No. 12-2621

IN THE

United States Court of Appeals for the Third Circuit

GABRIEL JOSEPH CARRERA,
individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

—v.—

BAYER CORPORATION AND BAYER HEALTHCARE, LLC,

Defendants-Appellants

Appeal from the United States District Court
for the District of New Jersey

BRIEF OF PUBLIC JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE CARRERA'S PETITION FOR REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Public Justice, P.C., hereby states that the organization does not have a parent company or issue stock, and that no publicly-held company has an ownership interest (such as stock or partnership shares) in Public Justice, P.C.

Date: October 4, 2013

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Founded in 1982, Public Justice, P.C. ("Public Justice") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate, governmental, and individual wrongdoing. Public Justice prosecutes cases to advance consumers' and victims' rights, civil rights and civil liberties, employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice is the only public interest organization in the country that both aggressively prosecutes a wide range of class actions and has a special project to preserve class actions and prevent their abuse. Public Justice regularly represents workers and consumers in both individual and class actions, and its experience is that aggregate litigation often affords the only way to redress corporate wrongdoing where individuals by themselves lack the knowledge, incentive, or effective means to pursue their claims.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* made any monetary contributions intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is undisputed that the proposed class in this case is clearly and objectively defined: all persons who purchased a single product—WeightSmart—in a single state—Florida—within a known time period. It is also undisputed that defendant Bayer's total liability to the class can be determined based on the company's own records. Nonetheless, because Bayer's records do not show who bought its product, and consumers are unlikely to have kept documentary proof of their purchases—facts that are common in cases involving small-value retail products—the panel held that class members were not "ascertainable" and thus that the class could not be certified. That holding was based on a fundamental misunderstanding of the Due Process Clause that conflicts with Supreme Court precedent. This Court should grant rehearing en banc to correct it.

The panel began with a sweeping proposition: "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims." Panel Op. 11. From that premise, the panel reasoned that "[a] defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership"—and that ascertainability protects that due process right. *Id.* While the plaintiffs proposed that class members could attest to their purchases of WeightSmart in affidavits like those regularly used in claims submission, the panel rejected that proposal on grounds that it would not be "administratively feasible" for Bayer to challenge the affidavits. *Id.* at 11, 14-15.

The panel's due process holding is contrary to both constitutional principles and class action jurisprudence. First, the panel's blanket assumption that

defendants always have a "due process right to raise individual challenges and defenses to claims" is disproven by the fact that courts regularly approve various forms of aggregate proof in class actions. Likewise, the widespread use of publication notice under Rule 23 shows that class action defendants cannot possibly have a due process right to bar certification of a class whenever all the class members cannot be identified.

Second, the panel's holding that Bayer has a due process right to challenge proof of class membership is in conflict with black-letter law that procedural due process protections apply only to the deprivation of a party's constitutionally-protected interest in liberty or property. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972). At most, Bayer has a property interest in ensuring that it does not pay more than its total liability under applicable Florida law. But as the panel acknowledged, "Bayer's total liability . . . [would] not increase or decrease based on the affidavits submitted." Panel Op. 15. Rather, liability would be determined at a trial at which Bayer would have the opportunity to present all defenses and challenges. Only *after* total liability is determined would class member affidavits "be used to determine to whom to pay the refund, and in what amount." *Id.* at 16. This critical fact sets the present case apart from the cases on which the panel relies, including this Court's decisions in *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013), and *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012).

Finally, even if Bayer has a legitimate property interest that would be violated if it could not challenge proof of class membership, that does not end the

analysis—courts determine what process if due by balancing the private interest at stake against other relevant concerns. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The panel stopped short of the required due process balancing test, apparently assuming that the mere possibility of violating Bayer's due process rights—without more—is a sufficient ground for decertifying the class. That alone is grounds for rehearing en banc. Furthermore, considering that this outcome would leave Florida consumers with no remedy and enable Bayer to keep $14 million in ill-gotten gains, competing interests would easily outweigh any interest Bayer could have in challenging proof of class membership.

The panel's holding that decertification of the class was necessary to protect Bayer's due process rights was wrong. Rehearing is warranted in order to correct the panel's misapplication of due process principles.

ARGUMENT

I. Defendants in Class Actions Do Not Have an Absolute Due Process Right to Raise Individual Defenses to Claims or Class Membership.

