UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NDOBIA NIANG, et al.

Plaintiffs

v.

EMILY CARROLL, et al.,

Defendants

Civil Case No. 4:14-cv-01100 JMB

Magistrate Judge Bodenhausen

Defendants' Memorandum in Support of Motion for Summary Judgment

Respectfully submitted,

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TABLE OF CONTENTS

I. Introduction 1

II. Issues Presented 2

III. Standard for Summary Judgment.. 2

IV. Argument 3

A. African-Style Hair Braiding is a Style within the Definition of Cosmetology and/or Barbering 3

B. The Question to Be Decided is Whether Missouri's Statute Meets the Rational Basis Test 5

C. Missouri's Licensing Scheme is Rationally Related to the Legitimate State Interests in Regulating the Hair Care Professions........................ 7

D. Missouri Has Several Legitimate State Interests in Regulating the Hair Care Professions 8

E. Missouri's Licensing Scheme Is Rationally Related to the Achievement of Its Legitimate State Interests 14

V. Conclusion... 23

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 3

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 3

Dandridge v. Williams, 397 U.S. 471 (1970) 6

Ex parte Lucas, 61 S.W. 218 (Mo. banc, 1901) 8

FCC v. Beach Communications, 508 US 307 (1993) 6

Ferguson v. Skrupa, 372 U.S. 726 (1963) 17

Hicklin v. Orbeck, 437 U.S. 518 (1978) 22

Kansas City Premier Apartments, Inc. v. Missouri Real Estate Com'n, 344 S.W.3d 160 (Mo. banc 2011) 10

Lawrence v. Texas, 539 U.S. 558 (2003) 16

Lochner v. New York, 198 U.S. 45 (1905) 16

Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp., 418 S.W.2d 173 (Mo. banc 1967) 10

Nebbia v. New York, 291 U.S. 502 (1934) 16, 17

New Motor Vehicle Board of California v. Orrin W. Fox Co., Inc., 439 U.S. 96 (1978) 17

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 6

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) 22

Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1989) 22

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 16

Statutes

Section 328.010(1), RSMo 5

Section 329.010(5)(a), RSMo 5

Rules

Rule 56(a), F.R.C.P. 4

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Defendants	)	

Defendants' Memorandum in Support of
Motion for Summary Judgment

I. Introduction

This is a civil rights action brought by the Plaintiffs, Ndioba Niang and Tameka Stiegers, who practice a form of hair styling they identify as African-style Hair Braiding (ASHB). Plaintiffs seek to have this Court declare that the United States Constitution forbids the State of Missouri to enforce its statutory provisions for the licensure of hair care professionals against practitioners of the particular variety of hair styling they provide. The Defendants are the Executive Director and the members of the Missouri Board of Cosmetology and Barber Examiners, which is charged by the Missouri Legislature with licensing hair care professionals (barbers and cosmetologists) and enforcing state laws prohibiting the unlicensed practice

of these professions. Plaintiffs contend that requiring them to complete the mandated training and qualification for licensure as hair care professionals in order to practice their style of hair care violates their rights to due process, equal protection, and privileges and immunities.

II. Issues Presented

Two issues are presented by this complaint:

1. Does the State of Missouri have legitimate state interests in the regulation of the professions relating to the styling of hair, including African Style Hair Braiding?

2. Is the statutory scheme chosen by the state legislature which requires a person engaged in hair care professions to hold a license as either a cosmetologist or a barber, rationally related to the accomplishment of those state interests?

III. Standard for Summary Judgment

Rule 56(a), F.R.C.P., states that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986). Summary judgment should be entered against a party who, after adequate time for discovery and upon motion, fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

IV. Argument

A. African-Style Hair Braiding is a Style within the Definition of Cosmetology and/or Barbering

The definitions of barbering and cosmetology in the Missouri statutes are broadly defined to encompass all forms of hair care and styling. Section 328.010(1), RSMo, defines a "barber" as "any person who is engaged in the capacity so as to shave the beard or cut and dress the hair for the general public." Under the definitions of cosmetology, Section 329.010(5)(a), RSMo, defines the occupation of "Class CH – Hairdresser" to include "arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means." Such services may also be performed by the holder of a Class CA cosmetology license.

By its nature, African-style hair braiding falls within the definition of "cosmetology," as it involves "arranging, dressing, … cutting, .. or similar work upon the hair of any person." The Board has determined that persons performing hair braiding must have a cosmetology license. In the course of reviewing the definitions for this proceeding, the Board also concluded that braiding could be construed as "dressing hair" such that it could be legally performed by one holding a barber license as well, although it has generally been treated as cosmetology.

