IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WOODMAN'S FOOD MARKET, INC., Plaintiff-Appellee,

٧.

THE CLOROX CO. AND THE CLOROX SALES
CO.,

Defendants-Appellants

On Appeal from the United States District Court for the Western District of Wisconsin No. 14-cv-00734-slc Hon. Stephen L. Crocker

BRIEF OF AMICUS CURIAE THE FEDERAL TRADE COMMISSION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE

The Federal Trade Commission, an agency of the United States, files this brief under Federal Rule of Appellate Procedure 29(a). The Commission seeks to assist the Court in interpreting Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e).

The FTC has authority to enforce the Robinson-Patman Act, *see* 15 U.S.C. §§ 21, 45, and publishes nonbinding, interpretive guidance to help businesses comply with Section 2(e), *see* 16 C.F.R. §§ 240.1-240.15. The district court's February 2, 2015, order relied heavily on FTC administrative decisions and guidance. The Commission is concerned that an overbroad interpretation of this provision could contradict other settled antitrust policies.

INTRODUCTION AND SUMMARY

The Robinson-Patman Act forbids sellers of goods from discriminating between competing buyers. Section 2(a) of the Act prohibits direct or indirect price discrimination, and Section 2(e) of the Act prohibits indirect price discrimination masked as promotional services or facilities. 15 U.S.C. § 13(a), (e). Because Congress understood that price discrimination is often procompetitive, Section 2(a) prohibits price discrimination only if it would "substantially ... lessen competition." In contrast, Section 2(e) categorically bans all discrimination within its ambit, whether it harms or promotes competition. Because an overbroad application of that categorical ban would reduce consumer welfare, courts today narrowly construe Section 2(e) to reach only obviously promotional activities, thereby requiring plaintiffs to rely on Section 2(a) instead for most claims of price discrimination.

The question in this case is whether offering a specific package size qualifies se m4Tso 9 rimination onlrat]TJheth.c8(e) t c.c8s Td (rW]TJheth.0m4r)]uWion 2(e 0 Tc 0.0022 Tv

instead, it prohibits discrimination only in genuinely promotional services or facilities distinct from the product itself.

Here, Woodman's allegations do not state a plausible daim that Clorox violated that narrow prohibition. Woodman's first daims that it is losing sales because consumers want large-sized packages. A.15-17 (¶¶ 59, 66-67). But this is not the sort of discrimination covered by the Robinson-Patman Act. For decades, courts have recognized that manufacturers may decide with whom they will deal and that such choice benefits consumers. Although the district court held that Section 2(e) requires equal distribution of package sizes because size "is connected to" resale (S.A.8), this logic would apply not just to size, but to any desirable product attribute. That rule would radically expand the scope of Section 2(e), subvert efficient manufacturer-retailer relationships throughout the economy, and contradict the central principles of modern antitrust law.

Woodman's also claims that it must now pay, at wholesale, a higher per-unit price for Clorox products than some of its rivals, placing it at a disadvantage in the retail marketplace. A.14-16 (¶¶ 53, 60). This is the exact sort of contention for which Section 2(a)—and its competitive harm test—were designed. But Woodman's is not pursuing a Section 2(a) violation; it invokes only Section 2(e)'s categorical prohibition. In allowing Woodman's suit to proceed, the district court opened the door for plaintiffs to invoke Section 2(e) to circumvent the limiting principles that Congress deemed necessary for price discrimination claims properly brought under Section 2(a).

the customer. *Id.* The Guides go on to offer several examples of a service or facility that could be covered by Sections 2(d) and 2(e) if they primarily promoted resale, including cooperative advertising, demonstrations, catalogues, displays, prizes, and—of particular relevance here—"[s]pecial packaging, or package sizes." *Id.*

B. Facts And Procedural History

In 2014, Clorox stopped selling "large pack" versions of several products—including food storage bags, kitty litter, lighter fluid, bleach, and salad dressing—to Woodman's, a grocery chain with 15 stores in Wisconsin and Illinois. Clorox notified Woodman's that it would sell these large packs only to membership-based "dub" retailers such as Sam's Club and Costco, and no longer to "General Market" retailers such as Woodman's. Clorox continued to offer smaller-sized packages to Woodman's.

Woodman's sued Clorox in the Western District of Wisconsin, alleging that Clorox's decision violated Sections 2(d) and 2(e) of the Robinson-Patman Act.

Woodman's claimed that Clorox's actions harmed it in two ways: First, because the large packs have a lower wholesale price-per-unit, Woodman's must pay higher prices than Sam's Club or Costco for Clorox products. A.14-16 (¶¶ 53, 60). Second, Woodman's has lost sales from retail customers who prefer large packs due to their lower unit price and superior convenience. A.15-17 (¶¶ 59, 66-67).

