

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 05-4353

**NEW DIRECTIONS TREATMENT SERVICES, on its Own Behalf
and on Behalf of its Patients; ANGEL DOE; DAN COE; JOSEPH JOE;
LUIS LOE; CARLOS POE; PETER VOE.
Plaintiffs-Appellants,**

v.

**CITY OF READING
Defendant-Appellee.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA, THE
HONORABLE PAUL S. DIAMOND, CIVIL ACTION NO. 04-CV-1311**

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

ARGUMENT

I. Introduction

This Court should reverse the district court's grant of summary judgment to the City of Reading. The City of Reading refused to grant a permit to the New Directions Treatment Services to offer methadone treatment in a location pursuant to 53 P.S. 10621, despite the fact that the clinic would otherwise have been an as-of-right use in this area and that the location formerly housed a drug treatment center. The City's claim that this refusal was based upon concerns about "traffic . . . , jaywalking and noise issues" (Br. at 28) is transparently pretext. The City can point to nothing unique to a methadone treatment center that raise unique traffic, jaywalking and noise issues that would not similarly be present in the other as-of-right uses in the Commercial Highway zone. The decision was clearly based upon community hostility to methadone use and heroin addiction – in violation of the Americans with Disabilities Act (42 U.S.C. § 12132), the Rehabilitation Act (29 U.S.C. § 794) and the Equal Protection Clause.

This same hostility prompted the enactment of 53 P.S. 10621 – a statute that singles out methadone treatment centers for unique burdens in violation of both federal statutes and the Equal Protection Clause. To burden the vast majority of

persons using methadone who do not use illegal drugs because of fears of crime committed by those few who do is precisely the type of discrimination based on non-individualized stereotypes which Congress intended to deter.

Appellants' Opening Brief argued that the lower court wrongly denied five plaintiffs standing based on use of illegal drugs. That exclusion from the federal statutes does not apply because the City did not act on the basis of the illegal drug use. Appellee does not respond to that argument but attempts to craft a new standing argument – there was no injury. Neither position avoids the undeniable standing of the organizational plaintiff – New Directions Treatment Services (“NDTS”) – nor the factual record of several of the individual plaintiffs .

Finally, there is nothing in the City brief that would identify the additional information that Appellee may legally demand to determine whether the class representatives can represent the class adequately.

The City's brief simply ignores the actual facts of this case and the grave discrimination the Commonwealth and the City of Reading have imposed on the statutorily-protected class of recovering addicts who use methadone as a way to end their addictive dependence upon heroin. As a consequence of that discrimination the City wrongfully has been able to block provision of the most

effective form of rehabilitation services in a community with a severe illegal drug problem. (A-243.)

II. “As Applied” Violations of the City

Critically, in its brief the City does not respond to Appellants’ main point: that the lower court erred by failing to take into account uses that are permitted by right at 700 Lancaster Avenue under Reading’s zoning ordinance. Accordingly, the court’s conclusion that it was rational for the City to reject a methadone clinic at that site because of “concerns” with traffic, street crossing and loitering must be reversed.

The City’s brief replicates the same error of the Court below by not acknowledging or discussing what the City allows to occur at 700 Lancaster Avenue by any non-methadone using occupant. The fact that a motel, nightclub, convenience store or passenger terminal could locate there is not disputed, but merely ignored. The fact that there is a bus stop and traffic light at the corner where the facility is located is not disputed, but merely ignored. The fact that there are 20 off-site parking spaces at the site, which do not exist at the West Reading site, is not disputed but merely ignored. The fact that community residents who signed the petition and testified at the hearings did not complain about traffic or street crossings, is not disputed but merely ignored.

Most importantly, both the lower court and the City ignore the fact that Berks County Counseling Center (“Berks CC”) operated a drug addiction and mental health facility at 700 Lancaster Avenue. (A-625.) Berks CC, a provider of counseling and other rehabilitative services, does not use methadone in the treatment of heroin addicts. It was not required – and would not be required today – to obtain a zoning permit to operate its facility at that location. (A-204 at 32; A-208 at 46-48.) That Berks CC could return there as of right is not disputed.

