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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Don and Thelma Dillon, husband and wife, Plaintiffs, v. State of Arizona; Arizona Department of Economic Security, et al., Defendants.	Case No. 08-CV-00796 PHX-DGC ECF FILING **PLAINTIFFS' RESPONSE TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM ON PRETRIAL LEGAL ISSUES** (Assigned to the Honorable David G. Campbell)

Pursuant to this Court's Order (Dkt# 111), Plaintiffs submit this memorandum of law in response to Defendants' initial brief as to the issues defined by the Court.

I. A.R.S. § 8-515.05 Creates a Liberty Interest.

Plaintiffs have a liberty interest protected by the 14th Amendment arising from A.R.S. § 8-515.05 and the Department of Economic Services ("DES") Children Services Manual procedures, both of which include substantive provisions that mandate that foster parents must receive prior notice, with limited exceptions, before children in their care are removed. "Liberty interests protected by the 14th Amendment may arise from two sources – the Due Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466 (1983). The inquiry is not limited to an analysis of statutory law; rather, "the appropriate constitutional analysis looks beyond the State's statutes to administrative rules, regulations, contractual commitments and the like." *Smith v. Sumner*, 994 F.2d 1401, 1405 (9th Cir. 1993), citations omitted. Specifically, a State creates a liberty interest by both (1) establishing substantive predicates to govern official decision-

making, and (2) using explicitly mandatory language, *i.e.*, specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow. *Kty. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462-63 (1989). The Supreme Court has declined to find state-created liberty interests where the state law permitted prison transfers to be made "for whatever reason or for no reason at all," *Meachum v. Fano*, 427 U.S. 215, 228 (1976); where the state law imposed no conditions on the discretionary power of prison officials; *Montayne v. Haymes*, 427 U.S. 236, 243 (1976); or where the law gave the Board of Pardons "unfettered discretion." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981). These cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). In this case, the State statute and DES procedures place substantive limitations on official discretion. Pursuant to the statute, if the licensed foster parent disagrees with a removal, CPS *cannot* overrule the foster parent by making a unilateral decision. If CPS wants to remove a child from one foster home to another, CPS *shall* comply with the notice procedures of the statute, unless the move falls within one of the specific exceptions. A.R.S. § 8-515.05. The statute does not provide CPS with unfettered discretion. The statute substantively limits CPS' authority when the licensed foster parents disagree with CPS' decision. When there is disagreement, the statute requires that the licensed foster parent and two members of the Foster Care Review Board ("FCRB") participate in the case conference and that a child *shall not* be removed unless a *majority* of the members of the review team agree that removal is necessary. *Id.* In addition, during the entire process, the child *must* remain in the current foster placement. *Id.* The legislative history specifically states that the legislation is intended to provide foster parents with "notice and due process rights." *See* EXHIBIT A. The legislation was designed to reduce the number of foster placements per child, recognizing that a general principle of child welfare is that lack of stability in foster care *is often more harmful than lack of stability* in the child's family of origin. *Id.* Therefore, the Legislature was careful to include *substantive* rights to the foster families,

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which are protected by due process safeguards. The Legislature specifically removed unfettered discretion from CPS, providing escalating layers of oversight. *Id.*

Thus, this statute was designed to avoid precisely what happened in this situation – multiple foster placements of the children, removing them abruptly from a loving, stable home.\[1] The behavioral issues the children were having should have been addressed by providing the very services for which the Dillons were zealously advocating. The evidence unequivocally demonstrates that the behavioral concerns, which were raised by the Dillons, were ongoing issues the children had been experiencing long before they were ever placed with the Dillons. The evidence further demonstrates that it was CPS who dropped the ball in failing to follow-up to provide the children the services they needed. Once the Dillons went to the Governor's office to complain about CPS' lack of action, CPS employees retaliated by removing the children from the Dillons' care without notice. CPS attempts to excuse their behavior in this case by arguing that the removal was necessary to place the children in a higher level of care, although the evidence demonstrates that the Dillons were in fact a therapeutic foster family and that there is not a higher level of foster placement in Arizona. The second excuse used by CPS is that the removal was necessary to protect the children from a risk of harm. However, the evidence demonstrates that the children had been exhibiting troubling behavior long before they were ever placed with the Dillons and the children's behavior had improved following their placement with the Dillons. Unless CPS can prove that the removal of the children was under one of the two exceptions claimed, the statute requires that the children continue to be placed in the Dillons' care pending the outcome of the case conference with two members of the FCRB participating, *i.e.* the licensed foster parents must be given notice so that they may invoke the due process protections afforded by the Statute. Arizona's statute uses explicitly mandatory language in connection with requiring specific substantive predicates specifically intended by the legislature to create

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[1] *See*, FCRB, January 18, 2005 Findings and Recommendations, EXHIBIT B – the Board made a finding that the placement was safe, appropriate and least restrictive.