Clorox moved to dismiss the Complaint on the ground that these allegations failed to state a claim under Sections 2(d) and 2(e) because the sale of packages in large sizes is not a promotional service. On February 2, 2015, the district court denied Clorox's motion and ruled that package size is a promotional service. No

court had ever addressed the question, but the district court relied on "a pair of old-but-never-revoked" FTC administrative decisions finding that sellers violated Section 2(e) when they declined to supply certain buyers with product sizes that retail customers found desirable. S.A.7 (discussing *Luxor Ltd.*, 31 F.T.C. 658 (1940), and *General Foods Corp.*, 52 F.T.C. 798 (1956)). The court also observed that the FTC's *Fred Meyer* Guides still list "special packaging, or package sizes" as examples of a promotional service. *Id.* at 7-8. Deeming *Luxor* and *General Foods* "dispositive," the court concluded that Clorox's large packs were a promotional service because their "special size ... is connected to the resale of those products."3 *Id.* at 8.

ARGUMENT

Although Woodman's contends that "providing a customer with a large pack of a particular product constitutes the provision of a promotional service," A.10 (¶ 28), Wood03 Tc 0.0T03 Tc /G 48is coorox9

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Co., 489 F.2d 904, 909 (7th Cir. 1973) (emphasis added); see also Gibson, 95 F.T.C. at 725-26. Section 2(e) does not prevent a seller from offering services other than promotional ones, or from distributing products in different types, quantities, or styles, to particular buyers.

A.

2(e) to "eliminate these inequities." *Simplicity*, 360 U.S. at 69; *see Fred Meyer*, 390 U.S. at 352.

Because discriminatory promotional assistance can be difficult to detect, *see Simplicity*, 360 U.S. at 68 & n.12, Congress drafted Sections 2(d) and 2(e) to impose a flat ban on such practices. Unlik

particular, Section 2(e) requires a showing that (1) the defendant provided advertising or other promotional services on disproportionate terms, and (2) the services promoted the product's resale. *See, e.g., Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 379 (4th Cir. 1992); *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1119 (5th Cir. 1982); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317 (9th Cir. 1979); *Gibson*, 95 F.T.C. at 725.

B. Applying Section 2(e) To Require That Sellers Distribute Products Uniformly To All Customers Would Contradict Settled Antitrust Policies And Deter Procompetitive Behavior

Courts read Section 2(e) narrowly for a simple reason: Because the statute requires no evidence of competitive harm, it may deter conduct that *benefits* competition and consumers, undercutting the basic purpose of antitrust law. The "primary concern" of antitrust law is to promote consumer welfare through competition between brands, and "[t]he Robinson-Patman Act signals no large departure from that main concern." *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180-81 (2006). Courts thus "construe the [Robinson-Patman] Act consistently with the broader policies of the antitrust laws." *Id.* at 181 (quotation omitted); *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 74 (1953). The Supreme Court has warned against interpreting the Act in ways "geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo*, 546 U.S. at 181.8 An expansive interpretation of Section 2(e)

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would ignore that warning and undercut longstanding antitrust principles to the detriment of consumer welfare.

Under bedrock antitrust principles, manufacturers ordinarily may choose the retailers with whom they do business or to whom they sell specific products. Absent monopoly or collusion, a seller is free to "exercise his own independent discretion as to parties with whom he will deal" and "announce in advance the circumstances under which he will refuse to sell." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The Robinson-Patman Act expressly adopts this principle: Section 2(a) provides that "nothing herein shall prevent persons engaged in selling goods ... in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." 15 U.S.C. § 13(a). This Court has recognized that Section 2(e) similarly allows a seller to choose its customers. *See Harper Plastics, Inc. v. Amoco Chems. Corp.*, 617 F.2d 468, 470 (7th Cir. 1980).

