CASE NO. 11-13673

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN V. FURRY, as Personal Representative of the Estate and Survivors of TATIANA H. FURRY,

Plaintiff-Appellant,

vs.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 10-cv-24524-PAS

APPELLANT'S INITIAL BRIEF

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CASE NO. 11-13673

JOHN V. FURRY,

Appellant,

vs.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA , et al.

Appellees.

_____/

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel for Appellant, hereby certify that the following is a list of persons and entities who may have an interest in the outcome of this case:

INTERESTED PERSONS

1. Rogow, Bruce S. Esq., Counsel for Appellant
2. Bruce S. Rogow, P.A., Counsel for Appellant
3. Cleary, Sean M., Esq., Counsel for Appellant
4. Sean M. Cleary, PA., Counsel for Appellant
5. Judge Patricia A. Seitz, Trial Judge
6. Bernardo Roman, III, Esq., Counsel for Appellees
7. Yinet Pino, Esq., Counsel for Appellees
8. Law Offices of Bernardo Roman, III

9. Chairman Colley Billie, Miccosukee General Council

10. Assistant Chairman Jasper Nelson, Miccosukee General Council

11. Secretary Andrew Bert Sr., Miccosukee General Council

12. Lawmaker William Osceola, Miccosukee General Council

13. John V. Furry, Plaintiff and father of decedent, Tatiana H. Furry

14. Helene Furry, mother of decedent, Tatiana H. Furry

15. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

16. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA d/b/a MICCOSUKEE RESORT & GAMING

17. MICCOSUKEE CORPORATION

18. MICCOSUKEE INDIAN BINGO

19. MICCOSUKEE INDIAN BINGO & GAMING

20. MICCOSUKEE RESORT & GAMING

21. MICCOSUKEE ENTERPRISES

22. MICCOSUKEE POLICE DEPARTMENT

CORPORATE DISCLOSURE

In regard to "corporate disclosure," there are no publicly traded companies with an interest in the outcome of this matter.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist the Court in this case. The question of tribal sovereign immunity is an important and unanswered question in the context of state enforcement of alcoholic beverage laws, *via* suits for damages by parties injured by violation of those laws. The court below recognized that neither the Supreme Court nor any federal circuit court had addressed the question in light of Title 18 U.S.C. § 1161, which requires tribes to act "in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe. . . ."

The issues presented would benefit from argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. § 1291. This is an appeal from a Final judgment entered on an Order Granting Motion to Dismiss and Closing Case.

STATEMENT OF THE ISSUES

1. Does Title 18 U.S.C. § 1161, which requires Indian tribes to abide by state law when engaging in alcoholic beverage sales, combined with an Indian Tribe knowingly and intelligently applying for and accepting a state liquor license, subject a tribe to a suit for damages by persons injured by the tribe's failure to follow state law?

2. Is tribal sovereign immunity either abrogated or waived where an Indian tribe accepts the benefits of state liquor laws pursuant to Title 18 U.S.C. § 1161?

STATEMENT OF THE STANDARD OF REVIEW

Because the Complaint was dismissed pursuant to Rule 12(b)(1) and 12(b)(6), the standard of review is *de novo* for each of the issues presented, with the Court accepting as true the allegations of the Complaint. *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009).

STATEMENT OF THE CASE

This is an appeal from an "Order Granting Motion to Dismiss and Closing Case" ending an action brought against the Miccosukee Tribe of Indians and other Miccosukee defendants seeking damages on behalf of the Estate of Tatiana Furry, "who died in a car crash after being sold substantial amounts of alcohol on Tribal property on multiple occasions such that Defendants knew that she was habitually addicted to alcohol." Order Granting Motion to Dismiss, DE: 59-1. The case was dismissed based on Tribal sovereign immunity. The district court summed up its holding this way:

> While the Supreme Court has noted that tribal sovereign immunity is "founded upon an anachronistic fiction" and has questioned the wisdom of continuing to extend it to off-reservation commercial activities, it has deferred to Congress to draw such limitations. *Kiowa* [*Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751] at 758 (citation omitted). In questioning the wisdom of the doctrine's broad application the Supreme Court has said that in today's interdependent economies, "immunity can harm those that are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* Such would appear to be the case presently before this Court. However, thus far Congress has not abrogated tribal sovereign immunity to permit private lawsuits arising from violations of state dram shop acts.