There is no separate profession of hair braiding recognized under Missouri law. Hair braiding is, by its very nature, a form of hair care and styling. IT involves the manipulation of hair for aesthetic effect, it has health and safety consequences just as other forms of hair care do, it is performed in salons using tools similar to other hair care services. It is a specialized style within the larger practice of hair styling. The Missouri legislature has the power to determine what professions should be licensed, how those professions should be defined, and what qualifications practitioners in those professions need to have.

The legislature cannot be expected to anticipate and provide distinct licenses for every group of specialists within a licensed profession who come to consider themselves a separate discipline. A person cannot simply select a

small area of concentration within a recognized profession and expect to be exempted from the general qualifications for that profession. A paralegal who decides to prepare only uncontested divorce petitions does not have a Constitutional right to be exempted from attending law school and learning about taxes, estates, and Federal procedure, even if she will never use that knowledge. An aspiring physician cannot elect to pursue only an arcane specialty within the profession, and assert that the Constitution protects her from having to take the full medical school course load and pass an examination dealing with body systems she will never address.

The legislature's determination of the bounds of each profession may not be perfect, but as long as there is a rational basis for its determinations, it is not the role of the judicial system to carve out exceptions and recognize new occupations from the specialized applications of that profession.

B. The Question to Be Decided is Whether Missouri's Statute Meets the Rational Basis Test

The constitutional guarantees of due process and equal protection do not empower the Federal courts to pass judgment on the wisdom, fairness, or logic of legislative choices. The power to determine what professions will be licensed, what the boundaries of those professions will be, and what qualifications will be required of persons seeking licensure in those

professions is vested in the state legislatures, not the courts. A person challenging a legislative determination on Fourteenth Amendment grounds bears the duty to show that the legislative action does not bear a rational relationship to a legitimate state interest. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 40 (1973).

The determination to be made under the rational relationship test involves two steps. First, is a legitimate state purpose served by the legislative determination? Second, does the solution chosen by the legislature bear a rational relationship to achievement of that purpose?

The rational relationship test does not require that the legislative solution be ideal or the most fair to all parties. Rational basis review requires broad deference to legislative choices, and a strong presumption of validity attaches to the statute. *FCC v. Beach Communications*, 508 US 307, 314-315 (1993). The Fourteenth Amendment does not allow courts to determine whether the state policy is the most wise or fair or perfect approach, only to determine whether it meets the standard of rationality. *Dandridge v. Williams,* 397 U.S. 471, 486 (1970).

C. Missouri's Licensing Scheme is Rationally Related to the Legitimate State Interests in Regulating the Hair Care Professions

Counsel for Plaintiffs asked variations of the same question countless times during the discovery phase of this case: "Is [a particular requirement] necessary in order for individuals to safely practice braiding?" The question incorporates three assumptions which are not valid in rational basis analysis.

- The first assumption is that the legislature of Missouri was required to specifically consider the safety requirements of African-style hair braiding in its general consideration of the subject of determining the licensing scheme for the hair care professions. In fact, the state is not required to anticipate and provide for every variant within a generally defined profession.

- The second is that the state is required to prove that a chosen requirement is necessary, when in fact the plaintiffs bear the burden of proving that the legislative choice is not rationally related to any legitimate state objective.

- The third assumption is that a requirement is only justified if it is required for health and safety purposes, when in fact a rational

connection with any legitimate state interest is a valid justification for a legislative restriction.

D. Missouri Has Several Legitimate State Interests in Regulating the Hair Care Professions

The state of Missouri has several legitimate state interests in the licensure and regulation of the hair care professions. For over a century, the Missouri courts have recognized that barbering (and by extension, cosmetology) involve significant health and safety issues. In 1901, the Supreme Court of Missouri identified the primary purpose of the barber licensing statute as promoting the health and safety of the public:

> [I]ts purpose, expressed not only in the title of the act, but all through its body, is to regulate the business and to prevent the spread of contagious diseases; and these purposes are clearly within the police power of the state, and tend to promote the health of the people.

Ex parte Lucas, 61 S.W. 218, 221 (Mo. banc, 1901). At the time the decision was made, barbering consisted primarily of cutting, shaving, and shaping hair. The health and safety interest of the state is not grounded in the use of chemicals, but in the profession of hair care generally.

The evidence in this case strongly demonstrates that African-style hair braiding is not a harmless aesthetic practice, as claimed in the complaint.