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a due process liberty interest protected by the 14th Amendment due process clause, as district courts in the Third Circuit have held in similar cases. *See*, *McLaughlin v. Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988) and *Long v. Holtry*, 673 F.Supp. 2d 341 (M.D. Pa. 2009). In *McLaughlin* and *Long*, the district courts interpreted a Pennsylvania statute with language remarkably similar to the Arizona statute at issue here. Pennsylvania's statute, 55 Pa. Code § 3700.73, EXHIBIT C, provides pre-removal notice and appeal rights to foster parents (with the exception of certain conditions), and also provides, similar to Arizona's statute, that during the appeal process, the child shall remain with the foster family. The *Long* court found it significant that the statute required that the child remain with the foster family during the process, and that by using mandatory language, the regulation necessarily implicated a protected liberty interest worthy of procedural due process protection, agreeing with the district court decision in *McLaughlin*, notwithstanding that *McLaughlin* relied on the pre-*Sandin* analysis of *Hewitt v. Helms*, 459 U.S. 460 (1983). *Long*, 673 F.Supp.2d 348, n. 3.\[2]

James v. Rowland, 2010 U.S. App. LEXIS 10723 (9th Cir. May 26, 2010) does not support Defendants' position as it is predicated on a state statute that is very different than the statute in this case, and very different than the Pennsylvania statute at issue in *McLaughlin* and *Long*. In *James*, the non-custodial parent plaintiff claimed his procedural due process rights were violated when CPS failed to notify him *after the fact* that his daughter had been taken into protective custody, and later that a voluntary placement of his daughter with her maternal grandmother was made. The statute at issue in *James* merely provided that a parent was to be immediately informed that the minor *had been* taken into custody. *Cal. Welf. & Inst. Code* § 307.4, EXHIBIT D. The statute requires that a peace officer, probation officer, or social worker who takes temporary

[2] *See*, *Carver v. Lehman,* 558 F.3d 869, 872-873, n. 5 (9th Cir. 2009), continuing to apply the "mandatory language" rule in order to determine whether a state statutory scheme creates a liberty interest. Moreover, the *McLaughlin* and *Long* courts demonstrate that liberty interests based on state law are not limited to laws regarding conditions of confinement in prisons and other institutions.

custody of a child under certain exigent circumstances, must make a good faith effort to find and notify the parent and provide them with information regarding their procedural rights. *Id.* The *James* Court found that the California statute did not establish any substantive predicates or mandate any outcomes – it simply required post-removal notice. *James*, at *27-28. With respect to the procedural due process claim asserted in *James*, the court merely relied on existing case law to determine that the California statute did not meet the well-established "explicitly mandatory language" test to establish a liberty interest. *Id.* The statute at issue in *James* is closely analogous to Arizona's A.R.S. § 8-823, not the operative statute here.

Other cases upon which the Defendants rely to claim that a foster parent does not have a constitutionally protected interest in the continuation of their relationship also do not address the situation here – *i.e.*, where Plaintiffs claim that a state statute is the source of the 14th Amendment due process protection. *See*, *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985)(no state statute involved); *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993)(no state statute involved); *Spielman v. Hildebrand*, 873 F.2d 1377(10th Cir. 1989)(no state statute involved; assuming liberty interest without deciding because foster parents received notice and hearing *prior* to removal). The cases cited by Defendants where a state statute is involved are not comparable. *See e.g.*, *Olin*, 461 U.S. at 469 (state statute did not constrain prison administrator in any manner).

