

In the
Supreme Court of Ohio

BROOKWOOD PRESBYTERIAN CHURCH,	:	Case No. 2013-1435
	:	
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
OHIO DEPARTMENT OF EDUCATION,	:	
	:	Court of Appeals Case
Appellee.	:	No. 12-AP-487
	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF THE OHIO DEPARTMENT OF EDUCATION**

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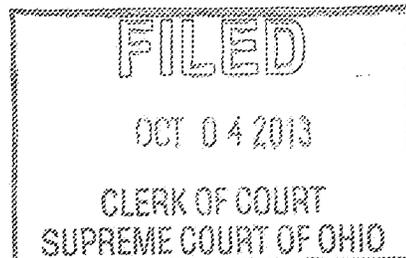


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INTRODUCTION

This appeal presents no issues that warrant the Court's review. The Tenth District Court of Appeals ("Tenth District") affirmed a judgment *for* Appellant Brookwood Presbyterian Church ("Brookwood") of the Franklin County Court of Common Pleas ("Trial Court"), which had vacated the Ohio Department of Education's ("Department") determination that Brookwood was not an education-oriented entity. The Trial Court found that the Department's determination was not in accordance with law and remanded for further proceedings. The case remains in that interlocutory posture. It does not raise the constitutional questions that Brookwood argues, nor does it involve an issue of public or great general interest. This Court's review is not warranted for several reasons.

First, because Brookwood prevailed on other grounds, neither the Tenth District nor the Trial Court addressed its constitutional claims. In its first and second propositions of law, Brookwood argues that the Department violated the Equal Protection Clauses of the United States and Ohio Constitutions. But the Tenth District did not address this issue. Rather, the Tenth District determined that the issue was rendered moot because Brookwood prevailed before the Trial Court on other grounds. Specifically, the Trial Court found that the Department failed to promulgate a rule meeting the requirements of R.C. 3314.015(B)(3) regarding eligibility determinations. It was on that basis—and that basis alone—that the Trial Court held that the Department's eligibility determination was not in accordance with law. Because neither court resolved (or even addressed) Brookwood's constitutional claims, this case is not a proper vehicle to hear them.

Second, Brookwood's claim regarding the record fails to account for this case's procedural history and does not accurately portray what occurred below. Until this Court's earlier decision

in this case, there was no indication that the Department would be required to file a record in this case. After all, Brookwood's initial appeal had been dismissed on jurisdictional grounds. Once this Court held that the Department's eligibility determination was appealable, the Trial Court addressed questions regarding the record. The Trial Court 1) found that in 2008 the Department made a substantial effort to comply with R.C. 119.12's record filing requirements, 2) defined what constituted the record, and 3) gave the Department 30 days to file it. The Department complied. What Brookwood now claims was a failure to file a complete record was, in reality, the inadvertent omission of a single page from the record that was filed with the Trial Court. That omission was subsequently remedied. Under this Court's precedent, because the omission of a single page in no way prejudiced Brookwood, that omission does not require judgment in its favor. That being said, as with Brookwood's constitutional arguments, the Tenth District did not address the merits of this argument. Accordingly, this Court should not review it on its own.

Third, Brookwood's appeal is premature. Brookwood persuaded the Trial Court to vacate the Department's eligibility determination as inconsistent with the requirements of R.C. 3314.015(B)(3). That statute requires the Department to identify by rule what it means to be an "education-oriented entity." But the Department had not done so at the time it determined that Brookwood was not education-oriented. On the heels of that loss, the Department began the process of revising Ohio Adm.Code 3301-102-02 to identify the criteria for determining whether an entity interested in applying to sponsor community schools is education-oriented. Those revisions are complete and the revised rule became effective June 27, 2013, a month before the Tenth District issued the decision that is the subject of this appeal—and over two months before Brookwood filed its Memorandum in Support of Jurisdiction.

Finally, the remedy that Brookwood seeks—for a court to grant its sponsorship application—is not a remedy this Court (or, for that matter, any other court) can provide. The General Assembly decided to give the responsibility to grant or deny sponsorship applications to the Department. But the Department has never reached the merits of Brookwood’s sponsorship application. By remanding to the Department, the Trial Court’s decision gave Brookwood the opportunity to have the merits of its sponsorship application considered.

