No. 07-1635

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STACY M. PLATONE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Appeal From The Administrative Review Board;
United States Department of Labor; Washington, DC

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT AND IN SUPPORT OF AFFIRMANCE

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December 5, 2007

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No. 07-1635 Caption: Platone v. United State Department of Labor

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The Equal Employment Advisory Council and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges the Court to affirm the Final Decision and Order of the Administrative Review Board ("ARB") and thus supports the position of Respondent, the United States Department of Labor.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination, non-retaliation, and equal employment opportunity.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function

of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to the "whistleblower" provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," "SOX" or "the Act"), 18 U.S.C. § 1514A. Accordingly, the issues presented in this case are extremely important to the nationwide constituency that EEAC and the Chamber represent. The ARB ruled correctly that Platone's conversations and email correspondence with two managers regarding a potential billing issue and possible violations of a purely internal policy did not constitute a protected activity under SOX. More specifically, the ARB properly concluded that Platone's communications did not relate to shareholder fraud or securities violations as required to trigger SOX whistleblower protection.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matters that have not already been brought to its attention by the parties. Because of their experience, EEAC and the Chamber are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Atlantic Coast Airlines ("ACA"), a regional airline carrier, is a wholly owned subsidiary of Atlantic Coast Airlines Holdings, Inc. ("Holdings"). *Platone v. FLYi, Inc.*, ARB Case No. 04-154, at 1-2 (Sept. 29, 2006). ACA hired Stacy M. Platone in the summer of 2002 as Manager of Labor Relations and to serve as ACA's point person in dealing with its labor unions, including the Airline Pilots Association ("ALPA"). *Id*. at 4.

In March 2003, ACA terminated Platone's employment after learning of her longstanding romantic relationship with a high-ranking ALPA official, because the company believed the relationship created a conflict of interest. *Id.* at 11. Platone subsequently filed a complaint under the whistleblower provision of the Sarbanes-Oxley Act, contending that the real reason for her termination was that she had reported to two ACA managers, Jeffrey Rodgers and Michelle Bauman, her discovery that ACA had either created, or acquiesced in, an alleged "scheme" to funnel improper payments to members of ALPA's Master Executive Council (MEC). *Id*.

Specifically, Platone's claim dealt with a practice known as "flight pay loss," which is the process by which ALPA reimburses ACA for wages paid by ACA to pilots who miss scheduled flights to participate in union business. *Id*. at 4. According to Platone, in late 2002 she discovered that some ACA pilots – who

were also ALPA officials – were arranging to have flights assigned to them when they knew they would have to be out on union business, thus obtaining "flight loss" pay for a day they otherwise would not have been scheduled to work. *Id*. at 5-6. Platone believed this practice violated ALPA's flight pay loss policy, and expressed her concern initially to Rodgers that ALPA may refuse to reimburse ACA in such cases. *Id*. at 6. Within a matter of days, the union's MEC chairman, Christopher Thomas, advised union officials to conduct themselves in an ethical manner, and assured Platone and Rodgers that ALPA would reimburse ACA for "trip drops that were picked up on originally scheduled days off." *Id*. at 7.

A few days later, it was discovered that Platone was involved in a romantic relationship with an ALPA official. *Id*. at 9. Rodgers met with Platone on March 11, 2003 to discuss his concerns about the relationship creating a possible conflict of interest. *Id*. at 10. During that meeting, Platone claimed that "ALPA was out to get her" because of the flight pay loss issue and that she felt her work environment had become hostile. *Id*. Michelle Bauman, ACA's director of employee services, met with Platone the following day to investigate her hostile work environment complaint. *Id*. at 10. Platone did not accuse Rodgers of any wrongdoing during the meeting. *Id*. at 11. On March 13, 2003, ACA suspended Platone pending its investigation of her alleged personal relationship with the ALPA official, and

ultimately terminated her employment on March 19, 2003, after concluding her conduct was improper and constituted a conflict of interest. *Id.*

Platone then filed a SOX whistleblower retaliation complaint with the Occupational Safety and Health Administration (OSHA). *Id.* OSHA investigated the complaint and ultimately dismissed the case upon concluding that Platone had not engaged in protected activity under SOX. *Id*. at 11-12. Platone was later granted a formal hearing before an Administrative Law Judge ("ALJ" or "the Judge"). *Id*. After a four-day hearing, the ALJ found that Platone had engaged in protected activity when she reported her "suspicions" to Rodgers and Bauman. *Id*. at 12. ACA appealed the ALJ's decision to the ARB. *Id.* at 13.