The Defendants offered the testimony of two distinguished dermatologists with extensive experience in hair and scalp issues with an African-American clientele and numerous publications, both of whom described at length adverse health consequences that can arise from improperly performed braiding and a failure to abide by sanitations standards. Plaintiffs called no physicians or medical experts to dispute this evidence. The evidence that there is a substantial state interest in health and safety is not just compelling; it is uncontradicted.

Although it is clear beyond dispute that Missouri has a significant health and safety issue in regulating the hair care professions, that is not the only legitimate state interest involved. In their response to Plaintiffs' Interrogatory No. 1, the Defendants identified several state purposes served by the licensing requirement that do not involve health and safety, including:

- That certain character and fitness requirements are met, including review of the professional and criminal history of applicants;

- That the public be protected through inspections, practice standards, and accountability through professional discipline for misconduct;

- That individuals who become unable to serve the public due to disability, lack of competence, financial problems, criminal conduct, discipline in other jurisdictions, and other disqualifying factors can be precluded from continuing to practice;
- That competence and accountability be required to prevent false advertising and misleading of the public; and
- That applicants be trained in business practices for purposes of consumer protection.

Health and safety is not the only basis on which licensure for the practice of professions requiring skill and expertise may legitimately be based. Missouri requires licensure for and regulates many professions with no significant health and safety connotations, such as attorneys, accountants, land surveyors, and real estate brokers. Protecting the public from fraud and dishonest conduct and assuring the professional competence of people holding themselves out as qualified to practice a profession are legitimate state interests which the state may rightfully protect through a licensing requirement. *Miller Nationwide Real Estate Corp. v. Sikeston Motel Corp.*, 418 S.W.2d 173, 176–77 (Mo. banc 1967); *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Com'n,* 344 S.W.3d 160, 166 (Mo. banc 2011).

The licensing system provides three essential functions, about only one of which the Plaintiffs complain.

First, the licensing system determines initial qualification. The Plaintiffs attack the educational requirement of 1500 hours for a cosmetology license (1000 hours for a barber license), much of which they will not use in a practice devoted solely to braiding. The Plaintiffs' argument assumes that they are qualified in the first place – that they have the training and competence to braid hair safely and provide value to consumers. The individual plaintiffs may have training in unaccredited settings, but this cannot be assumed with regard to all persons who might claim the qualification to do so. Granting the plaintiffs the relief they seek will not mean that highly trained and qualified braiders can offer services to the public – it would mean that anyone can, regardless of qualification. Anyone could put up posters and start charging the public for braiding services, regardless of whether they are properly trained or not. The public would have no assurance they are qualified, and no recourse if they are not.

Qualification is not limited to education. The Board's application process screens for a variety of factors, including but not limited to whether the applicant has a criminal history or has been disciplined for misconduct in another state. Judicial deregulation would remove these screens, and allow

anyone, regardless of personal or professional history or acts of bad character, to draw the public in with the promise of hair braiding services.

The second function the licensing system provides is inspection. A staff of twelve inspectors visits each barbering and cosmetology facility on a regular basis, reviewing whether the practices found in the facility comply with state regulations regarding sanitation, facility management, and best practices [Exhibit K, Orr Deposition , 6-9]. The inspectors use a checklist to monitor whether proper procedures are being followed. Minor violations are often found and corrected on the spot, while more serious or continuing violations may result in followup visits and referral for discipline if not corrected [Exhibit K, Orr Deposition , 9-12]. This process is an essential part of the Board's role in protecting the public and assisting licensees to correct and improve their practice for the benefit of their clients. Both inspectors testified that they have inspected licensed and unlicensed braiding facilities and found health-related and other violations. Indeed, Orr found minor, easily correctible violations in her inspections of the facilities of both Plaintiffs [Orr deposition, 13-18]. Conner testified about a hair braiding establishment she inspected that had numerous and serious health violation issues [Conner deposition 21-29].

The Board has no jurisdiction to inspect any facility unless they are licensed or there is reason to believe that services falling within the definitions of either barbering or cosmetology are being performed. If this Court were to perform a judicial deregulation by determining that hair braiding is not covered under those statutory definitions or that the Plaintiffs are not subject to the jurisdiction of the Board, no one in Missouri would have the authority to perform inspections on any facility that declared itself a braiding establishment, and the kind of sanitation violations the inspectors found in the braiding facilities would go undetected and uncorrected. Establishments performing hair braiding services outside the scope of the Board's authority would not be subject to routine inspections, and the Board's ability to find and address related activities which do constitute cosmetology would be greatly reduced.

