IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

MARVIN JONES,	)	**Civil Action No. 4:10CV-011-P-S**
Plaintiff	)	
v.	)	
TYSON FOODS, INC.; HALEY BARBOUR, in his official capacity of Governor of the State of Mississippi; CHRISTOPHER EPPS, in his individual and official capacities as Commission of the Mississippi Department of Corrections; LEE McTEER, in his official capacity as Community Correctional Director for Region I and in his individual capacity; and JONATHAN BRADLEY, in his official capacity as Correctional Supervisor of Leflore County Restitution Center and in his individual capacities	)	
Defendants.	)	

MEMORANDUM BRIEF IN OPPOSITION OF DEFENDANT HALEY BARBOUR'S MOTION TO DISMISS ON GROUNDS OF ELEVENTH AMENDMENT IMMUNITY

COMES NOW the Plaintiff, MARVIN JONES, by and through counsel, and files this his brief in opposition to the Defendant HALEY BARBOUR, (hereinafter "Barbour"), Motion to Dismiss, and would show the following:

INTRODUCTION

The Defendant has filed a Motion to Dismiss seeking to dismiss the Plaintiff's Section 1983 and 1985 claims brought against Defendant Barbour in his ***official*** capacity as Governor of the State

of Mississippi. Defendant Barbour, as the chief executive officer of the State of Mississippi, has the duty to ensure that the departments that compose the Executive Branch of Mississippi guarantee the federal constitutional and statutory rights of the inmates housed in correctional facilities owned and operated by, or providing services on behalf of Mississippi. Defendant Barbour, pursuant to Miss. Code Ann. § 99-37-19, holds the responsibility of supporting the operation of, and having sole jurisdiction over and responsibility for offenders in, such restitution program. As detailed by Plaintiff's complaint, Defendant Barbour failed to do so and such acts violate existing federal rights.

Thus, while the Eleventh Amendment does bar the Plaintiff from recovering a monetary damages award against the "official capacity" defendants, it does not bar the Plaintiff from seeking declaratory relief against Defendant Barbour for violating his Eighth, Thirteenth and Fourteenth Amendment rights as painstakingly detailed in Plaintiff's First Amended Complaint and the Factual Background section of this memorandum.

FACTUAL BACKGROUND

Plaintiff is a former inmate/resident of the Leflore County Restitution Center (hereinafter "LCRC") whose life was forever changed when he received a letter from the Mississippi Department of Health. (First Amended Complaint ("FAC") ¶20, **Doc. 12**).

"During your employment at Tyson you may have been exposed to an individual who has been diagnosed with Mycobacterium tuberculosis (TB)," the letter from Rebecca James, MD stated. (FAC ¶ 42, **Doc. 12**). "The chance of others in the work area developing TB is small, but possible." *Id.* For Plaintiff, the chance was not as small as the Department of Health had described. *Id.*

After receiving the aforementioned letter Plaintiff went for his tuberculin skin test and his results were positive. (FAC ¶ 42, **Doc. 12**). As the Department of Health stated in its letter, Plaintiff was exposed to an individual diagnosed with TB while fulfilling his restitution at Defendant Tyson. Plaintiff was subsequently diagnosed with the same, life-threatening, disease. *Id.*

Plaintiff Assigned to Defendant Tyson to Fulfill Restitution; Health Deteriorates

Plaintiff was sent to the Leflore County Restitution Center (hereinafter "LCRC") as a condition of his sentence for embezzlement. *Id.* Plaintiff's sentence was the least of his concerns.

After arriving at the LCRC Plaintiff was immediately assigned to fulfill his restitution at Defendant Tyson's Carthage, Mississippi plant to work as a chicken hanger. (FAC ¶ 21, **Doc. 12**). The chicken hanging process is unpleasant, as chickens are collected, crammed into a cage, left without water or food and transported to the chicken plant. *Id.*

Once inside the chicken plant, Plaintiff was responsible for hanging the chickens. (FAC ¶ 22, **Doc. 12**). To fulfill his state-ordered duties to Defendant Tyson, Plaintiff had to hang the chickens upside down, by their feet, while they were still alive. *Id.* Because of the nature of such methods, many chickens continually released feces and such feces would cover Plaintiff. (FAC ¶ 24, **Doc. 12**). Working in a plant in which employees, including Plaintiff, are forced to work while covered in feces constitutes an unsanitary and unhealthy work environment. *Id.*

While fulfilling his restitution at Defendant Tyson, Plaintiff's health quickly deteriorated. His neck, face and hands began to swell and when he approached a Tyson supervisor about these ailments, the supervisor refused to let Plaintiff see a company nurse. (FAC ¶ 32, **Doc. 12**).