The ARB rejected the ALJ's decision on appeal, ruling that Platone did not engage in protected activity under SOX. *Id.* at 22. The ARB held that SOX does not cover all employee complaints regarding the manner in which a company spends money or pays bills, but rather, provides whistleblower protection only for employee communications that "definitively and specifically" relate to shareholder fraud or securities violations. *Id.* at 17. The ARB concluded that Platone's communications to Rodgers and Bauman about possible violations of ALPA's flight loss policy did not meet that standard. *Id.* at 21. This appeal followed.

SUMMARY OF ARGUMENT

The whistleblower provision of the Sarbanes-Oxley Act prohibits companies from retaliating against an employee who engages in "protected activity" by communicating – to a supervisor, federal agency, or member of Congress – information regarding company conduct that he or she reasonably believes violates federal laws related to securities violations or shareholder fraud. 18 U.S.C. § 1514A(a)(1). It is an essential element of a SOX whistleblower retaliation claim that an employee communicates – to his or her supervisor, for example – an allegation of fraud on the part of the company. Thus, an employee must provide information definitively and specifically related to fraud against shareholders or security violations to be protected under SOX.

The ARB ruled correctly that the Platone's communications with company officials regarding possible violations of internal union policy did not constitute protected activity under SOX. Indeed, since Platone's communications did not raise allegations related in any way to fraud or securities violations, she failed to demonstrate a reasonably objective belief, as required by the Act, that the conduct complained of violated federal laws related to fraud against shareholders. The ARB's dismissal of Platone's action is fully supported by the legislative history and plain language of the Act, and is consistent with prior Labor Department interpretation and federal case law.

Employers must be free to act on and correct instances of employee misconduct as they see fit. While SOX protects an employee who engages in certain whistleblower activity, it shields employers from liability where their decisions are based on based on legitimate, non-retaliatory business reasons. Even assuming Platone's conduct in this case *did* rise to the level of protected activity under the Act, judgment for ACA still was proper, since she would have been discharged in any event for improper conduct on account of the conflict of interest created by her romantic relationship with a high-ranking ALPA official.

Just as courts generally will refrain from second-guessing an employer's nondiscriminatory business decision in the context of Title VII, so too should employers be free to exercise their business judgment in disciplining employees who engage in misconduct without running afoul of SOX's whistleblower retaliation provision. Where an employer possesses an honest, good faith belief that a violation of company policy has occurred – here, the conflict of interest – acting on that belief should insulate it from SOX liability. Any other rule would render it virtually impossible for an employer to defend against any SOX whistleblower claim. It would also lead to absurd results, with employers unable to address legitimate conduct and performance-related problems and complainants enjoying the unique advantage of being in the position to both manipulate the outcome of the case and to secure life-long job security for themselves.

ARGUMENT

I. THE ARB RULED CORRECTLY THAT PLATONE DID NOT ENGAGE IN PROTECTED ACTIVITY UNDER THE SARBANES-OXLEY ACT

A. Complainants Must Reasonably Believe The Challenged Company Conduct Violates Federal Laws Prohibiting Fraud Against Shareholders

The whistleblower protection provision of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley," "SOX" or "the Act"), 18 U.S.C. § 1514A, prohibits publicly traded companies from firing or otherwise discriminating against an employee for:

> [P]rovid[ing] information, caus[ing] information to be provided, or otherwise assist[ing] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by --
>
> (a) a Federal regulatory or law enforcement agency;
> (b) any Member of Congress or any committee of Congress; or
> (c) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).

18 U.S.C. § 1514A(a)(1). The Act further protects employees who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and

Exchange Commission, or any provision Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(2). To be protected under SOX, an employee must have a subjectively and objectively reasonable belief that some company conduct violates a federal law concerning fraud against shareholders or an SEC rule, and also communicate that belief to a supervisor, federal agency, or a member of Congress. *Wengender v. Robert Half Int'l, Inc.*, 2005-SOX-59, at 15 (ALJ Mar. 30, 2006).