By generally entitling manufacturers to choose the terms on which they will do business, modern antitrust doctrine reflects sound economic principles. In competing against other products, a manufacturer must decide whether to sell to many dealers that meet only a minimum "quality" threshold or instead to only a few dealers that meet "highly selective" standards. VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1441c1 (3d ed. 2010). A manufacturer may decide to

696 (1984). See also Hinkleman, 962 F.2d at 380-81 ("Because application of a per se rule risks adverse consequences, we prefer to limit the scope of section 2(e) to that necessary to fulfill the section's purposes.").

limit the number of dealers "to allow each a sales volume sufficient for efficient operation." *Id.* A manufacturer's decision to sell products only to specific dealers may "induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the effi

desirable product mix than other customers. *See Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976) (supplier's sale of "additional products ... to some of its customers ... as opposed to advertising or promotional services, is not actionable" under the Robinson-Patman Act); *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 55 (4th Cir. 1974) (discrimination in "the commodity itself, as opposed to a service or facility connected with the resale of the commodity ... places this case beyond the pale of Robinson-Patman").9

Because Section 2(e) does not bar discrimination in the sale of products, a plaintiff alleging a violation of that provision must show discrimination in an advertising or other promotional service distinct from the product itself. For example, "the supplier must become active in the resale of the product, by ... providing display materials or free advertising." *L & L Oil*, 674 F.2d at 1119 (citations omitted); *see also Hinkleman*, 962 F.2d at 380 (Section 2(e) only covers services that "actively promote" resale).

If a charge of discrimination does not involve advertising or similar services promoting resale, a plaintiff must bring its claim under Section 2(a) and not Section 2(e). The drafters of the Robinson-Patman Act made clear that "the bill should be inapplicable to the terms of sale except as they amount in effect to indirect

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⁹ See also Purdy Mobile Homes, 594 F.2d at 1318 ("refusal to sell a line of products to a prospective customer while maintaining sales of the product to other customers is ... not the type of discrimination prohibited by the Robinson-Patman Act"); Cecil Corley Motor Co. v. General Motors Corp., 380 F. Supp. 819, 848 (M.D. Tenn. 1974) (the Act does not cover a "claim that a manufacturer has discriminated in the allocation of available supplies of its product").

discriminations in price" under Section 2(a). H.R. Rep. No. 74-2951, at 5 (1936). As the Fourth Circuit explained in *Hinkleman*, "nonpromotional forms of direct or indirect discrimination should be judged under the more flexible standards of section 2(a) so that the courts can protect procompetitive behavior from prosecution." 962 F.2d at 380-81. This Court has similarly rejected attempts "to include within the provisions of §§ 2(d) and (e) such activity or conduct, clearly covered by § 2(a)." *Chicago Spring Prods. Co. v. U.S. Steel Corp.*, 371 F.2d 428, 429 (7th Cir. 1966); *see also Kirby*, 489 F.2d at 910 (rejecting "the theory that §§ 2(d) and 2(e) proscribe acts which are themselves prohibited by § 2(a)"); *Gibson*, 95 F.T.C. at 726 ("courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)").

Under Section 2(a), once a retailer shows that it had to pay a higher wholesale price for a product, it does not necessarily prevail; instead, liability arises only if the practice caused competitive harm and the defendant does not establish

respondent's products." *Id.* at 664. The Commission ordered Luxor not to "furnish[] any ... commodity packaged in containers of a certain size and style unless all purchasers competing in the resale of such commodity are accorded the facility of packaging in containers of like size and style, on proportionally equal terms." *Id.* at 665.

The Commission reaffirmed *Luxor* without explanation in the 60-year-old *General Foods* case, ruling that a manufacturer violated Section 2(e) by failing to sell coffee in "institution"-size packaging on equal terms to competing wholesalers, who were able to buy only smaller, "grocery"-size coffee packages. 52 F.T.C. at 826. Citing *Luxor*, the Commission rejected the manufacturer's argument that "varied packaging is not included within ... [Section 2(e)]." *Id.*

The FTC is unaware of any cases concerning differential package size in the nearly 60 years since *General Foods*. Indeed, despite *Luxor* and *General Foods*, differential package sizes sold to varying retailers are now commonplace. The FTC does not consider *Luxor* and *General Foods* good law.

A. Post-Luxor Decisions Have Confined Section 2(e)'s Scope To

scope."¹⁰ *Gibson*, 95 F.T.C. at 725-26; *see also General Motors Corp.*, 103 F.T.C. 641, 696 (1984). *Luxor* recognized no such limiting principles. It instead effectively mandated that manufacturers treat retailers equally in all respects that could result in "the loss of a sale" or "the loss of a ... customer." *See* 31 F.T.C. at 664. *Luxor* also did not consider the legislative history of Section 2(e), which reveals that Congress's purpose was to prohibit "special [promotional] allowances" that enable a favored retailer "to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." *Fred Meyer*, 390 U.S. at 351 (quoting S. Rep. No. 74-1502, at 7 (1936)).