The third function the licensing system provides is accountability through discipline. The inspectors testified that licensees who fail to correct violations may be referred to the Board for discipline. The Board provided, in response to Plaintiffs Interrogatory No. 11 and Request for Production of Documents No. 7, copies of documents on 18 cases that resulted in discipline against persons practicing African-style hair braiding [Exhibit A, 11-12]. Many of these cases involved sanitation violations or other failures to meet

standards, other than lack of licensure. Judicial deregulation of hair braiding would cut off the ability of the Board to take action to correct, and if necessary to shut down, practitioners who are performing services in a way that threatens the interests of their clients or the public. Aggrieved consumers would have no recourse other than the expensive and in many cases futile remedy of retaining private counsel and bringing legal action against practitioners who may be financially irresponsible, or who may not even be found when the sheriff comes to serve the papers.

E. Missouri's Licensing Scheme Is Rationally Related to the Achievement of Its Legitimate State Interests

The Plaintiffs argue that the Missouri requirement that persons engaged in providing hair care services to the public must be licensed is unconstitutional because it requires them to take a more extended course of qualification than they wish to use in their specialized practice.

The Board has never contended that the Missouri licensing scheme is perfect. The Board has twice voted to support legislation that would create a distinct license for hair braiding, with a lower number of hours required, and a distribution of hours to provide hair braiders with more specific instruction directly related to hair braiding. But the authority to determine what qualifications will be required for braiders, along with any other hair care

professionals, does not lie with the Board, nor the Plaintiffs, nor even the Court. It lies with the legislature. Until the Missouri legislature decides either to exempt braiders from the definitions of "arranging" or "dressing" hair, the question that must be answered is whether the legislature's determination to require either a barber or cosmetology license for such actions is rationally related to the state's legitimate public interests in protecting the public with regard to all hair care professionals, including braiders.

The curriculum followed by the approved schools and the examinations prepared by the National Interstate Council (NIC) are not designed to prepare and test one's preparation to engage in only African-style hair braiding. They are designed to teach and test one's ability to serve as a competent hair care professional. The practitioner who aspires to perform braiding can build on that foundational knowledge, but it is not irrational for the legislature to require that such a person have such a foundation before they can offer hair care services to the public for compensation.

A. Treating ASHB as a Hair Car Profession Does not Violate Substantive Due Process

Missouri's licensing scheme does not violate any right to substantive due process the Plaintiffs possess. The Supreme Court has stated,

> Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.

Lawrence v. Texas, 539 U.S. 558, 593 (2003).

In recent years the Supreme Court has primarily applied the concept of substantive due process in areas of personal liberty. During the laissez-faire era of the late 19th and early 20th centuries, substantive due process was invoked to invalidate state regulations on economic activity, notably in *Lochner v. New York*, 198 U.S. 45 (1905). However, the Supreme Court decisively turned away from application of the principle in such economic contexts, sharply reducing its scope and essentially overruling it in cases such as *Nebbia v. New York*, 291 U.S. 502 (1934), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). By 1978, the Supreme Court noted the demise of the *Lochner* principle:

> At least since the demise of the concept of "substantive due process" in the area of economic regulation, this Court has recognized that legislative bodies have broad scope to experiment with economic problems. States may, through general ordinances, restrict the commercial use of property and the geographical location of commercial enterprises. Moreover, certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. **Statutes prescribing the terms upon which those**

> **conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.**

New Motor Vehicle Board of California v. Orrin W. Fox Co., Inc., 439 U.S. 96, 106-107 (1978) [internal citations omitted, emphasis added].

The Supreme Court has stated,

> The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. … We are not concerned with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems…. It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

Ferguson v. Skrupa, 372 U.S. 726, 730-731 (1963).

The Supreme Court specifically held that the state may condition the right to a business or to pursue a calling on reasonable restrictions to protect the public interest. *Nebbia v. New York,* 291 U.S. at 512. Requirements of licensure to perform a wide variety of professions and occupations are

universal in the United States, and the constitutionality of such requirements is unquestioned.

The complaint errs in claiming that the Plaintiffs enjoy a fundamental liberty interest in practicing a particular form of hair styling, such that the Due Process Clause prevents the state from requiring that they demonstrate their competence and abide by the same standards of practice that are applied to those who offer other kinds of hair care to the public. The Due Process Clause does not require the state to carve out a special license for a particular style of practice within a profession which the state, for many valid reasons, has determined that licensing is necessary. Count I alleging violations of the Due Process Clause does not state a cause of action and should be dismissed.

