation with the implements of their trade—husbandry.

Montana has adopted laws concerning special fuels use taxes and the relevant law is set forth in Part 3 of Title 15, Chapter 70. There, "special fuel" is defined as "combustible gases and liquids commonly referred to as diesel fuel . . . when actually sold for use in motor vehicles operating upon the public roads and highways within the state of Montana." Mont. Code Ann. § 15-70-301(19) (emphasis added). A "special fuel user" is defined as "a person who consumes in this state special fuel for the operation of motor vehicles owned or controlled by the person upon the highways

of this state." Mont. Code Ann. § 15-70-301(21)(a) (emphasis added). A special fuel user is statutorily required to obtain special fuel user permits annually and to display such permits at all times. Mont. Code Ann. § 15-70-302(1)(a). Mr. Coleman was not a special fuel user nor did he use special fuels as defined by Montana statutes because his use of those fuels was not intended for the operation of motor vehicles upon the public roads or highways of the state. Mr. Coleman is a rancher whose equipment operates off-road with only occasional crossing or use of the road to connect to noncontiguous points of his property.

Consistent with its laws concerning special fuels and limitation on their use, Montana adopted Mont. Code Ann. § 15-70-330 which sets forth the special fuel penalties for misuse of special untaxed fuel. The enforcement provision under which Mr. Coleman was charged is subsection (3)(a) which states in its entirety:

> A special fuel user may not use dyed special fuel to operate a motor vehicle upon the public roads and highways of this state unless the use is permitted pursuant to rules adopted under subsection (3)(b). The purposeful or knowing use of dyed special fuel in a motor vehicle operating upon the public roads and highways of this state in violation of this subsection is subject to the civil penalty imposed under 15-70-372(2). Each use is a separate offense.

Mr. Coleman, in the operation of his feed truck, was neither a special fuel user nor was he using special fuel as defined for those purposes. Mr. Coleman's purchase of dyed fuel was for operation of farm vehicles on his ranch off Montana's public roads and highways.

Mont. Code Ann. § 15-70-330(3)(b) required that the Department of Transportation to "adopt and enforce reasonable rules for the movement of off-highway vehicles traveling from one location to another on public highways, public roads, or streets when using dyed fuel or nontaxed fuel." It is telling of the legislature's intent that the term "special fuel" or the term "special fuel user" is not used in this enabling provision.

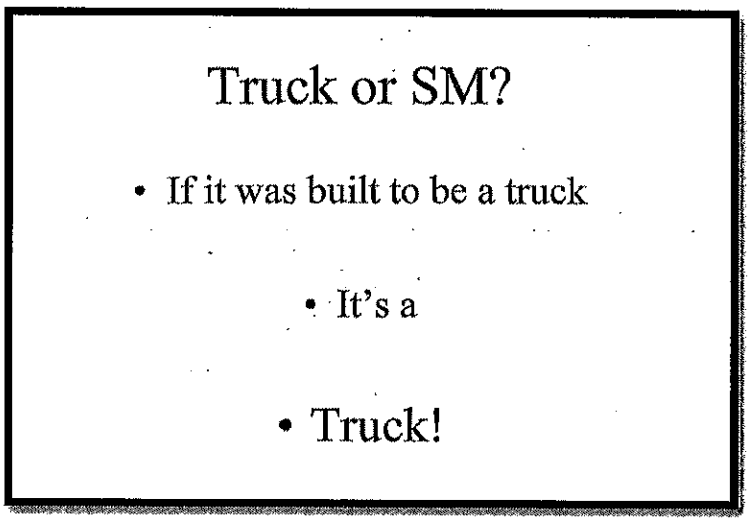
The Montana Department of Transportation did, indeed, adopt rules governing off-highway vehicles and equipment. Admin. R. Mont. 18.10.110 subsections (1) and (2) were adopted and pertain to off-highway vehicles. These subsections state:

> (1) For the purpose of this rule, an "off-highway or off-road vehicle" is defined as a vehicle not designed to transport persons or property upon the public roads and highways of this state, including special mobile (SM) plated vehicles and vehicles with physical characteristics intended for primary use in an off-road manner which may or may not be licensed as special equipment. These vehicles may occasionally move on the public road for purposes such as movement between job sites or repair.
>
> (2) There will be no restriction for miles traveled on the highway from location to location, so long as such travel is occasional and for those purposes listed above.