For these and other reasons, this Court should decline to review this matter.

STATEMENT OF THE CASE AND FACTS

A. Entities applying to sponsor community schools must meet several eligibility criteria.

A community school—Ohio’s term for a charter school—is a public nonprofit, nonsectarian school that operates independently of any school district. Community schools are operated by non-profit corporations pursuant to contracts with entities that are supposed to supervise the schools. Although those supervising entities are known as “sponsors,” they do not provide funding. Instead, the State funds each community school by diverting operating funds from the school district where the community school’s students live to the community school.

Any entity seeking to sponsor a community school must apply to the Department for approval as a sponsor. The Department subjects every sponsorship application to two stages of review. First, the Department determines whether the entity meets threshold criteria that make it *eligible to apply* for sponsorship. A qualified tax-exempt entity under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), is eligible to apply if: (1) it has been in operation for at least five years prior to applying; (2) it has assets of at least \$500,000 and a record of financial responsibility; (3) the Department determines that the entity is an “education-oriented entity,” i.e. an entity whose mission or operations foster education; (4) the Department

determines that the entity has successfully implemented educational programs; and (5) the entity is not a community school. R.C. 3314.02(C)(1)(f)(i)–(iv). If an entity satisfies all of these eligibility criteria, then the Department moves onto the second stage of review: evaluating the merits of the application and either approving or denying the entity as a sponsor.

B. Brookwood submitted an application to be recognized as a community school sponsor, but the Department determined that Brookwood was not eligible to apply because it is not an “education-oriented entity.”

Brookwood Presbyterian Church is a tax-exempt, nonprofit church organized for religious purposes. In November 2007, Brookwood submitted an application to the Department requesting approval to sponsor community schools in Ohio under Revised Code Chapter 3314. In support of its application, Brookwood included a letter from the Internal Revenue Service confirming that the national Presbyterian church and all of its subordinate churches are 501(c)(3) entities. Further, the letter explained that these churches “are organized and operated *exclusively* for religious purposes.”

In March 2008, the Department informed Brookwood that it was not eligible to apply to sponsor a community school because it is not an “education-oriented entity” as required by R.C. 3314.02(C)(1)(f)(iii). Brookwood asked the Department to reconsider and submitted voluminous documentation of the educational endeavors of the national Presbyterian church, but submitted only three pages of information evidencing Brookwood’s own educational efforts. The Department reaffirmed its eligibility determination in May 2008.

Because the Department determined that Brookwood was not eligible to apply, it never reached the merits of Brookwood’s application.

- C. The Trial Court and the Tenth District granted the Department's motion to dismiss, finding that the Department's threshold eligibility determination was not appealable; this Court reversed and remanded to the Trial Court, which vacated the Department's eligibility determination, a ruling affirmed by the Tenth District.**

Brookwood appealed the Department's May 9, 2008 eligibility determination to the Trial Court. The Trial Court granted the Department's motion to dismiss the appeal for lack of subject matter jurisdiction. Brookwood then appealed to the Tenth District, which affirmed the Trial Court's judgment. *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, 10th Dist. No. 09AP-303, 2009-Ohio-4645. Subsequently, this Court accepted Brookwood's discretionary appeal. This Court held that the Department's eligibility determination was appealable, reversed the Tenth District's judgment, and remanded the case to the Trial Court. *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, 127 Ohio St.3d 469, 2010-Ohio-5710.

Thereafter, the Department moved to remand the case for an administrative hearing and Brookwood filed both a Motion to Amend the Case Schedule and a Motion for Judgment in its favor. The Magistrate denied the Department's Motion, denied Brookwood's Motion for Judgment in its favor, and granted Brookwood's Motion to Amend the Case Schedule. Both parties filed objections to the Magistrate's Decision. The Trial Court adopted the Magistrate's Decision, ordered the Department to file the record, which the Court defined as "the documentation relating to ODE's May 9, 2008 determination that Appellant, Brookwood Presbyterian Church is not eligible to apply to be a sponsor of community schools in Ohio," and set a new briefing schedule. *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, Franklin C.P. No. 08CV-05-07539 (February 16, 2012).