Furthermore, the City does not dispute that City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), extensively quoted in Appellants’ Opening Brief, requires comparison of how the rejected use “would threaten legitimate interests of the city in a way that other permitted uses . . . would not.” 473 U.S. at 448. Instead, it attempts to distinguish that case on the ground that there was evidence in Cleburne that the denial of the permit was “based on mere negative attitudes and fear.” (Br. at 36.) Such “evidence,” however, was the court’s conclusion — after careful and thorough scrutiny of the purported reasons for the city council’s rejection — in light of what others were permitted to do in the same area. The district court failed to engage in such scrutiny here – and therefore must be reversed.

In this case, the City has not presented any evidence to suggest that methadone users present any greater hazard of jay-walking, loitering, double parking, or any other traffic problem than any of the other uses authorized by Reading's Zoning Code, Sec. 27-810, A-688 to be located in this "Commercial - Highway" district.¹ Thus Reading has not explained why the "volume and speed of traffic on Lancaster Avenue" (Br. at 30) affects the clinic differently from any other health care facility or professional office permitted there.

The City also appears to concede that the lower court applied an incorrect standard to establish disparate treatment under the ADA. The district court held that discrimination must be the "sole cause" of the decision. (A-25-6.) The City of Reading admits that a plaintiff need only prove that "the illicit factor played a role" in the decision, citing Miller v. CIGNA Corp, 47 F.3d 586, 598 (3d Cir. 1995). (Br. at 49.) The City, however, fails to note that at the third stage of the McDonnell Douglas proof of discrimination, a plaintiff can prove the reasons offered by the defendant are pretextual and thus may prove discrimination by circumstantial evidence from the inference drawn from the insufficiency of the defendant's justification, without the smoking gun of statements directly

¹As the City noted, the complaint and testimony of Glen Cooper acknowledged that there were minor "nuisance issues" at the West Reading site; Cooper also testified, however, that these had been addressed and eliminated. (A-633-4.)

displaying animus.² St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Sheridan v. DuPont, 100 F.3d 1061 (3d Cir. 1996) (en banc).

Reading's attempt to distinguish this case from the decisions in Sullivan v. City of Pittsburgh, 811 F.2d 171 (3d Cir. 1987) and MX Group, Inc. v. City of Covington, 293 F.3d 326 (6th Cir. 2002) is not persuasive. The statement that Sullivan did not involve an Equal Protection challenge is mistaken. *See Sullivan*, 811 F.2d at 185("These proofs ...lead us to conclude that, in light of Cleburne, class action plaintiffs-appellees are likely to prevail on the merits of their Equal Protection claim.") Although MX Group did involve only statutory discrimination, the Sixth Circuit opinion demonstrated a clear refusal to create inferences of legitimate concerns for safety of the community from testimony based on the generalized habits of recovering drug addicts. Moreover, to the extent that the City contends that the burden in statutory discrimination cases is different

² Reading's suggestion that the City was more than willing to allow the clinic to locate elsewhere in the City and that it was only this particular inappropriate location which was objected to omits an important part of the record. Council President's Vaughn's letter to NDTs states, and his subsequent deposition confirms, that he and Council would not approve locating the clinic in any residential area, which apparently includes any area with residences within 500 feet. (A-247; A-237 at 58-9.) This letter confirms that it was not "traffic" considerations unique to this location which prompted the rejection. (A-247.) Cooper testified that this policy in effect means NDTs could not be approved at any viable location within the City. (*See* Appellants' Br. at 18-19, noting that the only potential sites were a cemetery, two occupied industrial sites, and one small area with no appropriate facilities.)

from the burden in an Equal Protection case (Br. at 35), it necessarily agrees that the District Court misapplied the statutory standard, which it held was the same as under the Equal Protection cases.

As with Cleburne, “the record does not reveal any rational basis for believing that the [clinic] would pose any special threat to the city’s legitimate interests.” Cleburne, 473 U.S. at 448. Consequently, this court must find that Reading’s application of the state statute and refusal to grant a permit to NDTS violated the plaintiffs’ rights under the Constitution, Section 504 and the ADA.