The panel stated that "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims." Panel Op. 11. That sweeping statement is disproven by two commonly-used class action tools: aggregate proof and publication notice.

A. Courts routinely accept aggregate proof and limit individual defenses in class actions.

If the panel were correct that due process requires that defendants always be permitted to raise challenges and defenses to individual claims and to cross-

examine each individual plaintiff, courts would never accept aggregate proof. But courts regularly certify class actions where liability and/or damages will be proven on an aggregate basis, and do not find it necessary to permit defendants to put on individual defenses with respect to each plaintiff. *See, e.g., AmGen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1202-03 (2013) (adopting presumption of reliance on material misrepresentations when shares are traded in an efficient market because otherwise classwide damage recoveries would be precluded); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 297 (1st Cir. 2000) (where "most class members'" claims were unaffected by possible statute of limitations defenses, certifying a class and permitting aggregate proof subject to defendant being allowed to aggregate defenses through "common proffer[s]" to groups of class members); *Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975) (certifying securities case and holding that, while "defendant may be able to defeat the showing of causation as to a few individual class members," this did not bar classwide treatment because "right to disprove causation will not render the action unmanageable," and holding that "[a] defendant does not have unlimited rights to discovery against unnamed class members"); *George v. Nat'l Water Main Cleaning Co.*, 286 F.R.D. 168, 181-82 (D. Mass. 2012) (certifying class action in wage and hour case, and holding that liability could be proven on a classwide basis by showing existence of common policy and that "[t]he remedy, if one is required,

likely involves reconstructing the correct wage algorithm"); *Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2012 WL 689169, at *3 (N.D. Ill. Mar. 2, 2012) (rejecting defendant's argument that plaintiffs' claim would "require detailed examinations of evidence unique to each class member" and permitting classwide proof of liability and damages); *Morrow v. Wash.*, 277 F.R.D. 172, 192-93 (E.D. Tex. 2011) (aggregate proof including statistical analysis adequate to establish liability of city police for racial profiling); *cf. In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 854-55 (6th Cir. 2013) (affirming class certification on theory that plaintiffs could prove on classwide basis that all owners of allegedly defective washing machines had paid premium price, in light of undisclosed negligent design of machines, even if some individual customers were satisfied and/or had not experienced any foul odors from the machines); *Butler v. Sears, Roebuck & Co.*, --- F.3d ----, 2013 WL 4478200 (7th Cir. Aug. 22, 2013) (same).[2] Under the panel's rhetoric, the defendants in the cited cases would have had a strong argument that class certification should be denied on grounds that the defendants had a right to raise individual defenses to each class

[2] *See also* Alba Conte & Herbert Newberg, Newberg On Class Actions ("Newberg") § 10:5 & n.2 (4th ed. 2002) ("Aggregate computation of class monetary relief is lawful and proper. . . . Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process . . . right[] to contest each member's claim individually, will not withstand analysis."); *id.* § 10:5 & n.18 ("[T]he Constitution does not guarantee the defendants a jury trial to contest each class member's damage claim . . . .").

member. This Court should grant the Petition to rein in this sweeping language.

B. The widespread use of publication notice shows that defendants do not have a due process right to demand that class members be identifiable for class certification.

The panel held that, because the plaintiffs were unable to "show who purchased WeightSmart," certifying the class would violate Bayer's "due process right to challenge the proof used to demonstrate class membership." Panel Op. 5, 11. But as the Petition points out (at 12-13), Rule 23 itself assumes that not "all [class] members . . . can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In those circumstances, the remedy is ***not*** to deny class certification, but simply to ensure that class members receive "the best notice that is practicable under the circumstances"—which, when individual notice cannot "reasonab[y]" be provided, is normally publication notice. *Id.* If the panel were right that due process requires the identifiability of class members prior to certification, publication notice would not be constitutional, let alone commonplace.