Upon consideration of the documents in the record and the arguments raised in the parties' briefs, the Trial Court found that the Department's eligibility determination was "not in

accordance with law because it was not made ‘pursuant to criteria adopted by rule’ as required by R.C. 3314.015(B)(3).” *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, Franklin C.P. No. 08CV-05-07539, 2012 WL 9164466 (May 8, 2012). Accordingly, the Trial Court vacated the Department’s eligibility determination and remanded the matter to the Department so that the Department could promulgate a rule meeting the requirements of R.C. 3314.015(B)(3) and then re-evaluate Brookwood’s application pursuant to that new rule. Brookwood appealed to the Tenth District, which affirmed the Trial Court’s judgment. “By finding that the Department’s determination was not in accordance with law because it was not made ‘pursuant to criteria adopted by rule’” the Tenth District stated, “the [trial] court rendered moot Brookwood’s remaining arguments.” *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, 10th Dist. No. 12AP-487, 2013-Ohio-3260, ¶ 8. Therefore, the Tenth District concluded, “[i]t would have been a purely academic exercise for the common pleas court to address the merits of Brookwood’s additional arguments.” *Id.* at ¶ 9. Brookwood now asks this Court to accept jurisdiction in this case—for a second time and in an interlocutory posture.

THIS APPEAL IS NOT OF GREAT GENERAL OR PUBLIC INTEREST

The lengthy history of this case suggests that Brookwood’s ultimate goal is to have a court declare that it is eligible to sponsor community schools in Ohio—thereby short-circuiting the administrative process governing such determinations. However, the General Assembly has vested the Department, not the courts, with the authority to determine who is eligible to be a sponsor of community schools.

There is nothing new or novel about Brookwood’s current appeal that warrants a second review by this Court. When Brookwood filed its first discretionary appeal to this Court in this matter in 2009, it raised many of the same arguments it raises now. And this Court disposed of

the 2009 appeal without reaching the merits of those arguments, opting instead to remand the case to the Trial Court. On remand, the Trial Court ruled in Brookwood's favor by vacating the eligibility determination that precipitated this litigation. Yet Brookwood appealed that win. Brookwood's constitutional (and other) arguments are therefore not properly before this Court.

A. This case is not about whether a church qualifies as an education-oriented entity eligible to sponsor a community school under Ohio law.

As much as Brookwood might like it to be, this case is not now, nor has it ever been, about whether a church qualifies as an education-oriented entity eligible to sponsor a community school under Ohio law. Brookwood attempts to frame this case as a forum for debating the relationship between church and state in the context of Ohio's community schools. See Brookwood's Jur. Mem. at 2 ("ODE applied a facially neutral law ... to deny a request by Appellant to be a sponsor of charter schools in Ohio, solely on the ground that the request was made by a church."). But this case presents the same basic legal question posed by nearly every appeal: a challenge to the propriety of the lower court's decision. In this case, the challenge is to the propriety of the Trial Court's decision to vacate the Department's eligibility determination, having found that the determination was not made pursuant to criteria adopted by rule as required by R.C. 3314.015(B)(3). Such a run-of-the-mill legal question is not worthy of this Court's attention.

R.C. 119.12 authorized the Trial Court to vacate the Department's eligibility determination. And, as this Court has stated, "the power to reverse and vacate decisions necessarily includes the power to remand the cause to the decision maker." *Superior Metal Prod. Inc. v. Administrator, Ohio Bur. of Emp. Serv.*, 41 Ohio St. 2d 143, 146, 324 N.E. 2d 179 (1975). Accordingly, the Tenth District properly concluded that there was nothing erroneous

about the Trial Court's decision to remand this case to the Department for further consideration rather than reach out and resolve issues that it may never have to reach.