Mr. Coleman's feed truck was used exclusively in his cattle feeding operating. The only purpose for which this vehicle reached the public roads or highways of Montana was in traversing distances between noncontiguous sections of the Coleman ranch. In short, this feed truck held all physical characteristics

demonstrating that it was intended for primary use in an off-road manner and only occasionally moved on the public road and then only for purposes of movement between job sites. It was on one such occasion that Mr. Coleman was stopped and cited.

The facts of this case are not disputed—only the application of those facts to the controlling regulation and statute. Both the Montana Department of Transportation and the district court below focused upon the original design of the 1999 International Harvester truck as a highway vehicle. Indeed, in its handout to its enforcement officers, MDT states:



Mont. Code Ann. § 15-70-330(1), (2), and (3)(a) pertain to special fuels and penalties associated with special fuel use or misuse. Subsection (3)(b) eliminates the use of the term "special fuel user" and requires that the Montana Department of Transportation "adopt and enforce reasonable rules for the movement of off-

highway vehicles traveling from one location to another on public highways, public roads, or streets when using dyed fuel or nontaxed fuel." This provision says nothing about the off-highway vehicle's original design, nor, for that matter, does the regulation implemented to define an off-highway or off-road vehicle speak to original design. The inserted limiting word—"original"—is wholly a creation of the Montana Department of Transportation and its interpretation of its own regulation. Nowhere can such a limiting feature be found in the language of the enabling statute.

This Court's rules of interpretation of statutes requires this Court to first determine, if possible, the legislative intention "from the plain meaning of the words used . . .". *Dunphy v. Anaconda Company*, 151 Mont. 76, 80, 438 P.2d 660, 662 (1968). "Where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe." *Id.* The function of this Court is "not to insert what has been omitted." *Id.* Here, the statutory language requiring the Montana Department of Transportation to adopt rules addressing the movement of "off-road vehicles" from one location to another contained no such "original design" criteria. Rather, the legislature clearly and directly intended that a reasonable exception be adopted for off-road vehicles when those vehicles occasionally moved across or upon the state's highways. The Montana Department of Transportation's regulation

recognized this exception when it described a category of vehicles fitting this exception as "vehicles with physical characteristics intended for primary use in an off-road manner which may or may not be licensed as special equipment." Admin. R. Mont. 18.10.110. This definition says nothing about original design and speaks directly to "characteristics" and "intent". Both of which plainly and directly speak to the current characteristics and current intent.

Inserting the limiting word "original" is a patently unreasonable interpretation inconsistent with, and doing violence to, the exceptions and special treatment given farmers and ranchers in operating and using implements of husbandry in this state. The Montana Department of Transportation's interpretation, sustained by the district court, adds a condition never envisioned by the Montana Legislature—that this off-road exemption would apply only to off-road equipment originally designed as such. Moreover, this sort of limitation or interpretation makes no sense if the "physical characteristics" of the vehicle are to be examined to determine "primary use in an off-road manner . . .". Admin. R. Mont. 18.10.110. Why bother with this language if only original design is at issue? "If the legislative intent can be determined by the plain language of the words used, this Court may go no further and apply other means of interpretation." *Clover Leaf Dairy v. State*, 285 Mont. 380, 389, 948 P.2d 1164, 1169-70 (1997). The plain reading of the regulation and its enabling statute requires the vehicle to

be evaluated from the perspective of its current design and intended (or, in this case, actual) primary use.