This Court approved the use of publication notice when it affirmed the certification of a settlement class in *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004), a nationwide antitrust case against a pharmaceutical company. It noted that "neither the plaintiffs nor [the manufacturer] had access to the names and addresses of the multitude of people nationwide who purchased [the drug] because the identity of pharmaceutical purchasers [wa]s confidential." *Id.* at 536-37. The Court held that, "even in the absence of any individual notice via direct mail[,] . . . the District Court acted within its discretion in determining that

'reasonable effort' was made here to provide 'the best notice practicable under the circumstances.'" *Id.* at 536 (quoting Fed. R. Civ. P. 23(c)(2)).[3]

In *Hughes v. Kore of Ind. Enter., Inc.*, --- F.3d ----, 2013 WL 4805600 (7th Cir. Sept. 10, 2013), the plaintiff sought to certify a class of consumers who were charged ATM fees without the required notice. *Id.* at *1. As in the present case, the available records did not make the class members easy to identify. *Id.* at *2. Based in part on its conclusion that the notice requirement could not be satisfied, the trial court decertified the class. *Id.* at *4. On appeal, the court of appeals held that the inability to identify class members was not an obstacle to class certification. *Id.* The court reaffirmed that, "[w]hen reasonable effort would not suffice to identify the class members, notice by publication, imperfect though it is, may be substituted." *Id.*

As one federal court recently recognized, a defendant's objection that class members cannot easily be identified is best addressed in the notice analysis. The plaintiffs in *Agne v. Papa John's Int'l, Inc.*, sought to certify a nationwide class of consumers who were sent unsolicited text messages by the defendant marketing company. 286 F.R.D. 559, 561 (W.D. Wash. 2012). The defendants argued that the plaintiffs had failed to show that the class was ascertainable. While they did

[3] *Cf. In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 337 (3d Cir. 2010) (affirming certification of settlement class under Rule 23(b)(3) which provided that class members who submitted "reasonable" claims without any documentation showing they had purchased the defendant's product would recover up to $900; class members would be required to verify under penalty of perjury that the information submitted is true, and a claims administrator would make a "good faith determination of the validity of the claim.").

not challenge the class definition, they argued that it would be impossible to know who was in the class because the records of who had received the texts had been destroyed. *Id.* at 566. The court dismissed that argument, observing that the defendants' objection was basically that "identifying class members and providing them with notice may be difficult." *Id.* That issue, the court held, is best "addressed after class certification." *Id.*; *see also CE Design v. Beaty Constr., Inc.*, No. 07-C-3340, 2009 WL 192481, at *4 (N.D. Ill. Jan. 26, 2009) (refusing to bar class certification where "defendant has lost or destroyed the list of its alleged victims," reasoning that individual claimants "will have to represent to the Court—via affidavit and under the penalty of perjury" that they are class members).

The panel's holding that Bayer had a due process right to block class certification because class members could not be individually identified—even though the class definition is clear and objective—cannot be squared with Rule 23(c)(2)(B) or the myriad cases approving of notice by publication.

II. Bayer Has No Due Process Right to Challenge Proof of Class Membership Because Its Total Liability is Independent of Whether Any Individual Class Member Suffered Damages.

Where the defendant's total liability can be determined without reference to any particular class member's damages, the defendant has no property interest in whether any particular individual is a member of the class—and thus no due process right to challenge proof of class membership.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Constitution's] protection of liberty and property. . . . [T]he range of interests protected by procedural due process is not infinite."

Roth, 408 U.S. at 569-70. Thus, before evaluating a claimed due process right, a federal court first must resolve the threshold question of "whether the interest asserted is within the fifth amendment's protection of 'property.'" *Wilkinson v. Abrams*, 627 F.2d 650, 664 (3d Cir. 1980). Only if a "constitutionally protected property interest is implicated" does the court turn to the question of "what process is due." *Id.* In a class action seeking compensatory damages, the defendant may have a property interest in "pay[ing] damages reflective of [its] actual liability"—but no more. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). Where liability can only be determined by adding the individual damages suffered by each class member, it follows that the defendant's property interest is implicated by whether each person is actually a member of the class. That was the case in *McLaughlin*, the main decision the panel cites in support of its sweeping due process rule.[4] As the panel acknowledged, the plaintiffs in *McLaughlin* proposed that "aggregate damages would be based on estimates of the number of defrauded class members and their average loss." Panel Op. 11. The concern there was that "an aggregate determination is likely to result in an astronomical damages figure that . . . bears little or no relationship to the amount of economic harm actually caused by defendants." *McLaughlin*, 522 F.3d at 231. The court concluded that this approach would "inevitably alter defendants' substantive right to pay damages reflective of their actual liability." *Id.* The contrast between this

[4] *McLaughlin*'s abrogation was recently recognized by the Second Circuit. *See In re Foodservice Inc. Pricing Litig.*, --- F.3d ----, 2013 WL 4609219, *18 (2d Cir. Aug. 30, 2013) (affirming class certification where "[t]he claims of each class member will be governed by the same substantive law").

case and *McLaughlin* could not be more stark. In this case, the identity of specific class members has no impact on the amount of money (property, within the meaning of the due process clause) that Bayer would pay out if the plaintiffs prevail at trial. In *McLaughlin*, by contrast, the identity of the class members could have changed the defendant's total liability in an "astronomical" manner.