True to this history, almost all cases finding a valid Section 2(d) or 2(e) claim since *Luxor* have involved (1) subsidized advertising or other promotional services, which (2) relieved the buyer of costs it otherwise would have incurred, and thus (3) amounted to indirect price discrimination.¹¹ Consider the following examples:

- x Fred Meyer, 390 U.S. at 345-46: Suppliers paid for their products to appear in coupon books distributed by a grocery chain.
- x *Simplicity*, 360 U.S. at 60: A dress pattern manufacturer provided certain buyers with free display cabinets and catalogues.

¹⁰ Clorox is wrong, however, to assert (at 16, 41-42), that the Commission "abandoned" *Luxor* and *General Foods* in *Universal-Rundle Corp.*, 65 F.T.C. 924, 954-55 (1964). That decision addressed the Robinson-Patman Act's "like grade and quality" requirement, *see infra* note 13, and did not consider whether package sizes are a promotional service.

¹¹ But see supra note 6 (discussing Centex-Winston, 447 F.2d at 588); see also L & L Oil, 674 F.2d at 1119 ("Except for Centex-Winston and the cases adopting its holding [that Section 2(e) covers product delivery], the only arrangements courts have found to be services or facilities are those relating to promotional favors.").

- x Corn Products Ref. Co. v. FTC, 324 U.S. 726, 743-44 (1945): A dextrose seller paid to advertise a buyer's candy as "rich in dextrose."
- x *P. Lorillard Co. v. FTC*, 267 F.2d 439, 445 (3d Cir. 1959): Sellers purchased TV broadcast time for their grocery chain store customers.
- x Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 994 (8th Cir. 1945): A seller paid for sales derks to promote its perfumes in a buyer's department stores.

per se rule—that manufacturers distribute their products uniformly to all buyers, whether or not doing so is efficient or good for consumers.

Luxor's failure to consider economic consequences is especially troublesome because its logic goes far beyond package size alone. Luxor rests on two premises: (1) there is "public demand" for different-sized packages, and (2) the inability of a retailer to sell each size may result in lost sales and lost customers. 31 F.T.C. at 663-64. But innumerable attributes of a product and its packaging might conceivably attract "public demand." Carried to its logical conclusion, that reasoning would thwart efficient manufacturer-retailer relationships in countless settings throughout the economy. Manuf

channel differentiation, and other forms of interbrand competition that may enhance consumer welfare. As discussed, antitrust serves consumer interests by giving manufacturers wide latitude in deciding how to allocate their products among potential dealers. See Areeda & Hovenkamp ¶ 1441c; GTE Sylvania, 433 U.S. at 54. "Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations." Volvo, 546 U.S. at 181 n.4. Because Luxor elevates intrabrand competition above interbrand competition—and individual competitors above the competitive process—it does not reflect an antitrust-grounded interpretation of the Robinson-Patman Act. See id. at 181.

Thus, Section 2(e) should be read not as Luxor read it, but instead to require a plaintiff to demonstrate that a seller provided a promotional service distinct from the product itself. On that reading, Woodman's cannot state a plausible claim under Section 2(e) on the theory that it was deprived of products that customers desire. See A.15-17 (¶¶ 59, 66-67).

Nor does Section 2(e) provide a basis for Woodman's grievance that "because the unit price on these large pack items is significantly lower than ... for small packs ... Sam's Club and Costco are generally able to buy and ultimately sell these large pack items at significantly lower unit costs." A.15 (¶ 53). That is a claim of overt price discrimination covered by Section 2(a), which requires evidence of competitive injury. Section 2(a) is the exclusive remedy when, as here, a buyer alleges that discrimination in the "original sale" of products has increased the

buyer's "cost of doing business." *O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117, 121 (E.D.N.Y. 1983); *see also FTC v. Borden Co.*, 383 U.S. 637, 639-47 (1966) (Section 2(a) provides a remedy against a manufacturer that engages in price discrimination when selling milk of "like grade and quality" to different retailers under different packaging); *Chicago Spring*, 371 F.2d at 429 (Section 2(e) does not apply to claims "clearly covered" by Section 2(a)).¹³

In sum, Woodman's does *not* allege the type of hidden, promotional discrimination that Section 2(e) was meant to combat. *See Simplicity*, 360 U.S. at 68 & n.12 (Sections 2(d) and 2(e) induce sellers "to confine their discriminatory practices to price differentials, where they could be more readily detected").