A farm vehicle or an implement of husbandry cannot be defined by what it was but should be defined by what it is. An implement of husbandry is defined as a vehicle that is designed for agricultural purposes and exclusively used by the owner of the vehicle in the owner's agricultural operations. Mont. Code Ann. § 61-3-431(5). Nowhere is found the word "originally" and if this modifier had been added, it would be pointless to include the exclusive use limitation. Quite clearly, the legislature intended that if a vehicle were designed to be used in agriculture and, in fact was used in agriculture, it would be included as an implement of husbandry.

Mr. Coleman testified—and this fact is undisputed—that his feed truck was specially designed as a feed truck using the basic International Harvester truck chassis but including permanent modifications necessary for use in his cattle feeding operation. It is an uncontested fact that Mr. Coleman operated this truck exclusively off public roads and highways and on his ranch for purposes of feeding cattle with the exception of either crossing a road or highway to reach a noncontiguous portion of his ranch or following a road or highway to reach a noncontiguous portion of his ranch. The legislative instruction in Mont. Code Ann. § 15-70-330(3)(b) required the department to adopt and enforce reasonable

rules "for the movement of off-highway vehicles traveling from one location to another on public highways, public roads, or streets . . .." The department's response was the adoption of Admin. R. Mont. 18.10.110 allowing these off-road machines to "occasionally" move on public roads for purposes of movement between "job sites" which is precisely what Mr. Coleman was doing when he was cited.

No one has argued or asserted that Mr. Coleman cannot use dyed fuel in his feed truck. Any such assertion would fly in the face of MDT's own regulation and the various exemptions allowed to implements of husbandry. What apparently is at issue, besides the non-legislative inclusion of "original design", is the scope or meaning of occasional use. Is it practical for a farmer or rancher to operate his equipment on dyed fuel but then when crossing a road or highway be required to drain his fuel system and refuel with clear taxed fuel and, then upon crossing, drain that fuel and refill with dyed fuel? Such a clearly ridiculous interpretation could only come from one who has never operated farming equipment or performed the multitude of jobs required of a farmer or rancher within the limited time available.

Instead of focusing on original design, the focus should be on use and physical characteristics—coincidentally the regulatory mandate. In such a case, Mr. Coleman's feed truck fits the off-road exception perfectly.

Not coincidentally, the Montana Department of Transportation has previously resolved dyed fuel and implements of husbandry cases where the design of the vehicle was not "original" but the modifications significant and permanent and the use of the vehicle consistent with agricultural purposes. The first was a stipulation of settlement in March of 2008 in *In the Matter of the Motor Fuels Civil Penalty of Robert G. Propp*, Case No. MF 2007-0015. A true and correct copy of this Stipulation of Settlement is provided in the Appendix at p. 18 and was attached to motions to reopen discovery (Exhibit A to Supplemental Brief (Feb. 1, 2012)) filed by previous counsel for Mr. Coleman. This case involved a 2006 International Harvester modified to be used as a cattle feed truck. Post-administrative proceeding, the Montana Department of Transportation agreed that the truck should be considered an "off-highway" vehicle under the regulatory exception. This public document is provided to this Court as part of the record below even though the district court declined to allow further discovery or sanctions for lack of production by the Montana Department of Transportation.

The second case was also resolved by Stipulation of Settlement and concluded in March of 2008. That case involved significant and permanent modifications to a 1991 International Harvester feed truck. There it was clearly stated in the Stipulation of Settlement that the equipment as modified "should be considered an implement of husbandry". *In the Matter of the Motor Fuels Civil*

Penalty of Steven A. Vitt, Case No. MF 2007-0006. A true and correct copy of this Stipulation of Settlement is included in the Appendix at p. 19.