In both *Marcus* and *Hayes*, likewise, the defendant's total liability could not be determined from its own records. The records did identify the universe of potentially relevant transactions, but not *which* subset of transactions involved the allegedly unlawful conduct. For example, the class in *Hayes* was defined (in relevant part) as customers to whom Sam's Club had sold service plans for "as-is" products, who had not received service on the products. 725 F.3d at 355. It was known that the relevant transactions had involved price overrides, but price overrides were also performed for other reasons. Sam's Club's records revealed 3,500 price-override transactions during the relevant time period. *Id.* However, it was not known how many of those overrides had been for "as-is" products, nor which buyers had subsequently received service. *Id.* On that basis, the Court cautioned against relying solely on putative class members' "say-so." *Id.* at 356. The defendant's records in *Marcus* were likewise over-inclusive—it was impossible to determine from the defendant's own records how many transactions fell within the class definition. 687 F.3d at 593-94. If consumers had submitted false affidavits in *Marcus* and *Hayes*, that would have increased the defendants' total liability. Thus, unlike Bayer, those defendants had an actual property interest in the funds being distributed.

In contrast, where a defendant's liability can be determined without tallying the individual damages of each class member, the defendant's due process rights are adequately protected so long as the defendant has the opportunity to present defenses to the proof and methodology by which its total liability is determined. This was the case in *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971), where the court considered a putative price-fixing class action filed by states on behalf of consumers who had purchased antibiotics. *Id.* at 279. The defendant drug companies contended that the classes could not be certified without compromising their due process rights. Like Bayer here, they argued that it would be unmanageable to require individual proof of damages at trial by each class member, *id.* at 281, but that proving damages on a classwide basis would "seriously impair the defendants' rights to due process in resisting at trial the claims being asserted against them" because they would lose their right to "defend against consumers who are unable to prove their purchases." *Id.* at 288-89. As in this case, it was undisputed that damages could be "accurately computed by reliance on sales figures." *Id.* at 289. Given that questions about individual claims would have no impact on total liability, the court concluded that, "[i]n these circumstances . . . the defendants are [not] constitutionally entitled to compel a parade of individual plaintiffs to establish damages." *Id.* The court's reasoning applies equally here:

> The defendants . . . characterize[] a class-wide recovery as a 'pot of gold' which the plaintiffs and their counsel are somehow not entitled to receive. If we assume that a price-fixing conspiracy is proven at trial, however, the defendants will certainly have no right to the 'pot of gold' created by their illegal activities.

Id. at 287; *see also In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 839 (E.D.N.Y. 1984) ("[T]he purpose is to hold a defendant liable for no more than the aggregate loss fairly attributable to its . . . conduct. As long as that goal is met a defendant can have no valid objection that its rights have been violated."); *Daar v. Yellow Cab Co.*, 433 P.2d 732, 740 (Cal. 1967) ("Defendant . . . fails to distinguish between the necessity of establishing the existence of an ascertainable class and the necessity of identifying the individual members of such class as a prerequisite to a class suit. If the existence of an ascertainable class has been shown, there is no need to identify its individual members . . . .").

Here, "Bayer's records show it sold approximately $14 million worth of WeightSmart in Florida." Panel Op. 16. The plaintiffs claim that they will prove at trial that Bayer owes a refund for every purchase of WeightSmart, under Florida law. And at trial, Bayer will have the opportunity to challenge the methodology by which its total liability to the class is determined and to raise any and all defenses against that calculation. For example, Bayer may argue that its liability should be based not on its total sales, but on the premium consumers paid for WeightSmart over the price of Bayer's standard One-A-Day Vitamins (which are identical except for the promised effect on metabolism). Once a company's liability is determined at trial, it no longer has any constitutionally-protected property interest in how those damages are distributed. As one appellate court has recognized:

> A class action which affords due process of law to the defendant through the time when the amount of his liability is calculated cannot suddenly deprive him of his constitutional rights because of the way the damages are distributed. Where damages have been fairly and legally removed from his possession, a defendant's due process rights have been fairly and fully vindicated.