III. SECTION 2(e) PROHIBITS DISCRIMINATION IN PACKAGE SIZES ONLY WHEN THE SIZE PRIMARILY SERVES A PROMOTIONAL FUNCTION

The FTC's Fred Meyer Guides state that Section 2(e) covers only services or facilities that are "used primarily to promote resale of the seller's product by the customer." 16 C.F.R. § 240.7. The Guides list several examples of promotional

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Section 2(a) claim based on a manufacturer's sale of an identical substance in different-sized packages. Section 2(a) applies to price discrimination in the sale of products of "like grade and quality." 15 U.S.C. § 13(a). Borden held that identical products sold in different packages are of like grade and quality. See 383 U.S. at 639-41. Clorox is correct that when products have different physical properties, courts evaluate "consumer use, preference, or marketability" in deciding whether the products are of like grade and quality. See Clorox Br. 34, quoting Checker Motors Corp. v. Chrysler Corp., 283 F. Supp. 876, 889 (S.D.N.Y. 1968). But when different packages contain an identical substance, Borden controls. See also DeLong Equip. Co v. Washington Mills Abrasive Co., 887 F.2d 1499, 1517 (11th Cir. 1989) (products labeled as "special" and "stock" were of like grade and quality because they were "physically identical," despite consumer preference for the "special" product).

services, including, as the district court noted, "[s]pecial packaging, or package sizes." S.A.7, quoting 16 C.F.R. § 240.7 (emphasis added). The district court, reading the Guides in light of *Luxor*, concluded that the term "special packaging, or package sizes" means that Section 2(e) applies even to "specially-sized products that [are] offered on a year-round basis." *Id.* at 8.

In issuing the 2014 version of the Guides, however, the Commission "under score[d] that special packaging or package sizes are covered only insofar as they primarily promote a product's resale." *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 79 Fed. Reg. 58,245, 58,249 (Sept. 29, 2014). In other words, the special packaging or package size must convey a promotional message to consumers, rather than merely satisfy market demand for lower unit prices or desirable product attributes like larger quantities.

The Guides do not adopt *Luxor* or *General Foods* and never have. In fact, in 1988, when the Commission considered deleting "special packaging, or package sizes" from the Guides' list of examples of promotional services, distributed at the 17 w 19.9223.65 u (1988).

the scenario in which "special packaging" has "appeal to [resale] customers." Guides for Advertising Allowances and Other Merchandising Payments and Services, 55 Fed. Reg. 33,651, 33,654 (Aug. 17, 1990) (emphasis added). That scenario is markedly different from that addressed in Luxor and General Foods, which required sellers to provide their entire range of package sizes for a given product to customers in all circumstances, regardless of whether the size serves a promotional function.

In updating the Guides in 2014, the Commission rejected a proposal from the ABA's Antitrust Section to delete "special packaging, or package sizes" from the list of examples of promotional services. 79 Fed. Reg. at 58,248. In so doing, the Commission maintained the view that providing a special package or package size for a product *may* amount to a promotional service under Section 2(e). The Commission illustrated this scenario with the example, "[d]uring the Halloween season, [of] a seller of multi-packs of individually wrapped candy bars offer[ing] to provide those multi-packs to retailers in

The Guides also provided a contrasting scenario in which a customer asks a

61 F.T.C. 504, 508 (1962). In that scenario, the manufacturer's primary purpose is to advertise the product, and by doing so, it has relieved retailers of promotional expenses they would have incurred by opening up standard-sized packages and dividing their contents to give away as samples.

Likewise, a manufacturer might offer a promotional service by supplying retailers with chocolates in large, football-shaped packages featuring the statements "Super Bowl Size" and "Official Chocolate of the National Football League." The promotional nature of the packaging would be even more apparent if the manufacturer supplemented the special packages with in-store display materials or advertisements in other media promoting the chocolates in these special sizes and shapes.

By contrast, the products at issue here—such as large bags of kitty litter, 120-ounce containers of bleach, and big bottles of salad dressing—are not, without more, promotional services under Section 2(e). Indeed, Woodman's does not even contend that the large-sized packages convey a promotional message: as noted, its grievances concern unit pricing and its inability to obtain desirable products. In the absence of any allegation that Clorox is offering the large packs primarily to convey a promotional message, Woodman's cannot state a plausible claim under Section 2(e), and the district court should have granted Clorox's motion to dismiss.

CONCLUSION

The district court's February 2, 2015 Order denying Clorox's motion to dismiss Woodman's Section 2(e) claims should be reversed.

Respectfully submitted,

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November 2, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7) in that it contains 6,949 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirement of Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point New Century Schoolbook.

Dated: November 2, 2015 /s/ Bradley Grossman

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CERTIFICATE OF SERVICE

I hereby certify that November 2, 2015, I filed and served the foregoing with the Court's appellate CM/ECF system. I certify that the following counsel of record are registered as ECF filers and that they will be served by the CM/ECF system:

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