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**IN THE UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

JOHN MCCOMISH, NANCY MCLAIN, KEVIN GIBBONS, FRANK ANTENORI, TONY BOUIE, AND DOUG SPOSITO,

Plaintiffs,

v.

JAN BREWER, in her official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, DONALD LINDHOLM and LORI S. DANIELS, in their official capacity as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION,

Defendants.

No. CV08-1550-PHX-ROS

**DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER**

(Assigned to the Honorable Roslyn O. Silver)

Defendants Arizona Secretary of State Jan Brewer and the Arizona Citizens Clean Election Commission ("Defendants") ask this Court to deny Plaintiffs' Motion for

Temporary Restraining Order ("Motion") because it (1) fails to demonstrate a strong likelihood of success on the merits in light of numerous cases, including Supreme Court cases, rejecting their legal arguments; (2) fails to demonstrate the possibility of irreparable harm in light of the timing of the Motion; (3) fails to demonstrate hardships that would tip the balance in their favor; and (4) fails to address any public interest advanced by halting the functions of the Citizens Clean Elections Act on the eve of the primary. For these reasons, Plaintiffs' request for emergency relief is without merit and should be denied.

## I. BACKGROUND.

In the 1998 general election, Arizona voters approved Proposition 200, an initiative that created the Citizens Clean Elections Act (the "Act"). Declaration of Todd F. Lang ("Lang Decl.") at ¶ 6. The purposes of the Act are recited in the text itself: to create a system that "will improve the integrity of Arizona State Government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions." A.R.S. § 16-940(A); *see* Declaration of Tanja K. Shipman ("Shipman Decl."), 1998 Publicity Pamphlet attached as Ex. 1.

The Act is a citizen response to perceived ills in state politics. *See* A.R.S. § 16-940. As also described in the text, Arizona's then-existing campaign finance system allowed elected officials to accept large contributions from private interests in their electoral districts, hindered communications with voters by qualified candidates, suppressed the voice and influence of the majority of Arizona citizens in favor of wealthy special interests, and undermined confidence in the integrity of public officials. *See* A.R.S. § 16-940(B).

Arizona's system of public funding is voluntary. A candidate that wishes to

receive public funding (a "participating" candidate) must abide by specific spending limits. *See* A.R.S. §§ 16-941, -945; Lang Decl. at ¶ 7. These limits vary by office, and depend on whether the candidate is competing in a primary or general election. *See* A.R.S. § 16-951. Participating candidates may use limited amounts of personal monies and accept private "seed" contributions, but only during the exploratory or qualifying periods. *See* A.R.S. § 16-945; Lang Decl. ¶ 7. Private contributions are prohibited thereafter. *See* A.R.S. § 16-945.

To qualify for public funding, a candidate must raise a specified number of $5 contributions during the qualifying period. *See* A.R.S. § 16-946; Lang Decl. ¶ 7. The number of qualifying contributions required depends on the office sought, and ranges from 200 for legislative candidates, to 4,000 for candidates for governor. *See* A.R.S. § 16-950, as adjusted by rules of the Citizens Clean Elections Commission (the "Commission"), pursuant to A.R.S. § 16-956(D). Participating candidates must apply for public funding with the Secretary of State within one week after the qualifying period, must file a list of persons that made qualifying contributions, and must tender payment to the Secretary of State the total $5 contributions received. *See* A.R.S. §§ 16-947, -950(B).

Candidates who desire to run a privately-funded campaign ("traditional" candidates) may still do so. *See* Lang Decl. at ¶ 8. The Act limits the size of individual contributions that traditional candidates for statewide and legislative office can accept. *See* A.R.S. § 16-941(B). However, there are <u>no</u> limits on the total amount of contributions these candidates can receive, and <u>no</u> limits on their expenditures. Lang Decl. ¶ 8.

To make public funding a viable option, participating candidates receive matching funds when an opposing, traditional candidate exceeds the primary or general election spending limits. *See* A.R.S. § 16-952(A), (B). Matching funds are also provided when

independent expenditures are made against the participant, or in favor of a traditional opponent. *See* A.R.S. § 16-952(C). However, matching funds are capped at three times the original spending limit. *See* A.R.S. § 16-952(E). Beyond that threshold, a traditional candidate may outspend a participating opponent. Lang Decl. ¶ 11. Further, matching funds are not provided on a dollar-for-dollar basis but are reduced by 6% to account for a traditional candidate's fund-raising expenses. A.R.S. § 16-952(A).