Id. DE: 59-10.

This appeal seeks reversal of the sovereign immunity dismissal because, in the unique factual, state law, and federal law circumstances of this case, the Miccosukee Tribe's conduct was not protected by sovereign immunity, or if it was, the Tribe's conduct constituted a waiver of sovereign immunity.

STATEMENT OF THE FACTS

Because the case was dismissed on a Motion to Dismiss, the facts alleged are undisputed. We set forth below the facts drawn from the Complaint.

In January 2009, Tatiana Furry was at the Miccosukee Resort and Gaming establishment and was served a "substantial amount of alcoholic beverages which she consumed on the [Miccosukee] premises." Miccosukee employees knew that Tatiana was addicted to alcohol, and before she left the premises in the early hours of January 21, 2009, Miccosukee employees "witnessed Tatiana in an obviously intoxicated condition and yet failed to prevent her from getting into her own car and leaving the premises." DE: 1-6. Soon after leaving Miccosukee Resort and Gaming, but not on Miccosukee lands, Tatiana "was involved in a head on collision" with a vehicle driven by Kent Billie, a Miccosukee Indian, and she was fatally injured. Her blood alcohol level was four times the Florida legal limit of .08. *Id.* at 7.

The Defendants, Miccosukee Tribe of Indians of Florida, Miccosukee Tribe of Indians of Florida d/b/a Miccosukee Resort & Gaming, Miccosukee Corporation, Miccosukee Indian Bingo, Miccosukee Indian Bingo and Gaming, Miccosukee Resort and Gaming and Miccosukee Enterprises, "had applied for and became licensed to sell and/or furnish alcohol by the State of Florida Department of Business and Professional Regulation, Division of Alcoholic Beverages &

Tobacco." *Id.* at 8.

The Complaint alleged liability for damages primarily on two theories: A violation of Title 18 U.S.C. § 1161[1] against all defendants except the Miccosukee Police Department (Count I) and in Count II, for a violation of § 768.125, Florida Statutes.[2] The other counts: Negligence (Count III), Negligence against the Miccosukee Police Department (IV), Negligent Hiring (Count V), Negligent Training and Supervision (VII) (*id.* at 19), will rise or fall depending upon the

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[1] Title 18 U.S.C. § 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488 and 3699, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

[2] Section 768.125 provides:

> Liability for injury or damage resulting from intoxication. A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

outcome of the sovereign immunity issue.

As to the § 1161 Count I claim, the court below acknowledged that while several state courts have addressed the import of that statute, "neither the Supreme Court nor any federal Circuit Courts appear to have addressed the exact issue before this Court - whether section 1161 constitutes an abrogation of tribal sovereign immunity for purposes of individual suits against tribes for injuries resulting from the violation of state alcohol laws. . . ." DE: 59-6.

This appeal presents that, and other issues, *vis a vis* tribal sovereign immunity in the context of the application of state liquor laws.

SUMMARY OF ARGUMENT

Title 18 U.S.C. § 1161 requires Indian Tribes to conform with State laws with respect to alcoholic beverage operations in Indian Country. The Miccosukee Tribe applied for and accepted the benefits of, and responsibilities attendant to, Florida alcoholic beverage laws. Those responsibilities included being subject to liability for serving alcohol to addicted persons who are injured, or injure others, as a result of the dram shop law violation. Section 1161 either abrogated tribal immunity, or the Tribe waived immunity by agreeing to conform to Florida law in its liquor businesses. Either way, there was no impediment to the relief sought by the Estate of Tatiana Furry.

ARGUMENT

I.

THE ADMIXTURE OF 18 U.S.C. § 1161 AND THE TRIBAL APPLICATION FOR, AND ACCEPTANCE OF, THE BENEFITS OF FLORIDA ALCOHOLIC BEVERAGE LAWS RENDERS THE TRIBE AND ITS ENTITIES AND MINIONS SUBJECT TO SUIT IN THIS CASE.

A. Indian Sovereign Immunity.

We agree that "[a]s a matter of federal law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). We also know that tribal immunity was an after-thought and that the case upon which it was constructed, *Turner v. United States*, 248 U.S. 354 (1919), "simply does not stand for that proposition," and that the *Turner* language "is at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine." *Kiowa*, 523 U.S. at 756-57.