Defendants' reliance on the fact that Arizona courts have found that there is no fundamental liberty interest for foster parents is not inconsistent with finding a liberty interest under Arizona's statutes. In *Rourk v. State*, 170 Ariz. 6, 821, P.2d 273 (App. 1991), the court acknowledged that foster parents did not have a fundamental right sufficient to benefit from the parental immunity doctrine when sued for negligent supervision. That finding comports with *Smith* and its progeny, which recognize that foster parents do not have a substantive liberty interest, but that any liberty interest they possess is devolved from statutory protections. "[R]ecognition of a liberty interest in foster families for purposes of the procedural protections of the Due Process Clause

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would not necessarily require that foster families be treated as fully equivalent to biological families for purposes of substantive due process review." *Smith*, 431 U.S. at 843, n. 48. *Accord*, *Gibson v. Merced County Dept. of Human Resources*, 799 F.2d 582, 589 (9th Cir. 1986)(where no statutory source for due process protection was asserted, the procedures afforded the Gibsons were adequate to protect whatever liberty interests they may have had in the continuation of their relationship with Susan).

Therefore, there is no reason for this court to depart from its previous ruling that A.R.S. § 8-515.05, as well as the DES Child Services Manual Procedures, may create a liberty interest under state law, upon resolution of the factual disputes of the parties as to whether any exceptions to the statute and procedure apply. Order, (Dkt# 73), pp. 5-6.

II. The Law Was "Clearly Established" at the Time of the Relevant Events.

Having concluded that the Plaintiffs have a liberty interest protected by the due process protections of the 14th Amendment, the issue is whether the Plaintiffs' constitutional rights were clearly established at the time the alleged violations occurred – *i.e.* March 2005. In *Long*, in addressing this precise issue, the court found that the "material inquiry is whether it was sufficiently clear to a reasonable person in Defendants' position that violating a state regulation meant that they were also violating Plaintiffs' federal due process rights." *Long*, 673 F.Supp.2d at 351. *Accord*, *Pearson v. Callahan*, __ U.S. __, 129 S. Ct. 808 (2009)(this inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.")\[3] In order to find that the law was clearly established, "we need not find a prior case with identical, or even 'materially similar,' facts." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir. 2003),

[3] In *Long* the court noted that "[s]ince at least 1974, it has been established that liberty interests may arise from state laws and regulations," *Long*, 673 F.Supp.2d at 351, citing *Wolff v. McDonnell*, 418 U.S. 539, 556-558 (1974). Notice and due process rights have been included in A.R.S. § 8-515.05 since 2001. *See* EXHIBIT A. These rights are further cemented in the DES Children Services Manual, which references and interprets the statute. *See* Excerpt of 2004 Children Services Manual, attached as EXHIBIT E.

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citation omitted. Instead, we must "determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." *Id.* at 1137. The essence of Plaintiffs' claim is that the Defendants concocted a pretext not only to remove the children, but to allow CPS to remove them in a manner which would deprive Plaintiffs of the constitutional due process protections to which they were entitled. The Plaintiffs will show that the Defendants knew that they were attempting to circumvent the Plaintiffs' rights.

It is not necessary that the alleged specific act or statute be previously declared constitutional for a right to be clearly established sufficient to put a reasonable person in the Defendants' position on notice that they may violate the Plaintiffs' constitutionally required due process rights. *Long*, 673 F.Supp.2d at 351; *Burke v. Alameda*, 586 F.3d 725, 734 (9th Cir. 2009). Over thirty years ago, the Supreme Court in *Smith v. OFFER*, 431 U.S. 816 (1977), without deciding explicitly, recognized a limited liberty interest existed by virtue of the State's contractual relationship with licensed foster parents, sufficient for the court to examine whether New York's statutory framework provided due process to foster parents in the removal of children. *Id.* 431 U.S. at 846. In *Smith*, the court found the liberty interest constrained because the removal in that case was to return the children to their natural parents, and the court noted that therefore the licensed foster parents' liberty interest would be less than when children were removed to another foster placement. *Id.* 431 U.S. 846-847. The Supreme Court held that the statutory framework, because it provided adequate *pre-removal notice and hearing rights* to licensed foster parents, was adequate to protect whatever level of liberty interests to which the foster parents were entitled. *Id.* 431 U.S. at 856. Thus, whether or not it would be reasonable for a defendant to know the precise contours of the constitutional construct of liberty interests that are to be afforded a licensed foster parent, *Smith* puts defendants who administer foster care programs on notice that some level of due process is required to protect the foster parents' federal due process rights. This is further confirmed by the

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Legislature's express provision of such rights to licensed foster parents, *see* EXHIBIT A, and the DES' incorporation of the law into its procedures. *See* EXHIBIT E.