Bruno v. Super. Ct., 127 Cal. App. 3d 120, 129 (Ct. App. 1981). Here, so long as Bayer's rights are protected during the proceedings at which its total liability is determined, "the way the damages are distributed" cannot "suddenly deprive [Bayer] of [its] constitutional rights." *Id.*

The panel's theory that Bayer "has an interest in ensuring it pays only legitimate claims" implies that Bayer would somehow be improperly injured if it turned out that some consumers who receive money from the resolution of this case turned out to not be within the class definition. Panel Op. 17. But for that to be true, the Due Process Clause would have to be read to provide Bayer with a legal interest in the illegal profits it gained from deceptively advertised products. This is contrary to the applicable law, which provides that, instead of reverting to a defendant proven to have sold products in a deceptive manner, residual funds are maintained in an unclaimed property fund and used to benefit the class or similarly-situated persons. *See* Panel Op. 16. In sum, because of the facts of this case, Bayer has no property interest in whether any given individual is a member of the plaintiff class, nor in controlling how damages are distributed. Therefore, it has no due process right to challenge each plaintiff's membership in the class.

III. Even if Bayer Had a Legitimate Property Interest in Challenging Proof of Class Membership, That Interest Would Be Outweighed By the Interests Served by Certifying the Class.

As explained above, Bayer has no constitutionally-protected property interest in challenging class members' proof of membership. However, if Bayer did have a protected interest, the court would still need to balance it against the competing interests—and those are considerable.

Where a protected interest is identified, courts consider three factors in determining what process is constitutionally due: 1) the private interest; 2) the risk of an erroneous deprivation and the probable value of additional safeguards; and 3) the government's interest, including the function involved and the administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 334-35. Here, the panel determined that the additional safeguards required to protect Bayer's supposed rights—permitting it to actually challenge proof of class membership—are not "administratively feasible." Panel Op. 11. Thus, in the panel's view, the alternative to certifying the class without permitting such challenges was to bar the class action from going forward at all.

Denying class certification would mean that the only way the Florida consumer plaintiffs could vindicate their rights under the Florida Deceptive and Unfair Practices Act (FDUTPA) would be to bring individual cases seeking refunds of the price of WeightSmart. Without question, that will not happen. Indeed, class actions are designed for this circumstance: "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quotation omitted); *see also Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013) (citing FLA. STAT. § 501.202 and explaining that the legislative purpose of FDUTPA is "to protect individual consumers . . . from deceptive, unfair, or unconscionable methods of business competition and trade practice"). Florida courts have repeatedly recognized that class actions are

necessary to fulfill the remedial purposes of FDUTPA. *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 606 (Fla. Dist. Ct. App. 2007) (collecting cases). Dismissing this class action would frustrate those purposes.

Denying certification of this class action would also mean that, even if the plaintiffs could prove their case, Bayer would be permitted to keep $14 million in profits it obtained by deceiving consumers. It would be a "perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer" simply because not every class member could be identified. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). A court conducting the due process balancing test would find that the interests in protecting consumers and avoiding a patently unjust outcome outweigh any interest Bayer could have in challenging proof of class membership.

CONCLUSION

The Court should grant the Petition for Panel Rehearing and Rehearing En Banc.

Date: October 4, 2013

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The brief contains 3,941 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a 14-point proportionally spaced typeface using Microsoft Word.

3. L.A.R.31.1(c) Certification: The text of the electronic version of this brief is identical to the text in the paper copies of this brief. A virus detection program (Symantec Endpoint Corporate Anti-virus version 12.1.3001.165) has been run on the file of this brief and no virus was detected.

Dated: October 4, 2013

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CERTIFICATE OF BAR MEMBERSHIP

I certify that F. Paul Bland, Jr., counsel for amicus curiae Public Justice, P.C., is a member of the Bar of this Court.

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CERTIFICATE OF SERVICE & CM/ECF FILING

I hereby certify that the foregoing document was filed via the Court's electronic filing system on October 4, 2013, which will serve electronic notice to all parties of record.

Dated: October 4, 2013

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