We know that the Supreme Court has voiced doubts about preserving the doctrine:

> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been necessary to protect the nascent tribal governments from encroachment by states. In our independent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal

> self governance. This is evident when tribes take part in the Nation's commerce.

Id. at 758. Although the *Kiowa* court declined to revisit immunity despite its reservations, three justices would have done so, writing that "the rule is strikingly anomalous" and "is unjust," asking "[w]hy should an Indian tribe enjoy broader immunity than States, the Federal Government, and foreign nations?" *Id.* at 765 (Stevens, J. dissenting joined by Justices Thomas and Ginsburg).

Against that backdrop, we turn to the question in this case: Does the admixture of 18 U.S.C. § 1161, Florida law, and the Miccosukee application for, and adoption of, the benefits of Florida law, render them liable to suit in the context of the facts in this case.

B. Title 18 U.S.C. § 1161, *Rice v. Rehner*, and Florida Laws.

The court below rejected the argument that 18 U.S.C. § 1161 and *Rice v. Rehner*, 463 U.S. 713 (1983) lead to abrogation of tribal immunity in the state liquor law context, concluding that "nothing in *Rehner* suggests that section 1161 should be read to have abrogated tribal sovereign immunity to private lawsuits arising from violations of state dram shop laws." DE: 59-6. However, the court's approach was too narrow. The argument here is that the *combination* of § 1161, *Rehner*, Title 25 U.S.C. § 1747 (b)(2), § 285.16(2), Fla. Stat., *and* the Miccosukee application for

and adoption of the liquor laws of the State of Florida constitutes a waiver of sovereign immunity in the specific context of this case.[3]

The court below recognized that the purpose of § 1161 was to eliminate "prohibition in Indian Country" (DE: 59-3, n. 4); that the possible abrogative effect of the statute had not been addressed by "the Supreme Court nor any Federal Circuit Courts" (*id.* at 6); and that *Rice v. Rehner*, 463 U.S. 713 (1983) "found that states have an 'unquestionable interest in the liquor traffic that occurs within its borders' [and that] 'Congress has delegated authority to the states as well as Indian tribes to regulate the use and distribution of alcoholic beverages in Indian Country'. . . ." DE: 59-6, quoting *Rice* at 715. Nevertheless, the court focused on strict "abrogation," found that "nothing in section 1161's language definitively" indicated an intent to abrogate tribal immunity, and rejected the plaintiff's arguments.

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[3] 25 U.S.C. § 1747(b)(2) and Florida Statute § 285.16(2) provide:

> Section 1747(b)(2): The laws of Florida relating to alcoholic beverages (chapters 561, 562, 563, 564 and 565, Florida Statutes), gambling (chapter 849, Florida Statutes) sale of cigarettes (chapter 210,Florida Statutes), and their successor laws, shall have the same force and effect within said transferred lands as they have elsewhere within the State and the State shall have jurisdiction over said offenses committed elsewhere within the State.
>
> Section 285.16(2): The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere than that state.

The court's assessment of *Rice v. Rehner* did not give it the weight it deserves in determining if the Tribe's acceptance of Florida law constituted Tribal acceptance of the obligations imposed by Florida law, including susceptibility to suit for violations of Florida law. This language in *Rice v. Rehner* sets the stage:

> This historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian Country is justified by the relevant state interests involved. Rehner's distribution of liquor has a significant impact beyond the limits of the Pala Reservation. The State has an unquestionable interest in the liquor traffic that occurs within its border and this interest is independent of the authority conferred on the States by the Twenty-First Amendment.
>
> * * * * *
>
> Because we find that there is no tradition of sovereign immunity that favors the Indians in this respect, and because we must consider that the activity in which Rehner seeks to engage potentially has a substantial impact beyond the reservation, we may accord little, if any weight to any asserted interest in tribal sovereignty in this case.

463 U.S. at 724-25 (internal citations omitted). The Court held that "Congress did not intend to make tribal members 'super citizens' who could trade in a traditionally regulated substance free from all but self-imposed regulations." *Id.* at 732. So while *Rehner* did not deal with the precise questions posed in this case, the Court's exposition of 18 U.S.C. § 1161 and Indian Country liquor sales leaves no doubt that

tribes must comport with state liquor regulation. Here, the Miccosukee Tribe has accepted the duties and responsibilities that go along with the benefits of Florida alcoholic beverage laws.