III. Facial Violations of the Pennsylvania Statute

Under the facial challenge to the state statute on the basis of the Equal Protection clause, both the City and State Attorney General’s amicus brief emphasize that the plaintiffs must prove that “the legislative facts on which the classification is apparently based” could not reasonably be conceived as true. In this case, however, the legislature did not put forth or even discuss any legislative facts other than its desire to segregate heroin users from contact with children who might be found at churches, school yards and in residential areas. They never addressed why and in what ways methadone users differ from other permitted users, including other drug treatment facilities.³ Moreover, both briefs neglect to

³ One speaker asserted methadone users after six months of treatment commit an average of one crime a month, but provided no authority for the

state that the reason needs to be plausible. United States R.R. Retirement. Bd. v. Fritz, 449 U.S. 166, 179 (1980). In Section VII. A of its brief, the City does not posit any legislative facts which would justify the classification, other than the ones arising from the City's claimed reasons, concerns for traffic. Appellee does not attempt to explain or provide any evidence as to how methadone users might differ in their impact on traffic needs of residential communities, churches or schools.

The specter of crime – a word never used in the City brief – which pervades the State Attorney General's amicus brief is also inadequate to justify the State's statute. The State may not simply rely upon stereotypes about those suffering from heroin addiction to impose burdens upon those seeking to provide treatment. The language used by the State – that criminal activity is “frequently associated” by some unidentified persons with illegal drug use – does not make the connection between methadone use and increases in neighborhood crime a fact. (Pa. Br. at 8) According to the Justice Department's Technical Assistance Manual, “the determination of whether a significant risk [to others] exists requires an individualized assessment of ‘the nature, duration, and severity of the risk,’ and

statement. No facts concerning the extent of criminal activity against other persons were provided, nor was any connection made between the sites of the criminal activity and the sites of methadone clinics. (A-597.)

‘the probability that the potential injury will actually occur.’” Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 736 (9th Cir. 1999) (citing Department Of Justice, Technical Assistance Manual § II-2.8000). While the Ninth Circuit noted that harms “associated with the operation of the methadone clinic . . . may include a reasonable likelihood of a significant increase in crime,” they stressed that, “it is not enough that individuals pose a hypothetical or presumed risk. Instead, the evidence must establish that an individual does, in fact, pose a significant risk . . . [and] that the risk [is] of a serious nature.” Bay Area Addiction Research, 179 F.3d at 736-67.

No evidence was before the legislature or the District Court which makes this ‘frequent association’ anything other than a stereotype and irrational fear. It was this very type of association which the Sixth Circuit refused to countenance in the legislative activity of the Covington council. MX Group, 293 F.3d at 342 (“[W]here the discrimination results from unfounded fears and stereotypes . . . merely because Plaintiff’s potential clients are recovering drug addicts . . . such discrimination violates the ADA and Rehabilitation Act.”). Similarly, the Second Circuit has observed that, “[a]lthough the City certainly may consider legitimate safety concerns in its zoning decisions, it may not base its decisions on the perceived harm from . . . stereotypes and generalized fears.” Innovative Health Sys.

v. City of White Plains, 117 F.3d 37, 49 (2d Cir. 1997). The same is true for the state in enacting its zoning laws.

The State tries to suggest that the relationship between a methadone clinic and neighborhood crime is rational based on the deposition of Glenn Cooper, where he estimated that 20 to 30 percent of the clinic's patients would test positive for illegal drugs. (Pa. Br. at 5). In doing so, the State ignored the later submission of reports detailing the results of all the drug screens at NDTs's West Reading and Bethlehem facilities showing that the 30 percent positive testing was for patients in treatment six months or less, and that less than six percent of NDTs's patients test positive for opiates after six months.⁴ (A-567; A-579-81.) More importantly, there is no evidence to link such use of illegal drugs to "activities associated with" these uses such as "drug dealing, thefts and muggings" as the State asserts, nor with the site of the clinic. (Pa. Br. at 8.) Not only was there no evidence of any such associated events, but Cooper specifically testified that there had been no such incidents at NDTs' West Reading clinic. (A-626-29; A-633; A-644.) The record – no activities of drug dealing, thefts and muggings at the West Reading site and no evidence of such activities at any other clinic site – belies the rationality or