Defendants Remove Plaintiff from Tyson

Eventually Plaintiff's health temporarily prevented him from fulfilling his restitution at Defendant Tyson's plant. (FAC ¶ 33, **Doc. 12**). Plaintiff was forced to return to LCRC where he waited for his next assignment. (FAC ¶ 34, **Doc. 12**).

During this time he ***was not*** free to seek employment on his own. *Id.* Plaintiff contends Defendant Bradley's failure to reassign Mr. Jones was based upon the fact he angered Defendant Bradley because he could not fulfill his duties at Defendant Tyson, thus negatively impacting any and all personal benefits Defendant Bradley is believed to have received from Defendant Tyson as a

result of Plaintiff's placement. (FAC ¶ 35, **Doc.12**). It was well known among residents at LCRC that Defendant Bradley wanted as many of his residents as possible to be assigned to Defendant Tyson, even when other opportunities were available. *Id.*

Plaintiff, rather, was forced to wait months until Defendant Bradley assigned him to the Greenwood County Club; a place where Plaintiff excelled. (FAC ¶ 36, **Doc. 12**).

Plaintiff Re-Assigned to Tyson by Defendant Bradley

Plaintiff's time at Greenwood was short lived as Defendant Bradley reassigned Plaintiff to Defendant Tyson fulfill the remainder of his restitution. (FAC ¶ 37, **Doc. 12**). Plaintiff never had a choice as to where he was, or was not, assigned to fulfill his restitution. *Id.*

Though he was productive in his new assignment, Defendant Bradley, once again, assigned him to Defendant Tyson in March of 2008. (FAC ¶ 37 **Doc. 12**). This was done contrary to Mr. Jones's best interest and despite the fact he had a medical condition, hampering his productivity at Tyson. *Id.* This decision was arbitrary and capricious, and upon information and belief, the reassignment personally benefited Defendant Bradley. *Id.* Furthermore, by ordering Plaintiff back to Tyson, Defendants precluded Plaintiff from receiving his freedom after he satisfied the terms of his sentencing. (FAC ¶¶ 1-2, **Doc. 12**).

Defendant Barbour, Epps and McTeer failed to supervise Defendant Bradley, thus permitting him to play fast and loose with Plaintiff's life and violated his constitutional right to be free from cruel and unusual punishment and indentured servitude, as well as his procedural and due process rights.

Dangers of Chicken Processing Widely Recognized

Recent developments across the nation highlight the inherent health and safety dangers inherent in chicken processing.

In 2008 U.S. lawmakers recognized the dangerous conditions created by the harsh demands of poultry employers. The late U.S. Sen. Ted Kennedy, D-Mass., admitted the dangers poultry workers face when he explained, "Poultry workers' health and safety is threatened every day in a variety of ways. Their hands are crippled by hours of an assembly line that moves too fast. They are forced to work when they are sick and seriously hurt." (FAC ¶ 29, **Doc. 12**). The same was true of Plaintiff, as evidenced by his hand troubles and Defendant Tyson's refusal to let Plaintiff seek medical help. (FAC ¶ 32, **Doc. 12**).

The unhealthy aspect of chicken processing is further exasperated when one takes into account the national trend to hire illegal immigrants to work in the chicken plants. Defendant Tyson was accused of such behavior by the Bush Justice Department. (FAC ¶ 31, **Doc. 12**). The area from which a vast majority of illegal immigrants stem, Latin America, still suffers from TB outbreaks. *Id.*

Plaintiff Contracts TB

Because of his arbitrary assignment to Defendant Tyson and because the order dispatching Plaintiff to such an unsanitary and dangerous environment had Defendant Barbour's blessing, Plaintiff's constitutional rights were violated. As a consequence, he now suffers from TB. Since his diagnosis a deluge of agonizing symptoms has befallen Plaintiff. He currently suffers from muscle spasms, acute fevers, night sweats, loss of appetite, weight loss and a host of dire effects from the medications he must take. (FAC ¶ 43, **Doc. 12**). This has left him unable to work. *Id.*

ARGUMENT

The Plaintiff will concede his Section 1983 and 1985 monetary damages claims against Defendant Barbour in his ***official*** capacity only, but such a concession should not result in the dismissal of the official capacity claims made Defendant Barbour because Plaintiff has sought declaratory relief, as well.