## II. ARGUMENT

Plaintiffs have not met their burden. In order to succeed with their Motion, Plaintiffs must show "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)" or "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." *Gonzalez v. Arizona*, 435 F.Supp.2d 997, 999-1000 (D.Ariz. 2006)(denying TRO). Plaintiffs have not established any of these criteria and their motion should be denied.

### A. PLAINTIFFS FAIL TO SHOW A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

The constitutionality of public funding for campaigns is not in question. *Buckley v. Valeo*, 424 U.S. 1 (1976), directly reviewed the constitutionality of the presidential public funding system and stated that Congress may engage in public funding of candidates who agreed to decrease reliance on private contributions. Such measures are an "effort, not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge discussion and participation in the electoral process, goals vital to a

self-governing people." *Id.* at 92-93.[1] The Court added that "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.

In the wake of *Buckley*, states have an undisputed interest in encouraging publicly-funded campaigns. *See Vote Choice v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). Indeed, states need not be neutral on the issue of public funding, *Vote Choice*, 4 F.3d at 39, but may "rely on incentives for participation, which, by definition, means structuring the scheme so that participation is usually the rational choice." *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998).

Public funding programs need not be perfect. A law does not burden speech because the advantages available to participating candidates and the restrictions they must accept are not in "perfect equipoise." *Vote Choice*, 4 F.3d at 39. Rather, in viewing the scheme as a whole, a "rough proportionality" will do. *Id.* Indeed, unless the law is so "benefit laden" as to create a "large disparity" between benefits and burdens, it is upheld. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996). Plaintiffs present no evidence demonstrating that Arizona's funding scheme is "benefit laden" or that a large disparity exists.

As Defendants illustrate below, Plaintiffs have no strong likelihood of success on the merits. Indeed, courts have already rejected similar claims under schemes whose incentives for public funding go well beyond the provisions of the Act.

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[1] The Court said: "Congress was legislating for the 'general welfare' to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91.

1. **The Act's Matching Fund Provisions Do Not Burden Free Speech.**

Plaintiffs claim that the Act "creates a 'drag' on the exercise of First Amendment rights" "based on the guarantee that government subsidies will flow to support the campaigns of competing subsidized candidates." Motion at 6-7. Plaintiffs confuse their right to speak, which is not restrained here, with the right to be the only voice in the debate.

Nothing in the Act quells Plaintiffs' speech. Plaintiffs are free to communicate as much as they want and with whatever message that they want. Indeed, if there is any limitation on speech, it falls on participating candidates, who are barred from spending on political advocacy once the expenditure cap is reached.

In *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 463-69 (1st Cir. 2000), for example, the court turned away claims that providing matching funds to participating candidates based on expenditures by their opponents, or the special interests that support them, burdened political speech.

> Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response – the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources." *Buckley*, 424 U.S. at 49. The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures.

*Id.* at 464 (citation omitted).

Plaintiffs' rely on *Davis v. Federal Election Comm'n*, 554 U.S. __, 128 S.Ct. 2759 (2008), to support their statement that "the mere possibility of triggering privately-funded opposing campaign speech place[s] an impermissible drag on the exercise of First Amendment rights." Motion at 7. There is nothing in *Davis* that supports Plaintiffs' statement. Indeed, the Court's decision in *Davis* had nothing to do with the public

matching funds issues raised here and it analyzed only the constitutionality of the so-called Millionaires' Amendment, which relaxed generally applicable limits on campaign contributions under certain conditions for only one candidate. *Davis*, 128 S.Ct. at 2770.

Under that Amendment, "when a candidate spends more than $350,000 in personal funds and creates what the statute apparently regards as a financial imbalance, that candidate's opponent may qualify to receive both larger individual contributions than would otherwise be allowed and unlimited coordinated party expenditures." *Id.* The Court had no issue with elevated contribution limits on principle and stated that it would not find any basis for challenge had the contribution limits been "applied across the board." *Id.* at 2771. Here, contribution limits *are* applied across the board. Lang Decl. at ¶8. The constitutional concern in *Davis* was the imposition of restrictions on only one party. "We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech." *Id.* In holding that provision unconstitutional, the Court found it was an "unprecedented" and "asymmetrical" burden on speech. *Id.* at 2772, 2773.