⁴The records do not show the total percentage of individuals using illegal drugs. Since some patients test positive for more than one drug, the percentages can not be added to determine the percentage of clients using illegal drugs.

legitimacy of any “frequent association” relied upon by the State. It is difficult to call rational any procedure that reduces access to what is recognized as the most effective method of treating heroin addicts, while allowing other less effective treatment methods at the very same premises, with no evidence whatsoever that prohibiting this form of treatment has any impact on the safety of the clinic’s neighborhood.

This record also demonstrates beyond cavil that the Pennsylvania statute violates the ADA and Section 504. The statutory classification – methadone users – is explicitly a classification based on disability and therefore prima facie discriminatory.⁵ The State justifies burdening all methadone users as a way to

⁵The state seems to argue that it is not a classification based on a disability on the grounds that not all methadone users are disabled because the impairment may not interfere with a major life activity or because the methadone may mitigate the impairment to the extent they are no longer disabled. Consequently, the Attorney General asserts, the legislature was not targeting persons protected from discrimination. That argument, however, would immunize every zoning decision excluding methadone clinics. Courts have consistently rejected this argument, holding that methadone clinics (and their clients) have standing to assert a discrimination claim when zoning actions are taken against methadone clinics. Such holdings necessarily are based on findings that the clinics’ clients are disabled persons under the law. *See, e.g., Bay Area Addiction Research*, 179 F.3d at 730; *Innovation Health*, 117 F.3d at 44-46; *Tsombanidis v. City of West Haven*, 129 F.Supp. 2d 136, 150-51 (D.Conn. 2001); *MX Group, Inc. v. City of Covington*, 106 F.Supp. 2d 914, 920 (E.D. Ky. 2000), *aff’d* 293 F.3d 326 (6th Cir. 2002); *Smith-Berch, Inc. v. Baltimore County*, 68 F. Supp. 2d 602, 623 (D.Md. 1999). This Court’s decision in *Addiction Specialists, Inc. v. Township of Hampton*, was premised on, but did not decide, the principle that methadone users are disabled individuals under the federal acts, since the township did not dispute that

control the thirty percent or less who use illegal drugs, and the even smaller group who might engage in criminal activities in the neighborhood of the clinic. This argument, however, ignores the very structure of the federal statutes where Congress carefully distinguishes between persons “participating in a supervised rehabilitation program and . . .no longer engaging in [illegal drug] use” who are protected by the acts and persons “currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use,” who are not protected.

Compare 29 U.S.C. § 705 (20)(C)(ii)(II) with 29 U.S.C. §705(20)(C)(I). Congress did not intend to allow disabled persons who are not threats or dangerous to others to be discriminated against on account of the fears connected with persons who do pose such threats. Eradication of this sort of stereotyping is at the heart of the ADA.

In School Board of Nassau County v. Arline, 480 U.S. 273 (1987) the Supreme Court was faced with the question whether the need to exclude contagious persons with tuberculosis dangerous to other persons meant an employer could exclude all persons with tuberculosis consistent with Section 504.

The court held:

The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not

contention. 411 F.3d 399, 406 (3d Cir. 2005)

justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were ‘otherwise qualified.’ Rather, they would be vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent.” (Emphasis in original). Id. at 285.⁶

To permit the state statute to discriminate against all eligible methadone users in order to exclude that small percentage of ineligible methadone users drugs is the type of over inclusiveness rejected in Arline. One of the basic principles of statutory construction is that courts “express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.” Pa. Dep’t of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990). The state’s interpretation of Section 504 and the ADA would allow the provision excluding illegal drug users to render superfluous the provision protecting from discrimination persons with a disability who are in a rehabilitation program and not engaging in the use of illegal drugs. The acts’ central point of prohibiting discrimination against a person with a non-dangerous disability because of fears and myths about the nature of that disability would be lost.