An employee's belief must be reasonable from the outset, meaning the employee must have actually believed the employer's conduct violated an SEC rule or federal law related to shareholder fraud at the time of his or her communications to their supervisor. *Id.* An allegation of fraud during such communications is necessary to demonstrate "reasonable belief," even where it is the alleged violation of an SEC rule that is at issue. *Id.* ("Fraud is an integral element of a SOX claim . . ."); *see also Smith v. Hewlett Packard*, 2005-SOX-88, at 8 (ALJ Jan. 19, 2006) ("[F]raud is an essential element of a claim brought under the whistleblower provision").

The legislative history of the Act demonstrates that Congress created the whistleblower provision to encourage individuals to come forward with information regarding fraudulent corporate disclosures for the purpose of protecting investors:

> Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on *fraud and protect investors* . . . .
>
> * * *
>
> This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be *fraudulent*.

S. Rep. No. 107-146, at 19 (2002) (emphasis added); *see also Livingston v. Wyeth Inc.*, 24 I.E.R. Cas. (BNA) 1561, 2006 U.S. Dist. LEXIS 52978, at *27 (M.D.N.C. 2006) ("It is clear from the plain language of the statute and its legislative history that fraud is an integral element of a whistleblower cause of action"); *Marshall v. Northrup Grumman Synoptics*, 2005-SOX-8, at 4 (ALJ June 22, 2005) ("The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision").

Moreover, a "reasonable belief" does not exist where an employee merely makes general allegations of fraud. *Wengender v. Robert Half Int'l, Inc.*, 2005-SOX-59, at 15 (ALJ Mar. 30, 2006) ("SOX does not apply to generic allegations of accounting violations, violations of GAAP, or general allegations of fraud"). Rather, "[t]o be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves *shareholder* fraud." *Livingston*, 24 I.E.R. Cas. (BNA) 1561, 2006 U.S. Dist. LEXIS 52978, at *30 (emphasis added). Thus, an employee's communications to his or her supervisor,

for example, must "definitively and specifically" implicate a federal law related to fraud against shareholders. *Fraser v. Fiduciary Trust Co. Int'l*, 417 F. Supp.2d 310, 322 (S.D.N.Y. 2006); s*ee also Bozeman v. Per-Se Techs., Inc.*, 456 F. Supp.2d 1282, 1359 (N.D. Ga. 2006) ("Protected activity must implicate the substantive law protected in Sarbanes-Oxley 'definitively and specifically'") (quoting *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295-96 (6th Cir. 1998)).

SOX protects only those communications that fall within this carefully circumscribed category. Employees who raise issues outside of the scope of shareholder fraud or securities violations, while they may be protected elsewhere, have not engaged in protected activity under SOX. *See Minkina v. Affiliated Physician's Group*, 2005-SOX-19, at 7 (ALJ Feb. 22, 2005) ("[W]hile the Complainant may have had a valid claim of poor air quality, Sarbanes-Oxley, as discussed above, was enacted to address the specific problem of fraud in the realm of publicly traded companies and not the resolution of air quality issues, even if there is a possibility that poor air quality might ultimately result in financial loss") (emphasis added).

This Court previously has recognized that "federal courts can overturn an administrative agency's decision only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or 'unsupported by substantial

evidence.'" *Knox v. United States Dep't of Labor*, 434 F.3d 721, 724 (4th Cir. 2006). As demonstrated above, the ARB's ruling in this case – that an employee's communications must "definitively and specifically" relate to shareholder fraud or securities violations to constitute protected activity – is consistent with ARB and ALJ precedent, and also finds significant support in the legislative history and the federal courts. The standard applied by the ARB thus is "in accordance with the law" and therefore should be affirmed by this Court.

B. Possible Violations Of An Internal Company Policy Do Not Relate To Fraud Against Shareholders And Thus Raising Such Concerns Does Not Constitute Protected Activity Under The Act

The ARB ruled correctly that Platone's email exchanges and conversations with Rodgers and Bauman did not constitute protected activity under SOX. Platone's communications dealt primarily with the flight pay loss issue, which does not involve fraud against shareholders.