In both the above cases, the Montana Department of Transportation considered the current design of the feed truck and its current use in coming to a proper resolution by stipulation. These cases represent the proper application of fact to law in examining the current design of the vehicle and its actual use. It is no coincidence that both involved feed trucks designed and constructed by using an International Harvester truck chassis but modified in a manner to allow the originally designed highway truck to effectively operate off-road as a cattle feed truck. Mr. Coleman purchased a similarly modified feed truck and utilized it exclusively in his cattle ranching operation. Unfortunately, the Montana Department of Transportation chose to stand on its improper "original design" interpretation costing Mr. Coleman thousands of dollars and putting every rancher engaged in the same sort of operation at risk for citation with escalating penalties.

This interpretation is a case of first impression. No other cases construe either the enabling statutes language or the subsequently adopted regulation. The closest this Court has come to dealing with this language is found in *State v. Patton*, 227 Mont. 167, 737 P.2d 498 (1987). There, a used dump truck was purchased by Cremer Ranches and used exclusively for ranch work and did not drive upon a public road except "to travel from one part of the ranch to another."

Patton at 227 Mont. 168, 737 P.2d at 499. It was further agreed in stipulated facts that "the truck has not been modified by Cremer Ranches since it was purchased and is in essentially the same condition as when purchased, normal wear and tear excepted." *Id.* The question before this Court was whether or not for purposes of registration and payment of fees under Mont. Code Ann. § 61-3-431, this vehicle was an implement of husbandry as defined by Mont. Code Ann. § 61-1-121. This Court affirmed the district court's holding that this was not an implement of husbandry "because it was not designed for agricultural purposes." The district court had concluded that "the vehicle in question was a truck before Cremer Ranch obtained it, that it had not been modified, and that it continued to be a truck as defined in § 61-1-107, MCA [now repealed]." (Emphasis added.) While the Montana Department of Transportation cited this case below as authority for the proposition that "once a truck, always a truck" the decision in *State v. Patton* is clearly distinguishable. Both the district court and the stipulated facts provided to this Court reiterated that the vehicle "had not been modified". A fair reading of this case suggests that had the vehicle been modified for agricultural purposes, the outcome would have been different.

This Court should correct the erroneous and ongoing interpretation of Montana law and hold that the current design and use of the vehicle shall determine whether or not it is considered an off-highway vehicle for purposes of

exemption from dyed fuel penalties. Thus, confirming rights of exemption, eliminating confusion, and sparing Montana's farmers and ranchers unnecessary cost and expense in the operation of their agricultural enterprises.

SUMMARY AND CONCLUSION

The penalties levied as a result of improper interpretation are not insignificant for the farmers and ranchers of Montana—$1,000.00 on the first violation and $5,000.00 thereafter. This is a serious and significant issue for agricultural producers in the State of Montana. These farmers and ranchers cannot afford to leave interpretation of dyed fuel penalties unresolved or an open question. This Court should properly interpret both the enabling statute and the regulation by requiring an examination of the current design and use of the vehicle in question and exclude the Montana Department of Transportation's improper inclusion of the term "original design". The focus intended by the legislature and by common sense is upon the current characteristics and actual use of the vehicle. The district court's decision should be reversed and this matter remanded to the district court with instructions to dismiss the charges against Larry Coleman and provide the agricultural users of the State of Montana watching this case and decision with clear guidance going forward.

DATED this 23rd day of October, 2012.

REEP, BELL & LAIRD, P.C.

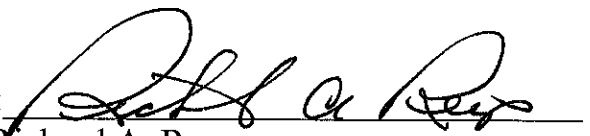
By: _____
Richard A. Reep
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that Appellant's Brief is printed in a proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and word count calculated by Word 2010 is 4,344 words, excluding the Table of Contents, the Table of Authorities, the Certificate of Service, and this Certificate of Compliance.

DATED this 23rd day of October, 2012.

REEP, BELL & LAIRD, P.C.

By: 
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 23rd day of October, 2012, a true and correct copy of the foregoing was served upon the following as indicated:

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