⁶ “By amending the definition of ‘handicapped individual’ to include . . . those who are regarded as impaired . . . , congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.” Id. at 284.

In the congressional record, the legislature emphasized that the statutory “provision recognizes that many people continue to participate in drug treatment programs long after they have stopped using drugs illegally, and that such persons should be protected under the Act.” H.R. REP. NO. 101-596, at 64 (1990) (Conf. Rep.), as reprinted in 1990 U.S.C.C.A.N. 267, 573. To allow methadone user to be used as a proxy for illegal drug use and other potential criminal activity would eviscerate the congressional intent demonstrated by specifically delineating a difference between persons addicted to drugs and to those still engaged in illegal drug use.

The State does not point to any evidence in this record or elsewhere to show the State had a legitimate reason to allow municipalities to exclude methadone users who are not using illegal drugs from residential neighborhoods.⁷ As the

⁷As noted above, the only evidence is that there has been no criminal incidents relating to any NDTs client at either the West Reading or Bethlehem clinics in the years they have been operating. The analogy to regulation of establishments serving alcohol is misplaced because there has been tremendous evidence of the relationship of serving liquor to creating public nuisance and dangerous behavior. No evidence of a relationship between treating recovering addicts with methadone and criminal activity dangerous to others has been offered at trial nor does the State’s brief refer to any submitted to any legislative body or in publicly available research literature. NDTs, as a licensed provider of methadone treatment for some 26 years, has developed policies to monitor and determine whether any particular individual is or is not conforming to the treatment by the continuing use of illegal drugs and it discontinues services as appropriate. (A-166-67 at 88-92.) In such cases, NDTs refers the patient to an inpatient program for more intensive treatment. *Id.*

Second Circuit said in Innovative Health Systems, “[a]n inevitable, small percentage of failures should not defeat the rights of the majority of participants in the rehabilitation program who are drug-free and therefore disabled under both statutes.” 117 F.3d at 48. This Court should not validate Pennsylvania legislation which suffers the same defect.

Finally, both briefs suggest that the state statute is not discriminatory because it does not ban methadone clinics but merely prescribes a more burdensome zoning procedure. The City asserts that this procedure is the same as would be required before a zoning hearing board. (Br. at 31.) These arguments are wrong. First, imposing additional procedural hurdles has long been recognized as a form of discrimination. Innovative Health Sys., 117 F.3d at 44; Smith-Berch, Inc. v. Baltimore County, 115 F.Supp.2d 250, 524 (D.Md. 2000). Second, in this case, the City is ignoring the fact that no hearing at all would be required under the Reading zoning ordinance. At 700 Lancaster Avenue, without the statute, NDTS would be entitled to a permit as of right. (A-204 at 32; A-208 at 46-48.) As the court in Smith Berch, Inc noted, it is the not the public hearing requirement which violates the ADA, it is subjecting only methadone treatment facilities to the requirement which creates the violation. Id.

IV. Plaintiffs' Standing Under the Federal Statutes

Although reciting at length the uses of illegal drugs by five out of the six individual Plaintiffs, the City does not cite any disagreement with the summaries in Appellants' Brief, which were based on the same Request for Admissions as used by the City.⁸ Those summaries show three plaintiffs – Joe, Loe and Poe – had not used drugs within the three months preceding the March 2002 permit denial by the City, and that five out of the six had not used any drugs within the three months preceding the filing of the complaint. (Br. at 44.)

More importantly, the City does not counter Appellants' argument that the exception excluding persons using drugs from being treated as "individuals with a disability" applies only "when a covered entity acts on the basis of such [illegal drug] use." 29 U.S.C. §705(20)(C)(I). In this case the City does not, because it can