If there is no tradition of sovereignty in relation to liquor sales and distribution in Indian Country, and if a Tribe engages in liquor transactions under the aegis of state laws, which it has accepted and benefited from, then there is no claim to sovereign immunity from a suit in which state liquor laws have been violated.

There is no dispute here over whether the Miccosukee Tribe accepted state authority over its alcoholic beverage establishments. The court below wrote that "[p]ursuant to 18 U.S.C. § 1161, Defendants applied for and became licensed to sell and furnish alcohol by the State of Florida Department of Business Regulation, Division of Alcoholic Beverages." DE: 59-1. There is no dispute that the application authorized the Division and other Florida officials to inspect and search "for the purpose of determining compliance with the beverage . . . laws." DE: 59-2, n. 3 (quoting application). There is no dispute that § 1161 required the Miccosukee Tribe to "act in conformity . . . with the laws of the State" in which its alcoholic beverage business occurs, i.e., Florida. Nor can there be any dispute but that under Florida Statute § 768.125, an alcoholic beverage vendor would have liability exposure to suit for serving intoxicated customers who he or she had reason to know were addicted to alcohol.

All the same factors led the Oklahoma Supreme Court to conclude, in light of the *Rice v. Rehner* language, that tribal sovereign immunity did not preclude a suit for dram shop liability against the Shawnee Tribe. The Oklahoma Supreme Court read § 1161

's use of "laws" to mean all state laws. *See Bittle v. Bahe*, 192 P.2d 810 (Okla. 2008). The district court below belittled the *Bittle* "broad reading of *Rehner* and § 1161" (DE 59-8), finding that it did not comport with the requirements of "definitive language" in order that congressional abrogation obtain. *Id.* The court below sided with Arizona, Texas and Washington cases that, like the decision below, found there to be sovereign immunity. DE: 59: 6-8, citing *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 129 P.3d 78, 83 (Ariz. Ct. App. 2006); *Foxworthy v. Puyallup Tribe of Indians Association*, 169 P.3d 53, 57 (Wash. Ct. App. 2007); *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843, 845, 854 (Tex. Ct. App. 1997).

But none of those cases, nor the court below, approached the issue quite like we do here. Where there is no historical sovereignty in certain kinds of Indian activities, and where Indians have knowingly, intelligently, and for duly-considered economic interests embarked on conduct that requires acceptance of state laws, a tribe cannot hide behind sovereign immunity. The issue is both "abrogation" and a knowing waiver of sovereign immunity that meets the classic standards for waiver -

- even where the most protective rights and privileges are at stake.

C. The Admixture of Abrogation and Waiver

Two strains of legal principles lead to the conclusion that tribal immunity, in the context of this case, need not be "expressly" abrogated and that waiver can be established from the Tribe's conduct.

Rice v. Rehner made clear "that there is no tradition of sovereign immunity that favors the Indians with respect to the regulations of liquor transactions." 463 U.S. at 724-25. Against that holding, tribal immunity is not entitled to great deference:

> When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect 'except where Congress has expressly provided that State laws shall apply.' *McClanahan, supra*, 411 U.S., at 171 (quoting U.S. Dept. of the Interior, Federal Indian Law 845 (1958) (hereafter Indian Law)). Repeal by implication of an established tradition of immunity or self-governance is disfavored. *Bryan v. Itasca County*, 426 U.S. 373, at 392. If, however, we do not find such a tradition or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty. *See Confederated Tribes, supra*, 447 U.S., at 154-159; *Mescalero Apache Tribe, supra*.

Id. at 719-720. This case falls within the ambits of "less weight." Thus, it is not a reach to find that § 1161's "conformity with … the laws of the State" demands

compliance with state laws, including lawsuit remedies available for violations of those laws.