Since *Kentucky v. Graham*, 473 U.S. 159 (1985) holds that suing officials in their official capacities is tantamount to suing the State, itself, the Defendants are correct that they are immune from damage liability in their official capacity by virtue of the Eleventh Amendment. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996).

However, Defendant Barbour should be retained as a Defendant his official capacities for purposes of declaratory relief. Plaintiff's Complaint seeks to declare the state of action of placing him in an unsanitary environment with known safety hazards violates the Eighth Thirteenth and Fourteenth Amendments of the United States Constitution. Furthermore, Plaintiff's lawsuit has challenged the arbitrary state action of sending Plaintiff to Defendant Tyson and holding him there for a time longer than required.

I. PLAINTIFF'S REQUEST FOR DECLARATORY RELIEF NEGATES THE DISMISSAL OF THE OFFICIAL CAPACITY CLAIMS MADE AGAINST DEFENDANT BARBOUR .

Plaintiff's First Amended Complaint asks this Court to "[d]eclare that Defendants' actions, as herein described, violated Plaintiff's constitutional rights under the Eighth, Thirteenth and Fourteenth Amendments to the United States Constitution." As such, the "official capacity" Defendants should ultimately remain defendants in this case. *See Ex parte Young*, 209 U.S 123 (1908) (carving out exception to Eleventh Amendment and specifically authorizing private suits against state officials for injunctive relief and declaratory relief in situations where defendants violate federal law).

While it is true Supreme Court precedent has rejected the notion "any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature," valid

declaratory relief, even if it does impact the State's treasury, is not outside *Young's* carefully carved exceptions.[1] *Edelman v. Jordan*, 415 U.S. 651, 665-667 (1974).

"As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Id.* at 667. Thus, when a Plaintiff seeks a declaration holding the actions of a State, or its officers, has unconstitutional, the monetary costs associated with the command to comport to the constitution are not be enough to justify Eleventh Amendment immunity. *Id.*

"State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*" *Id.* at 668.

When the relief sought is prospective, i.e. intending the State and/or its officers to comply with federal law in the future, Eleventh Amendment immunity does not bar the lawsuit. *See Papasan v. Allain*, 478 U.S. 265, 279 (1986) (*holding* the Court will 'look to the substance rather than to the form of the relief sought, ... and will be guided by the policies underlying the decision in Ex parte Young"). *See also Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (The Court upheld a decree requiring state payments to programs intended to redress past wrongs because those programs were "part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system").

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[1] Defendants McTeer and Bradley cite *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal citations omitted) to support the contention federal courts cannot declare past acts of state actors unconstitutional under ***any*** circumstances. This is wrong. The internal citations omitted by Defendants, *Green v. Mansour*, 474 U.S. 64, 73 (1985), held when the "issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court" a declaratory judgment constitutes an "end-run" around established precedent and the Eleventh Amendment. As explained in this memorandum, such circumstances are not created by Plaintiff's case, thus a declaratory judgment would not be barred by the Eleventh Amendment.

In the course of holding that a court had the authority reinstate a state employee who had been unconstitutionally discharged, notwithstanding the Eleventh Amendment, the United States Court of Appeals for the Fifth Circuit has stated:

> As noted above, Nelson relies on the exception to Eleventh Amendment immunity created by the Supreme Court in Ex parte Young, 209 U.S. 123, ... (1908). Pursuant to the Ex parte Young exception, the Eleventh Amendment is not a bar to suits for prospective relief against a state employee acting in his official capacity. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 482 (5th Cir.2008), petition for cert. filed.... Thus, "prospective injunctive or declaratory relief against a state [official] is permitted ... but retrospective relief in the form of a money judgment in compensation for past wrongs ... is barred." *Brennan v. Stewart*, 834 F.2d 1248, 1253 (5th Cir.1988).

Nelson v. University of Texas at Dallas, 35 F.3d 318, 321-22 (5th Cir. 2008).

Plaintiff has alleged the actions of Defendants McTeer and Bradley, which had the blessing of Defendant Barbour as the chief executive of the State, violated his Eighth, Thirteenth and Fourteenth Amendment rights. Plaintiff's Eighth Amendment claim includes, but is not limited to, his assignment to a poultry plant where he was forced to work covered in chicken feces and work alongside illegal immigrants with infectious diseases. Such an environment is cruel and unusual.[2]

Plaintiff's Thirteenth Amendment claims includes, but is not limited to, his being detained by Defendants longer than required due to a 42 U.S.C. § 1985 conspiracy to deprive him his civil rights and, upon information and relief, to further an agreement between Defendants Tyson and Bradley to exploit Plaintiff and others similarly situated.