The Act here imposes no asymmetrical burden on a traditional candidate's ability to contribute or expend his or her own money. It creates a voluntary system under which candidates may either (1) raise private funds for their campaigns and send as much money as they can raise or (2) forego private contributions and abide by strict spending limits to accept public financing. Under the Act, a participating candidate can receive no contributions after the qualifying period, and receives matching funds (minus 6% attributed to fundraising expenses) until the limit of three times the original disbursement is reached. Lang Decl. at ¶¶ 7-11. Once that occurs, the Act does not lift any

contribution limitations imposed on the participating candidate; rather, the traditional candidate is free to outspend the participating opponent with abandon and no matching funds are triggered. *Id.* at ¶ 11. "All contribution limits remain the same for all candidates regardless of how much money they raise or spend." *Id.* at ¶ 8. Further, independent expenditures that trigger matching funds for participating candidates count towards their overall funding limits and, as a result, a participating candidate could "max out" without any additional spending by the traditional candidate and be left without any funds once his opponent begins spending. *Id.* at ¶ 12.

Plaintiffs also argue that "the Act's matching funds provisions structure electoral competition to overwhelmingly favor subsidized candidates." Motion at 9. First, Plaintiffs claim that the matching funds given to participating candidates have more "purchasing power" because the "real costs of raising campaign funds are not deducted from the subsidies they receive." *Id.* Plaintiffs provide no facts to support this claim. Further, A.R.S. § 16-952 accounts for the costs of fund-raising by requiring that the Commission deduct 6% from the total reported by the traditional candidate prior to issuing matching funds.[2] Also, a law does not burden speech because the advantages available to participating candidates and the restrictions they must accept are not in "perfect equipoise." *Vote Choice*, 4 F.3d at 39. Finally, matching funds are sometimes less than the reported cost of the expenditure because A.R.S. § 16-952(C) requires that expenditures subject to matching funds "be allocated among candidates for different offices based on the relative size and length and relative prominence of the reference to candidates for different offices." Lang Decl. at ¶ 14. "As a result, participating candidates in those instances receive matching funds that are not sufficient to respond in

[2] This was the result of a recent legislative modification passed in 2007 and contained in HB2690.

kind to the communication that triggered the matching funds." *Id.* This circumstance has occurred in the 2008 election cycle as well. *Id.*

The First Amendment issue in this context is whether the benefits of participating, or the burdens of not participating, are so great that a candidate is effectively coerced into participating in the system. *See Daggett*, 205 F.3d at 467. In 2006, 40% of the candidates in Arizona chose not to accept public funds. Lang. Decl. at ¶ 13. In 2008, 36% of the candidates chose not to accept public funds. *Id.* In light of this data, there is no serious argument that the Act coerced participation.

Matching funds have been repeatedly found to be constitutional. Most recently, in *North Carolina Right to Life, Inc. v. Leake*, 524 F.3d 427, 437-39 (4th Cir. 2008), the Fourth Circuit held that North Carolina's similar scheme of optional public funding for candidates seeking election to the state's supreme court and court of appeals did not chill free speech. That court rejected appellants' identical argument that their speech was chilled because they "choose to spend less money (and thus engage in less political speech) in order to prevent candidates they oppose from receiving public funds. *Id.* at 437. Like Plaintiffs here, "[t]he plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire." *Id.* at 437. The distribution of matching funds, "'furthers, not abridges, pertinent First Amendment values' by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Id.* (quoting *Buckley*, 424 U.S. at 92-93.) Plaintiffs' arguments here should similarly be rejected. *See also Gable*, 142 F.3d at 949 (finding Kentucky's public funding trigger provision constitutional); *Daggett*, 205 F.3d at 464 (finding Maine's clean election statute constitutional).

Matching funds are an important component of the Act and are necessary for its ability to fulfill its anti-corruption purposes. They serve two purposes: 1) they make the

choice of public financing a rational option and (2) as a practical matter, they preserve the public's funds so that funding is provided only for necessary campaign expenditures made in response to an opponent's actions. Without matching funds, a candidate's decision to run a publicly-funded campaign in Arizona would seldom be the "rational choice." A participating candidate would receive only a modest public disbursement, after which she could be grossly outspent by an opponent unconstrained by limits on expenditures. The Act does not turn a blind eye to independent expenditures, based on the same legitimate concern.

Absent such safeguards, "the State could reasonably believe that far fewer candidates would enroll in its campaign financing program." *Rosenstiel*, 101 F.3d at 1554. And, while these provisions advance, rather than burden, speech, the matching funds are sufficiently tailored – indeed, vital – to serving the compelling interests of the public funding program. *See Rosenstiel*, 101 F.3d at 1553; *Vote Choice*, 4 F.3d at 39.

*Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), relied upon by Plaintiffs, is inapposite. Both the First and Fourth Circuits have expressly rejected *Day*, which equated responsive speech with impairment of the initial speaker. *See Daggett*, 205 F.3d at 464 ("we cannot adopt the logic of *Day*"); *Leake*, 524 F.3d at 437 ("we reject as unpersuasive the Eighth Circuit's decision in *Day*"). *Day* also is inapposite on its facts. There, the state sought to justify the independent expenditure match as an incentive to participation. Given that participation already soared near 100%, the court concluded that no interest, no matter how compelling, could be served. *Day*, 34 F.3d. at 1361.[3]

After *Day*, the Eight Circuit seemed to contradict its own precedent by holding that a candidate's expenditure which triggered the release of his opponent's spending

[3] Further, while the court in *Day* decided that strict scrutiny should apply, it never completed the analysis, and therefore does not help Plaintiffs here. *See* 34 F.3d at 1361.

limit did not burden First Amendment rights. *See Rosenstiel*, 101 F.3d at 1552. Thus, the logic of *Day* and *Rosenstiel* are inconsistent, leaving *Day* "open to question." *Daggett*, 205 F.3d at 465 n.25. In fact, when the provision is a legitimate part of the public funding scheme, *Rosenstiel* suggests that there is no burden. *See* 101 F.3d at 1555. As in *Rosenstiel*, the Act's matching funds provisions are an essential component of the Act, without which the state would be unable to "avert a powerful disincentive for participation in its public financing scheme." *Id.* at 1555.

As a result, Plaintiffs have demonstrated no burden on their free speech. However, even indulging Plaintiffs that more speech is antithetical to First Amendment values, the narrowly drawn provisions in this case serve the state's compelling interests.

**2. The Matching Fund Provisions Serve a Compelling State Interest.**

Public funding systems serve compelling state interests, including to reduce corruption or the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court in *Davis*, cited *Buckley* on this point and reaffirmed the constitutionality of public financing. *Davis*, 128 S.Ct. at 2771-72. *See Daggett*, 205 F.3d at 459 (finding sufficiently compelling the government's interest in abolishing the appearance of corruption in the political process).

Taking *Buckley's* cue, courts have supported efforts by Congress and the states to enact meaningful campaign finance reform. In *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 115 (2003), the Supreme Court upheld provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") designed "to purge national politics of what [is] conceived to be the pernicious influence of 'big money' campaign contributions." In passing on the constitutionality of BCRA, the Court reaffirmed government's interest in addressing corruption. *See id.* at 143 ("Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political

contribution limits."). The Court also affirmed the deference to be afforded legislatures in implementing reform. *See id.* at 117 ("Congress' 'careful legislative adjustment of the federal election laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.'") (quoting *Fed. Election Comm'n v. Nat'l Right to Work Comm'n*, 459 U.S. 197, 209 (1982) (internal quotation omitted)).

The Act was created with the purpose of reducing corruption and the appearance of corruption. *See* A.R.S. § 16-940(A). As a voter initiative, arguments supporting the Act are contained in the Secretary of State's publicity pamphlet and reflect the intended purpose of the law:

- "Arizona has earned the reputation of a state rife with corruption and abuse of money in politics. Our elected officials are going to jail and this cycle of abuse seems endless. It's time to change that. It's time to restore confidence in our political system. It's time to pass the Citizens Clean Election Act." Shipman Decl., Ex. 1 at 88.
- "We have watched in horror as, in each new election, the politicians have extended the boundaries of ethical campaigning, skirting the edges of the campaign finance laws at every opportunity. . . . It's time for us to take charge and mandate the desperately needed corrections!" *Id.*
- "You can end the money chase, halt corruption, limit campaign spending and reduce special interest influence by supporting 'Clean Elections.'" *Id.* at 87.
- "The shocking fact is that non voters outnumber voters. Polls reveal that a lack of confidence in government is a major factor. Voters believe that their elected representatives enact policies that favor special interests – not theirs." *Id.* at 86.

The Act is a citizen response to perceived ills in state politics. As also described

in the text, Arizona's then-existing campaign finance system allowed elected officials to accept large contributions from private interests over which they had jurisdiction, hindered communication to voters by qualified candidates, suppressed the voice and influence of the majority of Arizona citizens in favor of wealthy special interests, and undermined confidence in the integrity of public officials. *See* A.R.S. § 16-940(B).