III. The Post-Removal Process Did Not Satisfy Due Process.

Plaintiffs are not claiming that the statute's due process provisions are insufficient to protect their liberty interest. Plaintiffs claim that they were not afforded *any* notice or opportunity to be heard in accordance with the statutory provisions to which they were entitled. *See e.g.*, *Amor v. State*, 2009 U.S. Dist. LEXIS 19606 at *26 (D. Ariz. Feb. 27, 2009). Defendants claim that the post-deprivation procedures, associated with the Dillons' foster care license revocation, satisfies the due process guarantees to which the Dillons may have been entitled under the removal statute. However, procedural due process claims should not be subject to *de minimis* analysis. *Brittain v. Hansen*, 451 F.3d 982, 1000 (9th Cir. 2006). The requirements of due process are flexible and call for such procedural protections as the particular situation demands. *Id.*, citation omitted. States are free to require *pre*-deprivation proceedings by statute. *Id.* at 1002.

In determining the type and amount of process owed, courts evaluate the factors set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976): first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. By weighing these concerns, courts can determine whether a defendant has met the fundamental requirement of due process – "the opportunity to be heard at a meaningful time in a meaningful manner." *Id.* 424 at 333. Here, the first factor is established in favor of the Dillons under the same analysis that establishes that the Dillons have a liberty interest protected by the 14th Amendment created by A.R.S. § 8-515.05. This liberty interest is substantial and the Legislature stated that it crafted the notice and due process provisions to protect children from serial foster placements. Moreover, as this case demonstrates, the risk of error engendered by

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the Defendants' failure to follow the statutory notice and hearing provisions is also substantial. Ultimately, after the Dillons were given an opportunity to be heard, they were fully vindicated – each and every pretext raised by the Defendants was found to be unsubstantiated. *See* Appeals Bd. Decision, (Dkt#16). Had the statute been followed, the children would have remained with the Dillons while they defended themselves against the arbitrary decisions of CPS. Therefore, the risk of erroneous deprivation is high. Lastly, the burden on the government does not outweigh the interests of the Dillons, as recognized by the Legislature by specifically including notice and due process rights for licensed foster parents. *See* EXHIBIT A. The Legislature specifically provided that a pre-deprivation procedure be followed. DES policy recognized that the provisions of the statute were designed to promote stability for children by minimizing placement moves. Furthermore, the Supreme Court in *Smith v. OFFER*, acknowledged the importance of the foster family relationship:

> [T]he importance of the familiar relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children . . . as well as from the fact of blood relationship. No one would seriously dispute that a deeply and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship . . . [f[or this reason we cannot dismiss the foster family as a mere collection of unrelated individuals.

Smith v. OFFER, 431 US at 844-45. *See* EXHIBIT E, at AZ-DILLON 01031. *Cf. Gibson*, *supra* (foster parents were provided with notice and hearing prior to removal, therefore, no due process violation occurred); *Brewster v. Bd. of Ed.*, 149 F.3d 971,985 (9th Cir. 1998)(prior to *any* action being taken with regard to his salary, Brewster was notified in writing on two separate occasions); *Smith v. OFFER*, 431 U.S. at 856 (New York statute providing pre-removal notice and hearing sufficient to protect federal constitutional due process rights).

The Defendants' interpretation that the the post-deprivation hearings associated with the licensing revocation met the Dillons' constitutional due process requirements, albeit not the statute's due process requirements, is unreasonable. Defendants'

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contention that "Plaintiffs received notice and an opportunity to be heard at the time of the removal and again two days later," Defendants' Suppl. Brief, p. 7, is specious. The first notice the Dillons had was when the Defendants showed up at the door with police in tow. There was no opportunity to be heard and nothing the Dillons could say or do at that point in time would have prevented the Defendants from removing the youngest child from the home – the other two boys had already been picked up at school. The so-called notice, Defendants' Ex. 3, 1) only lists the youngest child, 2) is not the appropriate notice for the factual situation here; 3) Defendants admitted that this form was never used when removing a child from a foster parent, *see* excerpts of Defendant Heermans and Hobson's testimony at the licensing revocation hearing, EXHIBIT F; 4) the notice did not provide Plaintiffs with any information as to a place and time of hearing, *see e.g.* A.R.S. § 8-823; and 5) the notice indicated that the Plaintiffs could request a court hearing *when* the Defendants filed a Motion of Change of Physical Custody – the Plaintiffs were never given a copy of such a motion. Moreover, Defendants own exhibit shows that the meeting a few days after the removal was not to afford the Dillons a meaningful opportunity to be heard, but to explain to the Dillons after the fact why the children were removed. *See* Defendants' Ex. 1, p. 80 of Dillon deposition transcript.