Plaintiff's Fourteenth Amendment claims are both procedural and substantive.

Plaintiff's request for declaratory relief is independent of any compensatory damages he may or may not be seeking. Instead, his request for declaratory relief against Defendant Barbour was

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[2] *See Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (*holding* unsafe working conditions in the Texas prison system constitute cruel and unusual punishment as proscribed by the Eighth Amendment.

made for the purpose of finding their past behavior unconstitutional and ordering any future behavior to be consistent with the U.S. Constitution. Furthermore, the facts support such violations occurred and are not, despite the wishful thinking of Defendant Barbour, vague.

After arriving at the Leflore County Restitution Center, Defendant Bradley assigned Plaintiff to Tyson's Carthage, Mississippi to perform the functions of a chicken hanger. (FAC ¶ 20, **Doc. 12**). In recent years, the dangers associated with the poultry industry have been exposed.

U.S. lawmakers have also recognized the inherent danger associated with the poultry industry and voiced concern that harsh demands issued by poultry employers place poultry worker's health in jeopardy. (FAC ¶ 28, **Doc. 12**). Former U.S. Sen. Ted Kennedy, D-Mass., admitted the dangers poultry workers face when he testified, "'Poultry workers' health and safety is threatened every day in a variety of ways. Their hands are crippled by hours on an assembly line that moves too fast. They are forced to work when they are sick or seriously hurt." *Id.*

Furthermore, Defendant Tyson has a reputation of placing the bottom line before worker safety and has been charged with hiring illegal immigrants from Latin America who may have carried the TB virus into the Carthage, Mississippi plant. (FAC ¶ 31, **Doc. 12**).

Crippled hands and disease wielding illegal immigrants, however, are just the tip of the iceberg. By forcing Plaintiff to work in a chicken plant, Defendant Barbour, by supporting the policies of the other state Defendants, exposed Plaintiff to an environment in which he was routinely covered in chicken feces. Plaintiff's work environment, thus, was clearly an unsanitary example of cruel and unusual punishment because Plaintiff had to conduct his work among chickens compelled to release feces due to the nature in which Defendant Tyson was processing the poultry. (FAC ¶ 24, **Doc. 12**).

Because Plaintiff seeks declaratory relief as part of this cause of action, the Eleventh Amendment does not bar Plaintiff's lawsuit made against Defendant Barbour in his official capacity and it would be inconstant with Supreme Court precedent to dismiss such claims.

II. PLAINTIFF'S CLAIMS SHOULD NOT BE BARRERED BY § 11-46-9(m)

If held to bar Plaintiff's right to seek redress against wrongdoing by the State, § 11-46-9 violates the equal protection clause of the Fourteenth Amendment, by irrationally disallowing suits by prisoners, while allowing other citizens to sue the State.

As stated by the United States Supreme Court:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See Youngberg v. Romeo, supra 457 U.S., at 317, ... ("When a person is institutionalized-and wholly dependent on the State[,] ... a duty to provide certain services and care does exist"). The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs- e.g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

DeShaney v. Winnebago Co. Dept. of Social Services, 489 U.S. 189, 199-200 (1989) (footnote omitted).

To deny Plaintiff's claim merely because he was an inmate would violate the fundamental principles of equal protection.

III. PLAINTIFF MAKES THE GOOD FAITH ARGUMENT THAT *HANS V. LOUISIANA,* 134 U.S. 1 (1890) IMPROPERLY EXPANDED THE ELEVENTH AMENDMENT'S CONVEYENCE OF SOVEREIGN IMMUNITY TO NON-DIVERSITY LAWSUITS.

In *Hans v. Louisiana,* 134 U.S.1 (1890), the Supreme Court expanded the Eleventh Amendment's conveyance of sovereign immunity and held a U.S. citizen of a state cannot sue that same state in federal court. By barring such a lawsuit, the Supreme Court relied on, and continues to rely on, "flawed premises, misguided history, and an untenable vision of the needs of the federal

system it purports to protect." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 248 (1985) (BRENNAN, J., dissenting).

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const., Amendment Eleven. Thus, the plain text of the Amendment seeks to bar "only federal actions brought against a State by citizens of another State or by aliens." *Welch v. Texas Department of Highways*, 483 U.S. 468, 504 (1987) (BRENNAN, J, dissenting).[3]

By interpreting the Eleventh Amendment's grant of sovereign immunity to extend to a resident citizen of a state suing his home state in federal court to vindicate a deprivation of civil and constitutional rights, the Court has skewed the delicate balance between state and federal power.