⁸ Appellee relies on cases under Title I of the ADA (42 U.S.C. § 12114), the employment discrimination provision, to assert that the Individual Appellants were not qualified individuals under the Act. (Br. at 40-41 and n. 18.) The Supreme Court has explained that Title I is limited to cases involving discrimination in employment. University of Alabama v. Garrett, 531 U.S. 356, 368 (2001). Congress clearly recognized that different standards were applicable in determining fitness for employment and access to social services. In particular, it enacted 29 U.S.C. §12210(c) which states an individual "shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services." By targeting its zoning statute at methadone drug rehabilitation, Pennsylvania is effectively impeding the federal policy to protect persons undergoing rehabilitation, whether or not they use illegal drugs, from discrimination in access to those services.

not, claim that Reading denied NDTs a permit based on these individual plaintiffs' illegal drug use. The City has never claimed that illegal drug use had anything to do with its rejection of the permit, but instead has cited traffic and loitering concerns. Consequently the statutory exclusion relied on by the District Court is not applicable.

The City also suggests that several of the plaintiffs do not have standing because they suffered no injury from the City's rejection, a matter on which the District Court did not rule. In particular, it claims that Plaintiff Loe, who has not used illegal drugs for over two decades, suffered no injury from the denial because he was not even a Pennsylvania resident seeking methadone treatment in March 2002. Loe alleged no capacity for his treatment (A- 61) and showed a delay of 110 days (A-678) in receiving treatment in the Reading area due to the shortage of capacity resulting from the permit denial. Consequently Loe is in the same position as the unknown plaintiffs in Innovative Health Systems, and Sullivan, who alleged injury from future inability to find treatment space due to the actions of the defendants.⁹

⁹The City asserts that Plaintiffs Coe, Doe, and Poe have sustained no injury to date since they were already receiving services at the time of the permit rejection and continued to receive services thereafter. They each continue to be affected by the need to receive services in West Reading rather than Reading and are at risk of injury if they suffer a relapse or otherwise leave the program and must find a new placement.

The District Court also found that NDTS has standing to contest violations of the two federal anti-discrimination statutes. The court assumed all plaintiffs had standing to challenge the Constitutional violations alleged.

V. Denial of Class Certification

The City tries to justify the denial of class certification by the lower court on the grounds that a Rule 23 (b)(2) class was not appropriate because there is not a common question of law or fact when the class is seeking monetary damages based on individual injuries. While this issue remains contested, compare Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) with Robinson v. Metro-North Commuter R.R., 267 F.3d 147 (2d Cir. 2001), it is irrelevant as the complaint does not seek monetary damages for class members in this case but only for the “named Plaintiffs.” (A-78-9.)

Reading also asserts NDTS “dropped the ball” by failing to renew its motion for class certification “once it had provided this information [sought by defendant].” (Br. at 58.) Plaintiffs, however, did not believe they need provide any additional information, since the only information defendant sought was the identities of the individual plaintiffs. Because the lower court granted their motion to proceed in pseudonym, there was no additional information which defendant requested which could be used to determine whether the named class

representatives represent the class adequately. The challenge is whether the district court was right in denying class certification unless Plaintiffs provided information which even now remains unidentified by Appellee. Plaintiffs did not believe they had to provide it and do not believe they were required to go through the fruitless act of raising the same issue a second time.

VI. Conclusion

For the reasons set forth in this Reply Brief and in Appellants' Brief, Appellants respectfully asks this Court to reverse the grant of Summary Judgment in favor of Defendants, grant Summary Judgment to Plaintiffs, and remand the case for determination of relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,715 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)&(6) because this brief has been prepared in 14-point Times New Roman.

/S/ Michael Churchill
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CERTIFICATION OF IDENTICAL COMPLIANCE OF
E-BRIEF AND HARD COPY OF BRIEF

I hereby certify that the text of the E-Brief, which was electronically filed with the Court on April 4, 2006 is identical to the text in the ten paper copies that were sent to the Clerk of the United States Court of Appeals for the Third Circuit and that a virus detection program, Symantec Antivirus, has been run on the file and that no virus was detected.

/S/ Michael Churchill
Michael Churchill

DATE: April 4, 2006

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2006, I served two true and correct copies of this Reply Brief upon the following counsel by first class mail, I also certify that the copies sent to the below listed counsel are identical to the Reply Briefs that were filed with the Clerk of the Court of Appeals for the Third Circuit:

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