The Supreme Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property. *See, e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U. S. 532, 542 (1985) (the root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest). This is not a case "where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," so that a prior hearing may not be required. *Ingraham v. Wright*, 430 U. S. 651, 682 (1977). The Legislature carefully balanced the interests of licensed foster parents and the agency in developing a notice and hearing protocol, and in providing that the children remain with the foster parents while the process unfolded.

The Defendants' interpretation to the contrary is inconsistent with the goals of the Legislature. The State statute's due process procedures conform to the constitutional protections to which the Dillons were entitled. Moreover, a state does not violate the due process clause by providing alternative or additional procedures beyond what the constitution requires. *Smith v. OFFER*, 431 U.S. at 853.

IV. Defendants Waived Their Right to Raise These Legal Issues.

The Defendants have waived their right to raise these legal issues by failing to assert them in their motion for summary judgment. The Defendants filed a Motion for Summary Judgment on the last day for filing dispositive motions. *See* Defendants' Motion for Summary Judgment (Dkt# 60). In that Motion, the Defendants argued that "[t]he possession of a foster care license is not a constitutional protected liberty or property interest under the 14th Amendment." *Id.*, at pp. 7-8. Eighteen lines of this argument were "cut and pasted" into the pre-trial memorandum. *See* Joint Pretrial Memorandum (Dkt# 95), pp. 28-29. Defendants merely elaborated on this argument, adding a couple of cases, one of which was the recent *James v. Rowlands* case. As demonstrated above, the *James* case does not articulate a new legal theory – the court in *James* relied on well-established constitutional jurisprudence in formulating its decision. Similarly, the Defendants argued in their Motion for Summary Judgment that the post-deprivation proceedings associated with the foster care license revocation proceedings satisfied any due process protections to which the Plaintiffs may have been entitled. *See*, Defendants' Motion for Summary Judgment (Dkt# 60), pp. 5-6, 8. The claim that the Notice of Removal satisfied a component of due process was never raised before. The additional cases cited by Defendants in the pretrial memorandum were decided many years ago and could have been included in the Defendants' Motion for Summary Judgment. *See*, Joint Pretrial Memorandum (Dkt # 95), p. 28, 37, citing cases from 1914, 1985, 1988, 1993, and 2003. Thus, Defendants' inclusion of these arguments in the pretrial memorandum was improper as this court had previously considered and rejected these arguments. Revisiting these arguments is nothing more than a motion for

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reconsideration.\[4] As a general rule, "new arguments and new legal theories that could have been made at the time of the original motion may not be offered in a motion for reconsideration." *Garber v. Embry-Riddle Aeronautical University*, 259 F.Supp.2d 979, 982 (D. Ariz. 2003). The Defendants cannot show that these arguments could not have been made at the time of the original motion. Moreover, allowing the Defendants to present these arguments for reconsideration by the court more than three (3) months after the Motion for Summary Judgment was decided would be highly unfair and prejudicial to the Plaintiffs.\[5] "Under the law of the case doctrine, a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). "The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion." *Id.* A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. *Id.* Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion. *Id.* The Defendants have not shown any evidence of a special circumstance that would allow the court discretion to depart from the law of the case doctrine. *See U.S. v. Alexander*, 106 F.3d at 876. In summary, there was a clearly established right, codified in statutes and procedures, to prior notice and hearing for foster parents before children are removed from their care under the circumstances of this case. The belated and contrived "hearings" after the fact do not meet constitutionally secured due process requirements. Defendants' new legal arguments are inappropriate as these issues were previously considered and decided by this Court.

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[4] It does not appear that Defendants were seeking reconsideration, but preserving these issues in the record in the event Defendants elected to appeal these holdings.

[5] *See*, Order denying Plaintiffs' Motion for Reconsideration (Dkt #77), as it was fourteen (14) days late. Substantial litigation and trial preparation occurred since this Court ruled on the Defendants' Motion for Summary Judgment.

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I hereby certify that on July 30, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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A copy of the foregoing was mailed this 30th day of July, 2010, to:

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