"Federal courts are instruments of the National Government, seeing to it that constitutional limitations are obeyed while interpreting the will of Congress in enforcing the federal laws." *Atascadero State Hospital*, 473 U.S. at 255. When viewed through the Eleventh Amendment, however, "the Court instead relies on a supposed constitutional policy disfavoring suits against States as justification for ignoring the will of Congress; the goal seems to be to obstruct the ability of Congress to achieve ends that are otherwise constitutionally unexceptionable and well within the reach of its Article I powers." *Id.*

This is exactly what has unfolded in the case at bar. Plaintiff was subjected to cruel and unusual punishment, a deprivation of liberty and a life-threatening disease and the State of

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[3] Justice Brennan further explained, "The Eleventh Amendment does not bar a suit ... by a Texas citizen against the State of Texas. The part of Article III, § 2, that was affected by the Amendment provides: 'The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens or Subjects.'. The Amendment uses language identical to that in Article III to bar the extension of the judicial power to a suit 'against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.' The congruence of the language suggests that the Amendment specifically limits only the jurisdiction conferred by the above-referenced part of Article III." *Welch*, 483 U.S. at 504.

Mississippi is permitted to use the Eleventh Amendment as a get out of jail free card. And when viewed in light of history and context, the argument for a change in current Eleventh Amendment jurisprudence must change is strengthened.

There is little historical evidence to suggest the founding fathers subscribed to the view Article III of the U.S. Const. failed to authorize diversity or federal question suits brought by citizens against their state in federal court. Further, Chief Justice John Marshall, through written opinion, accepted the idea a citizen could sue his state in federal court.

In *Cohens v. Virginia*, 6 Wheat. 264 (1821), the Chief Justice addressed Article III's limitations on the Court to review the validity of a writ issued in a criminal case in which a State and a citizen of the same state were parties. In rendering its decision, the Court, rejecting Virginia's claim the court was lacking jurisdiction, held Article III's grant of jurisdiction applied "to all [federal question cases] without making in its terms any exception whatever, and without any regard to the condition of party."

Additionally, the Court rejected the notion that a general principle of sovereignty could be implied in light of Article III's clear language. Justice Marshall explained:

> From this general grant of jurisdiction [in federal question cases], no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case.

Id. at 382-383.

Because the Court has relied on a "misguided history" of the Eleventh Amendment the essential function of the federal courts - to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land – is undermined. *Id.* at 256. Even further, federal jurisprudence has developed a "complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur" and such rules, as evidenced by this case, creates "manifest injustices." *Id.*

In some, a suit brought under federal law against a state by is not barred. *Id.* at 247-304.

IV. ASSUMING PLAINTIFF HAS NOT PLED HIS CLAIM SUFFICIENTLY, THIS COURT SHOULD GRANT HIM LEAVE TO FILE AN AMENDED COMPLAINT.

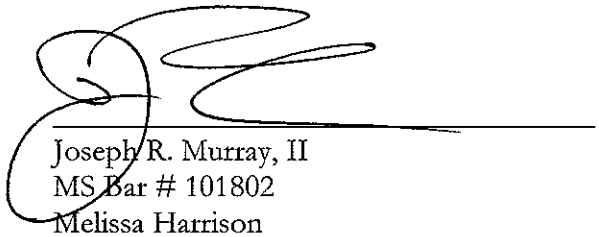
The Fifth Circuit stated, "Unless we have searched every nook and cranny of the record, like a hungry beggar searching a pantry for the last morsel of food, and have determined that 'even the most sympathetic reading of the plaintiff's pleadings uncovers no theory and no facts that would subject the present defendants to liability,' we must remand and permit plaintiff to amend [her] claim." *Brown v. Texas A&M University*, 804 F.2d 327, 334 (5th Cir. 1986) (*citing Jacquez v. Procunier*, 801 F.2d 789, 791 (5th Cir. 1986)).

If this Court finds Plaintiff's complaint is deficient, he should be first given an opportunity to remedy the deficiency before having his case dismissed.

CONCLUSION

For all the reasons stated herein, Plaintiff's request for declaratory relief against Defendant Barbour in his *official* capacity is not barred by Eleventh Amendment immunity and such claims should not be dismissed and Plaintiff requests the Court deny Defendant's Motion to Dismiss on such grounds and deny Defendants' request for other relief sought.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I have filed the forgoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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