B. Brookwood's appeal to this Court is premature.

The Trial Court ruled in favor of Brookwood. It vacated the Department's determination that Brookwood is not an education-oriented entity and is not eligible to apply to sponsor community schools in Ohio. Consequently, the eligibility determination that precipitated this litigation and underlies three out of four of Brookwood's Propositions of Law no longer exists. Furthermore, after the Trial Court issued its decision finding that the eligibility determination was not in accordance with law, the Department revised Ohio Adm.Code 3301-102-02. In accordance with R.C. 3314.015(B)(3) and the Trial Court's decision, the revised rule specifies criteria that must be considered when determining whether an applicant is an education-oriented entity. *See* Ohio Adm.Code 3301-102-02(I)(6)(c).

In short, Brookwood's appeal raises issues concerning an eligibility determination that no longer exists and that was based on an administrative rule that has since been revised. Not only does the revised rule specify criteria for determining whether an entity is education-oriented, it also reassigns to the State Board of Education the responsibility for making eligibility determinations.

If the Department again denies its application, Brookwood will have ample opportunity at that time to press the constitutional claims that it seeks to now raise before this Court. In addition to vacating the Department's eligibility determination, the Trial Court remanded to the Department for further proceedings. The practical effect of the Trial Court's order is to give Brookwood the opportunity to obtain exactly what it seeks—to be found eligible to sponsor community schools in Ohio. If on remand the State Board of Education determines pursuant to

the newly established criteria set forth in Ohio Adm.Code 3301-102-02 that Brookwood is not an education-oriented entity and so is not eligible to sponsor community schools in Ohio, Brookwood can appeal that determination.

Addressing Brookwood's claims now will short-circuit the on-going review process and will result in an advisory opinion. As the Tenth District correctly noted, "[b]ecause the Department's denial of eligibility was vacated, no actual genuine, live controversy exists which could definitely affect Brookwood's existing legal status." *Brookwood Presbyterian Church*, 2013-Ohio-3260 at ¶ 9. Rather than entertain arguments based on an eligibility determination that no longer exists, this Court should exercise judicial restraint and decline to accept jurisdiction over this appeal, at least at this time. Doing so will enable Brookwood to avail itself of the remedy ordered by the Trial Court.

C. The lower courts' refusal to render judgment in favor of Brookwood is consistent with Ohio case precedent.

In declining to render judgment in Brookwood's favor based on what Brookwood perceives as the Department's failure to properly certify and file the record, the lower courts acted in accordance with well-established precedent. Although Brookwood would have this Court believe that the lower courts' rulings have the potential to shake the foundation of Ohio administrative procedure, Brookwood is wrong on the facts and wrong on the law.

As an initial matter, the Trial Court determined that the Department had made a substantial effort to comply with R.C. 119.12's record filing requirement in June 2008. At that time, the Department filed a Notice and Affidavit that explained that because there was no administrative hearing, there existed no record as contemplated by Chapter 119 for the Department to file with the Court. Moreover, because Brookwood's initial appeal was dismissed on jurisdictional grounds and did not require the Trial Court to review a record to address the

merits of Brookwood's arguments, the *Genoa Banking Co. v. Mills*, 9 Ohio App. 3d 237, 459 N.E.2d 584 (10th Dist. 1983), case establishes that Brookwood was not entitled to judgment in its favor based on the Department's alleged failure to file the record in June 2008.

The question of whether a record existed was not resolved until February 2012. Consequently, in accordance with R.C. 119.12, the Trial Court found that the Department was entitled to an additional 30 days to file the record. With that question answered, the Department timely filed the newly defined record. Upon learning that a single page had been inadvertently omitted from the record, the Department immediately filed the omitted page. This Court's precedent dictates that absent a showing of prejudice, a mere omission does not require a finding for Appellant. *Lorms v. State*, 48 Ohio St. 2d 153, 357 N.E. 2d 1067 (1976), paragraph one of the syllabus. And Brookwood has suffered no prejudice.

The decision not to render judgment in Brookwood's favor resulted from a routine application of Ohio administrative law. Nothing about that exercise necessitates this Court's review.

ARGUMENT

Appellee Ohio Department of Education's Proposition of Law Number 1:

Brookwood's constitutional challenges are not properly before the Court.