B. Treating ASHB as a Hair Care Profession Does Not Violate Equal Protection

In Count II, the Plaintiffs allege that the state of Missouri has violated their right to equal protection of the laws not by treating them differently than similarly situated persons, but by treating them the same as other hair care professionals. Plaintiffs construct three theories in search of an equal protection issue.

The first theory, stated in Paragraph 124 of the complaint, seems to contend that because African-style hair braiding is not a mandatory part of the cosmetology or barbering curricula, braiders are treated unequally in being required to qualify for licensure in a hair care profession before providing hair care services to the public. As argued above, African-style braiding is not a separate profession, but a specialty within the hair care professions. African-style braiders are not treated any differently than any other aspiring hair care professionals. They must learn the basics of the profession before they can proceed to practice in a specialty.

The second theory argues that braiders are unfairly treated the same as cosmetologists or barbers, based on a premise that they do not provide cosmetology or barber services. The premise is invalid, because, as shown in Section IV(a) above, hair braiding does fall within the statutory definition of cosmetology or barbering. The argument also misunderstands the purpose of the qualifying education, which is not to teach every specialized practice area, but to provide a basic foundation on which the hair care professional later builds with experience and continuing education, once he or she decides to pursue a specialty or area of concentration within the profession.

It is no violation of equal protection that applicants aspiring to specialize in African-style hair braiding must study core curriculum in which

they are not interested. All prospective hair care professionals must study the basic curriculum, whether or not they plan to use the skills taught in some of the specified courses. African-style braiders are not the only students required to study subjects they may not need, nor are they treated differently than any aspiring other hair care professional.

Like any other professional who desires to specialize, the remedy is not for the specialist to sue to be relieved of the education requirements; it is to choose a school that offers the courses and instruction best suited to the applicant's area of interest. The evidence shows that many Missouri schools do teach African-style braiding. The practitioner interested in concentrating in that area has the option of investigating and enrolling in one of those schools.

The third theory advanced in Paragraph 126 of the Complaint argues that the fact that licensure is required only when braiding services are performed for compensation is not rationally related to health and safety. Again, the complaint errs in assuming that health and safety is the only basis on which a restriction on economic activity may be grounded. The state also has a legitimate consumer protection interest in assuring that consumers are not defrauded by unqualified persons holding themselves out as able to perform services requiring professional qualification and expertise.

Moreover, the premise that the Equal Protection Clause forbids a state to license one who performs a business for compensation unless it also proscribes that service when performed for free has implications bordering on the absurd. To follow the logic of this argument, the state cannot require barbers to have a license to cut hair, unless it also prohibits parents to cut their children's hair in the kitchen. The Equal Protection Clause does not compel such a ridiculous result. It is a legitimate exercise of legislative discretion for the state to impose requirements for licensure and expend state funds on enforcement only as to persons who hold themselves out as qualified and willing to perform professional services for compensation.

C. Treating ASHB as a Hair Care Profession Does Not Violate the Privileges and Immunities Clause

The Supreme Court has described the effect of the Privileges and Immunities Clause as establishing equality of opportunity across state lines for citizens to engage in economic opportunity. The Court has stated:

> The purpose of the Clause… is to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of

> happiness; and it secures to them in other States the equal protection of their laws.

Hicklin v. Orbeck, 437 U.S. 518, 524 (1978). The focus of the clause is not to establish rights of citizens regarding their own state of residence, but to address the equality of citizens across state lines.

As to occupational licensing matters, the Privileges and Immunities Clause has found application primarily in the context of economic activities that cross state lines. Several cases have addressed licensing provisions that impose different standards or requirements on nonresidents than those residents must meet. For instance, courts have applied the doctrine to hold that states may not establish barriers to prevent or burden out-of-state lawyers from admission to the state bar. See, for instance, *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), and *Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1989).

However, the Supreme Court has not interpreted the Privileges and Immunities Clause to require that all states have the same standards for licensure or license all the same professions that might be recognized in another state. Occupational and professional licensure in the United States remains primarily a matter of state law, and the Privileges and Immunities clause does not compel the states to license any person who might be licensed

elsewhere or who is unwilling to comply with the state's uniformly applied laws for licensure.

V. CONCLUSION

The Complaint fails to set forth a cause of action on which the Plaintiffs are entitled to relief, and the Court should grant the Defendants' Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2015, I electronically filed the foregoing with attachments with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all CM/ECF participants.

/s/ Edwin R. Frownfelter

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