In *Reddy v. MedQuist, Inc.*, 2004-SOX-35, at 3 (ALJ June 10, 2004), the ALJ dismissed a SOX whistleblower retaliation claim because the complainant's communications to management "concerned internal company policy as opposed to actual violations of federal law." The ARB affirmed the ALJ's decision on appeal, ruling that the complainant's communications failed to "provide[] information [about conduct] she reasonably believed constituted violations of the federal fraud statutes, or an SEC rule or regulation, or any federal law pertaining to

shareholder fraud." *Reddy v. MedQuist, Inc.*, ARB Case No. 04-123, at 7 (Sept. 30, 2005). *See also, Galinsky v. Bank of America Corp.*, 2007-SOX-76, at 9 (Oct. 12, 2007) ("Complaints regarding internal company policies and decisions are not protected activities under the Act"), *appeal docketed*, ARB Case No. 08-014 (Oct. 30, 2007).

In this case, Platone sent Rodgers an initial email on March 3, 2003, stating her belief that some ALPA representatives were abusing ALPA's flight pay loss policy, and expressing concern that this might cause a problem for ACA accounting if ALPA decides not to reimburse ACA's payments to those individuals. *Platone v. FLYi, Inc.*, ARB Case No. 04-154, at 17 (Sept. 29, 2006). Platone's subsequent exchanges with Rodgers were, for the most part, to follow-up on the initial email and reiterate her concerns about the flight pay loss issue. *Id.* Platone met with Bauman on March 12 primarily to discuss her hostile work environment claim, although she allegedly mentioned the flight pay loss issue as well. *Id.* at 20. None of these communications provided any information concerning conduct related to possible fraud against shareholders. Rather, it is evident that Platone was acting in her official capacity and in accordance with her responsibilities as the labor relations manager, to resolve a potential billing issue between ACA and ALPA revolving around a possible violation of an internal *union* policy.

Fraud is an essential element of a Sarbanes-Oxley claim that Platone cannot establish. Implicit in the concept of "fraud" is an element of intentional deception that would impact shareholders or investors. *Wengender v. Robert Half Int'l, Inc.*, 2005-SOX-59, at 15 (ALJ Mar. 30, 2006). In *Fraser v. Fiduciary Trust Co. International*, for instance, the court ruled that the complainant, a Vice President of an investment management company, did not engage in protected activity under SOX when he complained to company officials about the company's failure to follow his investment advice. 417 F. Supp.2d 310, 322-23 (S.D.N.Y. 2006). The court held that although the company's failure caused some clients to lose money, the complainant's communication did not indicate that he reasonably believed the company, by not following his advice, had violated a federal law related to fraud against shareholders. *Id.* The court in *Fraser* determined that the complainant did engage in SOX protected activity, however, when he communicated concerns that the company had provided inconsistent investment advice to the benefit of some clients and to the detriment of others. *Id.* at 323-24.

In this case, Platone's communications to Rodgers and Bauman do not demonstrate that she reasonably believed some fraud was being perpetrated on shareholders. Platone's OSHA complaint – which she filed *after* she was discharged – makes general allegations of mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and a violation of SEC Rule 10b-5 (17 C.F.R. § 210.10b-

5), which prohibits fraud specifically "in connection with the purchase or sale of any security." *Platone v. FLYi, Inc.*, ARB Case No. 04-154, at 15-16 n.108 (Sept. 29, 2006). As the ARB correctly noted, however, the relevant inquiry is not what Platone alleged in her OSHA complaint, but rather, what was actually communicated to Rodgers and Bauman prior to her discharge. *Id.* at 17; *see also Stone v. Instrumentation Lab., SpA*, 2007-SOX-21, at 20 (ALJ Sept. 6, 2007) ("it is the complainant's actual communications to the employer, or actions taken, prior to the discharge that determine whether the complainant engaged in protected activity, rather than what is alleged in the complaint").

Because Platone never claimed that ACA made any false statements to *anyone*, much less its shareholders, the ARB ruled correctly that Platone did not engage in protected activity under SOX.