Brookwood has not properly raised its first and second propositions of law. As the Tenth District noted, "[b]y finding that the Department's determination was not in accordance with law . . . the [trial] court rendered moot Brookwood's remaining arguments," and "[b]ecause the Department's denial of eligibility was vacated, no actual genuine, live controversy exists which could definitely affect Brookwood's existing legal status." *Brookwood Presbyterian Church*, 2013-Ohio-3260 at ¶¶ 8- 9. Accordingly, the Tenth District declined to engage in the "purely

academic exercise” of addressing the merits of Brookwood’s assignments of error. *Id.* at 9. Thus, the Tenth District has not yet ruled on the merits of this issue.

The Court should decline to be the first to rule on the merits of Brookwood’s constitutional challenges because the Tenth District did not resolve them below. “Courts should not decide constitutional issues if the case can be decided without reaching them.” *Consolo v. City of Cleveland*, 103 Ohio St. 3d 362, 2004-Ohio-5389, ¶ 23 (internal quotations omitted). This Court typically declines to review issues for the first time on discretionary appeal. See *State v. Brooks* (1989), 44 Ohio St.3d 185, 193 (“We decline to decide this issue before the court of appeals has had an opportunity to address this issue in the first instance.”).

This appeal is not the appropriate time to decide Brookwood’s constitutional arguments. It is possible that Brookwood may raise these arguments again in the future, and the Court may wish to address them then. But now is not the time to do so. As such, the Department will not argue the merits of these propositions of law unless and until they have been properly raised and adjudicated below. That will not occur, however, until—as ordered by the Trial Court—the State Board of Education re-evaluates Brookwood’s application in light of newly-adopted Ohio Adm.Code 3301-102-02. This Court’s review is therefore unwarranted at this time and the Court should deny jurisdiction.

Appellee Ohio Department of Education’s Proposition of Law Number 2:

The Trial Court’s inquiry under R.C. 119.12 properly concluded with the finding that the Department’s eligibility determination was not in accordance with law.

Having found that the Department’s eligibility determination was not made pursuant to a promulgated rule and was therefore not in accordance with law, it would have been futile for the Trial Court to separately determine whether the eligibility determination was supported by reliable, probative, and substantial evidence. R.C. 119.12 establishes the standard for reviewing

an order issued by an administrative agency as whether “the order is supported by reliable, probative, and substantial evidence and is in accordance with law.” R.C. 119.12, paragraph 13. The statute is written in the conjunctive, meaning that in order to affirm the order, the reviewing court must find both that the order is supported by reliable, probative, and substantial evidence and that the order is in accordance with law. In the absence of this finding, a reviewing court may, *inter alia*, vacate the order.

The Trial Court’s decision to remand is consistent with the general rule that “a reviewing court may remand a case to an administrative body.” *Chapman v. Ohio State Dental Bd.*, 33 Ohio App. 3d 324, 328, 515 N.E.2d 992 (9th Dist. 1986). As this Court has stated, “the power to reverse and vacate decisions necessarily includes the power to remand the cause to the decision maker.” *Superior Metal Prod. Inc. v. Administrator, Ohio Bur. of Emp. Serv.*, 41 Ohio St. 2d 143, 146, 324 N.E. 2d 179 (1975). Although Brookwood may believe that the Trial Court “should have granted [its] sponsorship application” (Brookwood’s Jur. Mem. at 12), the General Assembly has vested the Department, not the courts, with the statutory authority to approve sponsorship applications.

There is no basis to the claim that the Tenth District’s decision improperly gave the Department an “indefinite period of time to adopt rules defining what constitutes an ‘education-oriented’ entity” (Brookwood’s Jur. Mem. at 13). The Department has *already* revised Ohio Adm.Code 3301-102-02 to include criteria for determining whether an entity is “education-oriented.” Those revisions took effect June 27, 2013, a month before the Tenth District issued its decision—and over two months before Brookwood filed its Memorandum in Support of jurisdiction.