For the foregoing reasons, Plaintiffs have failed to demonstrate any likelihood of success on the merits and their claims fail as a matter of law. Plaintiffs' Motion should be denied. *See Gonzalez*, 435 F.Supp.2d at 1000 ("if Plaintiffs' claims fail as a matter of law, no likelihood of success exists and the temporary restraining order cannot be issued")(citation omitted).

### B. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR DENYING THE TRO.

The balance of harms and the public interest favor preserving the status quo while this lawsuit is pending so that the candidates can complete this election under the present campaign finance system. Changing the rules now would irreparably harm the candidates who in good faith chose to accept public funding by participating in Arizona's Clean Elections program. Declaration of Kara Kelty at ¶¶ 3-6; Declaration of Jackie Thrasher at ¶¶ 2-9; Declaration of John Valdez at ¶¶ 3-6. It would also undermine Arizona's campaign finance system and its elections by eliminating a key component of Arizona's public funding program.

There is no justification for Plaintiffs' eleventh hour effort to cut funding for their opponents, and there is certainly no emergency that justifies a TRO. The Clean Elections Act is nothing new. It has been in place for ten years. Arizona voters approved the Act in 1998, and the 2008 election is the fifth in which the public funding alternative has been available to statewide and legislative candidates in Arizona. The legal issues they raise

are also not new. The issue of the constitutionality of matching funds has been raised in another lawsuit pending in federal district court (*Martin v. Brewer*, CV 2004-0002). And, although Plaintiffs think that the United States Supreme Court decision in *Davis* supports their legal theory, that case does not justify their delay in filing this lawsuit. The Court issued that decision June 27, 2008, almost two months before Plaintiffs filed this action. *See Grudzinski v. Bradbury*, Civ. No. 07-6195-AA, 2007 WL 2733826, at *3 (D. Or. Sept. 12, 2007)(denying a request for a TRO and a preliminary injunction with regard to a ballot measure where the plaintiff waited six weeks after the legislature placed the initiative on the ballot).

In this year's election, all 90 legislative seats are on the ballot, as well as three out of the five seats on the Arizona Corporation Commission. These candidates had to file their nomination papers by June 4, 2008—more than two months ago. Lang Decl. at ¶ 23. They have already made decisions about whether to participate in Clean Elections or rely on private contributions to finance their campaigns. Candidates began qualifying for clean elections funding after January 1, 2008. *Id.* at ¶¶ 9 & 19. Sixty-four percent of the 176 candidates running for statewide and legislative offices in the 2008 election have chosen to participate in Clean Elections and qualified for funding. *Id.* at ¶ 13. Plaintiffs submitted their TRO application only one week before the September 2, 2008 primary election, well after early voting began July 31, 2008. *Id.* at ¶ 13. Early voting for the general election will begin October 2, 2008, and the general election is November 4, 2008. *Id.* at ¶ 22. It is simply too late to change the campaign finance system this election cycle.

The requested TRO presents a serious threat to the public interest, and the certainty and magnitude of its harmful effects on Arizona's electoral system would dramatically outweigh the illusory injury asserted by Plaintiffs. As the Ninth Circuit

made clear, "election cases are different from ordinary injunction cases" because the "hardship [of an injunction] falls not only upon the putative defendant, . . . but on all the citizens of [the state]." *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). The hardship that would befall Arizona's citizens if a TRO upended its campaign finance system just two months before an election is plain. Participating candidates who had agreed to spending limits with the assurance that matching funds would be available would suddenly be placed at a substantial disadvantage vis-à-vis their traditional opponents. And rather than fostering speech, as Plaintiffs' assert, the TRO would actually reduce the amount of information flowing to the electorate. After all, the only effect of the TRO would be to prevent participating candidates from receiving matching funds.

Neither the balance of harms nor the public interest is served by altering the campaign finance system in the middle of an election cycle. "Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented." *Southwest Voter Registration*, 344 F.3d at 918. Voting for the primary is underway, and it is unfair to the candidates and to the voters to alter the campaign finance system now, undermining the public funding program Arizona voters approved almost 10 years ago. Plaintiffs' application for a TRO should be denied.

## III. CONCLUSION.

For each of the above reasons, Defendants respectfully request that Plaintiffs' Motion be denied.

RESPECTFULLY SUBMITTED this 28th day of August, 2008.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2008, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing, and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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**COPY** also served the following business day, the 28th day of August, 2008, by U.S. Mail with Notice of Electronic Filing, on:

The Honorable Roslyn O. Silver
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