II. THE SARBANES-OXLEY ACT IS NOT DESIGNED TO UNDERMINE AN EMPLOYER'S ABILITY TO TAKE ACTION TO PREVENT EMPLOYEE CONDUCT BELIEVED IN GOOD FAITH TO BE DETRIMENTAL TO THE COMPANY

Assuming Platone's conduct in this case *did* rise to the level of SOX protected activity, judgment for ACA still was proper, since she would have been discharged in any event due to her inappropriate personal relationship with a high-ranking ALPA official. In order to obtain whistleblower protection under SOX, a plaintiff must establish that: 1) he or she engaged in a protected activity; 2) his or her employer was aware of the protected activity; 3) he or she suffered an adverse

employment action; and 4) the circumstances were sufficient to raise an inference that the protected activity was a contributing factor in the adverse employment action. 29 C.F.R. § 1980.104(b).

Even when a complainant can establish a *prima facie* case of retaliation and prove that any alternative reasons articulated by the employer for taking the adverse action were pretextual, the employer still will not be held liable if it proves by clear and convincing evidence that it would have taken the same action absent the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1980.109(a) ("Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior").

Thus, although the SOX whistleblower provision protects an employee who provides information to his or her employer that the employee reasonably believes relates to a violation of federal laws prohibiting shareholder fraud, the Act does not usurp an employer's ability to make management decisions that are based on legitimate, non-retaliatory reasons – in this case, the conflict of interest. This important principle often arises in the context of Title VII of the Civil Rights Act of 1964, and has direct application here. *Kester v. Carolina Power and Light Co*., ARB Case No. 02-007, at 5-6 n.12 (Sept. 30, 2003) (noting that the Title VII framework applies in the context of federal "whistleblower" cases).

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court described the limits of Title VII when it cautioned that "[t]he statute was not intended to 'diminish traditional management prerogatives,'" nor does it require "the employer to restructure his employment practices . . . ." *Id*. at 259 (citations omitted). This Court has also recognized repeatedly that Title VII's sole focus is on whether discrimination played a role in an adverse employment action. In *DeJarnette v. Corning Inc*., 133 F.3d 293 (4th Cir. 1998), for example, the Court acknowledged that Title VII does not allow it to criticize an employer's reason for taking an employment action as unwise, or even unfair, if there is no evidence of discrimination. Under Title VII, the court's task simply is to determine whether discrimination played a role in the discharge. As the Court explained in *DeJarnette*:

> Title VII is not a vehicle for substituting the judgment of a court for that of the employer. Particularly, this Court does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination. Our sole concern is whether the reason for which the defendant discharged the plaintiff was discriminatory. Thus, when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination.

Id. at 298-99 (internal quotations and citations omitted); *see also Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995) ("Title VII is not a vehicle for substituting the judgment of a court for that of the employer"); *EEOC v. Clay*

Printing Co., 955 F.2d 936, 946 (4th Cir. 1992) ("It is not . . . the function of this court to second guess the wisdom of business decisions").

The principle that restricts courts from evaluating the wisdom or fairness of an employer's business reason for making an employment decision in a Title VII case absent evidence of discrimination applies equally in the context of a SOX whistleblower case where the complainant has engaged in misconduct. Whether the employer learns of the misconduct on its own or through the employee's supervisor, the focus of the inquiry is limited to whether the employer truly believed that the employee engaged in the misconduct. If so, the employer's honest belief constitutes a legitimate, non-retaliatory reason for the termination that is not a pretext for unlawful retaliation, even if the court or another decision-maker would have responded differently.

Any other rule would render it virtually impossible for an employer to defend against a SOX whistleblower claim when the complainant's supervisor is aware of the protected activity and also has primary responsibility for monitoring and correcting the complainant's future work performance, which is *very often* the case. It would also lead to absurd results – with employers unable to address legitimate conduct and performance-related problems and complainants enjoying the unique advantage of being in the position to both manipulate the outcome of the case and to secure life-long job security for themselves.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully urge the Court to affirm the Final Order and Decision of the Administrative Review Board.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1635 Caption: *Platone v. United States Department of Labor*

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I hereby certify that on the 5th day of December 2007, two (2) true and correct copies of the foregoing BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT AND IN SUPPORT OF AFFIRMANCE were served via U.S. Priority Mail, postage prepaid, addressed as follows:

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I further certify that an original and 7 copies of the foregoing brief were filed on this day via U.S. Priority Mail, postage prepaid, addressed to:

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