The Trial Court decision to remand this case to the Department for further consideration is consistent with R.C. 119.12 and with this Court's precedent. There is nothing about the Tenth District's affirmance of that decision that requires intervention by this Court. The Court should therefore decline review of this case.

Appellee Ohio Department of Education's Proposition of Law Number 3:

Brookwood is not entitled to an entry of judgment in its favor.

Brookwood is not now, nor has it ever been, entitled to an entry of judgment in its favor based on the Department's compliance (or claimed lack thereof) with the record filing requirements in R.C. 119.12. When Brookwood filed its original appeal in May 2008, the litigation revolved around a jurisdictional question—whether the Department's eligibility determination was appealable under R.C. 119.12. The Trial Court granted the Department's motion to dismiss and the Tenth District affirmed. Put briefly then, because this case was initially dismissed on jurisdictional grounds, which did not require the Trial Court to review the record in order to address the merits of Brookwood's arguments, Brookwood is not entitled to judgment in its favor. *See Genoa Banking Co.*, 9 Ohio App. 3d 237 at 239. (Holding that failure to file an agency record was not prejudicial because the trial court did not need “the agency's record of proceedings to determine the jurisdictional question presented by the . . . motion to dismiss.”).

It was not until November 2010, when this Court reversed and remanded to the Trial Court, that there was any indication that a record might be required in this case. Even then, the Department on remand again argued that there was no record to file because there had been no hearing. It was not until February 2012 that the Trial Court determined that the record in this case was comprised of the “documentation relating to” the Department's May 9, 2008

determination that Brookwood was not eligible to apply to sponsor community schools. The Trial Court also determined that the Department made a substantial effort in June 2008 to comply with R.C. 119.12's filing requirements and gave the Department 30 days to file the newly defined record. The Department complied with the Trial Court's order. However, shortly after filing the record, the Department realized that it had inadvertently omitted a single page from the record—the Office of Community Schools' March 5, 2008 initial eligibility determination letter. The Department subsequently supplemented its March 15, 2012 filing with this letter.

Brookwood is therefore also not entitled to judgment in its favor based on the Department's omission of one page from the record it did file with the Trial Court. Ohio courts draw a distinction between complete failure to file the record and a mere omission from the filed record. This Court has held that the mere omission of an item from the certified record does not require a finding for the appellant where the omitted item in no way prejudices the appellant in the presentation of its appeal. *Lorms v. State*, 48 Ohio St. 2d 153, 357 N.E. 2d 1067 (1976), paragraph one of the syllabus (“An agency's omission of items from the certified record of an appealed administrative proceeding does not require a finding for the appellant, pursuant to R. C. 119.12, when the omissions in no way prejudice him in the presentation of his appeal.”); see also *Checker Realty Co. v. Ohio Real Estate Comm.*, 41 Ohio App. 2d 37, 322 N.E. 2d 139 (10th Dist. 1974).

Even if the Department did fail to file the record in a timely manner, that failure is at most harmless. Brookwood has not and cannot show that the omission of the March 5, 2008 letter prejudiced the presentation of its appeal in any way. A review of Brookwood's filings shows that Brookwood has been citing this letter in its briefs since its initial appeal in 2008,

including the Brief submitted to the Trial Court on March 30, 2012. See *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, Franklin Co. Common Pleas, Case No. 08CVF-05-7539; *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, Tenth District Court of Appeals, Case No. 09AP-303; *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, Ohio Supreme Court, Case No. 2009-1926. Further, a review of these briefs reveals that Brookwood has essentially presented the very same arguments, with minor variations, since this case's inception.

Because Brookwood has suffered no prejudice in presenting its arguments, the lower courts were not obliged to render judgment for Brookwood. Therefore, there is no unresolved issue worthy of this Court's intervention.

CONCLUSION

For the above reasons, this Court should decline jurisdiction over the appeal.

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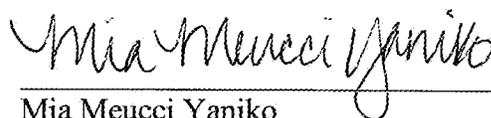
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of the Ohio Department of Education was served by U.S. mail this 4th day of October, 2013, upon the following counsel:

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