The word "express" does not always have the force accorded to it by the court below. In *Mitchum v. Foster*, 407 U.S. 225 (1972), the Court addressed the language of 28 U.S.C. § 2283, the federal anti-injunction statute, which provides that a federal court "may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress . . . ." *Id*. at 226. Title 42 U.S.C. § 1983 did not contain any language intimating that it was an "expressly authorized" exception to § 2283, but the Court found that it was because § 1983 could be given "its intended scope" only by allowing stays in state court proceedings. *Id*. at 238. *See also Vendo Co v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), where a confusing combination of a six justice plurality allowed that in some situations, § 16 of the Clayton Act provided an express authorization for injunctions where the "pending state court proceedings . . . are themselves part of a pattern of baseless repetitive claims that are being used as an anti-competitive device." *Id*. at 644 (Blackmun, J., concurring in the result). The Clayton Act contained no language that met the § 2283 "expressly authorized" mark.

What is clear is that "expressly authorized" may take shape from the context of the legislation. Section 1161 directs conformity with state laws. Sovereign immunity is no shield in this legislative sphere, because if it were, the statutory

language mandate could not be given its intended plain meaning. "Conformity" with state laws would be rendered meaningless if a tribe could avoid the consequences of such conformity.

Because Indian Tribal immunity is a court created construct, not a fundamentally guaranteed constitutional right, the Eleventh Amendment waiver cases help our case. *Parden v. Terminal Railroad*, 377 U.S. 184 (1964) was the high water mark of "constructive consent," holding that because Alabama operated an interstate railway, it could be deemed to have constructively consented to being sued for FELA violations allegedly growing out of its railroad operations. The Court wrote an end to *Parden*-style waivers in *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 527 U.S. 666 (1999):

> *Parden*-style waivers are simply unheard of in the context of other constitutionally protected privileges. As we said in *Edelman*, "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." … The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." … We see no reason why the rule should be different with respect to state sovereign immunity.

Id. at 681-82. But that *fini´* to constructive consent has no application here.

In the case of tribal immunity, especially in the context of alcoholic beverages, there is both a reason why the rule should be different and a reason why the Tribe's acceptance of state law as the *quid pro quo* for its alcoholic beverage

operation, should constitute waiver of any immunity. The rule on constructive consent should be different because there is no "surrender of constitutional rights." Tribal immunity is not a constitutional guarantee. The waiver is apparent because the Miccosukee defendants knew at the time they applied for their state alcoholic beverage license that they were obligated by federal law to abide by state laws, and they so agreed.

Unlike *Sanderlin v. Seminole Tribe of Florida*, 243 F. 3d 1282 (11th Cir 2001), this is not a case built on accepting federal funds contingent on compliance with the Rehabilitation Acts of 1973, 29 U.S.C. § 701. This case is built on specifically accepting state law, pursuant to a federal law, which specifically commands that acceptance as the price of an alcoholic beverage operation on the Miccosukee reservation. Waiver "does not require specific or magic words." *Bittle v. Bahe*, 1952 P.2d 810, 826 (Okla. Sup. Ct. 2008), quoting *C&L Enterprises, Inc., v. Citizen Board Potawatoni Indian Tribe of Okla.*, 532 U.S. 411, 422 (2001).

Bittle's summarization of the Shawnee's responsibilities is equally applicable to the Miccosukee Tribe's responsibilities in this case:

> The words "laws of the State" in § 1161 are comprehensive and under *Rice v. Rehner*, include state authority over alcoholic beverages whether it is legislative, exclusive or adjudicative in nature.
>
> * * * * *
>
> We reject the Tribe's argument that dram shop liability

> should be excluded from the words "laws of the State" in § 1161.
>
> * * * * *
>
> It chose to also become an alcohol vendor at its casino. It applied for and obtained a state license to sell liquor by the drink at the casino under the laws of the State of Oklahoma. Oklahoma's alcoholic beverage laws protect the public, as in this case, the public traveling along the busy highways. Many tribal casinos are located on or near our busy highways. The nexus between the serving of liquor by the drink at the casinos and the traveling public compels us to reject the Tribe's claim of legal irresponsibility for serving liquor to obviously intoxicated casino patrons. Like any other state-licensed commercial vendor operating a bar and serving alcoholic beverages for consumption on the premises, the Tribe is subject to the criminal and civil jurisdiction of the state courts and may be hailed into state court to answer allegations that it furnished alcoholic beverages to a noticeably intoxicated customer.

Bittle, 192 P.3d at 823, 827-28.

The Florida Miccosukee defendants in this case must adhere to the same standard – the admixture of abrogation and consent require that they be subject to suit.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 4,509 words.

BRUCE S. ROGOW

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2011, the foregoing document was served on the below via U.S. Mail:

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