

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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No. 05-4222

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Lisa Burke, Michael Carper, individually, and on behalf  
of all others similarly situated,

Plaintiffs-Appellants,

v.

Utah Transit Authority, John English, individually, Local 382 of the Amalgamated  
Transit Union and the United States Department of Labor,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

The Honorable Paul G. Cassell  
District Judge

D.C. No. 2:04-CV-00985

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**APPELLANTS' REPLY BRIEF**

**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

This filing is a Reply to the filings of the Utah Transit Authority and John English (“UTA”) and Local 382 of the Amalgamated Transit Union (“Local 382”). As in the briefings for No. 05-4079, both Responses of the defendants seem to ignore the arguments by the plaintiffs and make arguments which were anticipated and addressed in the initial filing by the plaintiffs. Consequently, plaintiffs will file a reply that only concentrates on the global issues of this case in the minimum amount of pages needed.

## ARGUMENT

### **I. THE PLAINTIFFS WERE UNDER NO OBLIGATION TO FILE A MOTION TO REOPEN A CASE THAT NEVER SHOULD HAVE BEEN CLOSED. THIS COURT SHOULD REMAND THE CASE FOR A DECISION ON THE AMENDMENT AFTER IT DETERMINES THE PROPER LEGAL STANDARD TO EVALUATE THE AMENDED COMPLAINT.**

The defendants argue that the plaintiffs could have filed a motion to reopen the case since they speculate that the Trial Court may not have seen the filing of the motion to amend prior to its issuing a decision on the summary judgment.

Defendants do not cite to any requirement established by rule, statute or case that requires such a filing nor do they cite any legal support for not remanding this case for a determination of a properly filed motion to amend. Due to other decisions rendered by the Trial Court, the plaintiffs reasonably believed a request to reopen

the case would be an exercise in futility that would just increase the cost of litigation and delay their ability to have their case addressed by an impartial court.

A brief history of the actions by the Trial Court is illuminating. After the plaintiffs filed for injunctive relief, they requested an evidentiary hearing in a filing, since the TRAX employees were afraid to voluntarily provide testimony without the protection of subpoenas. See companion case No. 05-4079 Aplt. App. A at 135, 141, ¶ 2 and 150, ¶ 1. In addition, an evidentiary hearing was mandatory prior to granting an injunction if the case could be considered a labor dispute. See companion case No. 05-4079 Aplt. App. A at 136, ¶ 2. This request was never formally denied by the Trial Court but plaintiffs were informed through a clerk that no evidentiary hearing would be granted.

At the first oral hearing that was held, the Trial Court suggested that it consider the issue of the dismissal of the Department of Labor despite the fact that the hearing had only been noticed as a hearing on the injunction. It was probably only the professional conduct of Jeffery Kahn, the attorney for the Department of Labor, that prevented the Trial Court from holding the hearing. Mr. Kahn's suggestion, that having oral argument on an issue where the plaintiffs had not even seen the Reply Brief of the DOL might raise due process issues, probably prevented that travesty. See companion case No. 05-4079 Aplt. App. B at 305, Ins. 14-25 through 306, Ins. 1-10.

After an adverse decision on the injunction, the plaintiffs filed a request for a new injunction which also requested a review by the Trial Court of its legal decision on whether the case was a severance or an accretion case. The plaintiffs provided strong cases that the Trial Court's previous decision was manifest error. The new injunction was denied in an unsigned minute entry without any findings of law or conclusions of facts. Aplt. App. A at 007, docket entry 53.

When close to thirty days for an appeal had run, the plaintiffs filed a motion requesting that if the unsigned minute entry was indeed a final order, that it be signed, since persuasive case law suggested that an unsigned order was not a final order for appellate purposes. Aplt. App. A at 114-116. The Trial Court not only failed to comply with that reasonable request, it then filed an order granting the DOL's motion to dismiss contrary to its tentative decision to deny and was completely silent on the injunctive relief. Aplt. App. A at 119-121. Thus, despite the motion, the plaintiffs had to file an appeal with an unnecessary procedural cloud to avoid losing its ability to appeal at all.

At the hearing for defendant UTA's motion for summary judgment, the Trial Court actually stated that it wanted a "belt and suspenders" to rule against the plaintiffs and hoped to find additional grounds.<sup>1</sup> In one of the most surreal

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<sup>1</sup> Due to an error by the court reporter, the transcript reads he wants "felt" suspenders. However, what was said was "belt and suspenders" and the context demonstrates the accuracy of this assertion. Aplt. App. B at 385 ln. 21.

moments, the Trial Court judge seemed to be negotiating with opposing counsel. Looking straight at counsel for UTA, The Trial Court judge discussed whether it would be better to have additional briefing to find another grounds to rule against the plaintiffs or just rule against the plaintiffs immediately. Aplt. App. B at 385, Ins. 20-25 through 386, Ins. 1-2.

The Trial Court chose to require additional briefing. At the same hearing, plaintiffs pointed out to the Trial Court that the tentative order by the Trial Court granting defendant UTA's motion did not address defendant Local 382. The plaintiffs correctly pointed out the Trial Court would lose subject matter jurisdiction over Local 382 if it dismissed the claims against UTA and thus should dismiss Local 382 for a lack of subject matter jurisdiction in its final order if it did not change its tentative decision. Aplt. App. B at 323, Ins. 2-23. The plaintiffs also addressed this in their additional briefing on the issue. Aplt. App. A at 165 n. 1.

Thus, having provided the background, the belief that the dismissal without considering the motion to amend is highly dubious. The motion to amend was filed at 11:48, Sunday night, August 14, 2005, so that it would attract the attention of the Trial Court as early in the week as possible. It was scanned in electronically and e-mailed to all the parties by 9:17 a.m. on Monday morning, August 15, 2005. The Trial Court entered its decision Monday, August 15 at 2:13 p.m. Additionally, the Trial Court had from August 15, 2005 to August 22, 2005 to *sua sponte* change its

order. Since it was the defendants who had the obligation to answer the motion, they should have inquired of the Trial Court whether the dismissal was final, if they truly believed the dismissal was unintentional. The defendants do not even argue that they took that step.

Defendants' hypothesis would also require that after not addressing the summary judgment motion for over two months and thus depriving the plaintiffs the ability to appeal to an impartial tribunal a clearly flawed decision, the Trial Court just happened to decide to enter the summary judgment order hours after the motion to amend was docketed. Aplt. App. A at docket entries 82-84. Statistically, there is about a 2% chance of this occurring randomly.<sup>2</sup> This is particularly true since the final order is virtually identical to the tentative order issued the day of the summary judgment hearing and thus does not reflect an extensive re-write. Most telling, it does not address Local 382, the critical subject matter jurisdiction issue.

Additionally, it does not address the exhaustion of remedies issue, that it ordered be briefed at the summary judgment hearing. Finally, it does not address the plaintiffs' request to brief how the NLRA protects individual rights, a topic that plaintiffs perceived that the Trial Court did not understand. Aplt. App. A at 164, ¶¶ 2- 3.

By all appearances, it seems to have been rushed out by the Trial Court after the

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<sup>2</sup> There were more than 60 days between the final briefing and the order. Even accounting for holidays and weekends, the probability that the order would be issued the day after the filing of the motion to amend is about 2%.

motion to amend was filed. The order denied all attempts by the plaintiffs to have some discovery on a factually intensive issue, in a case where the evidence on many issues was in the exclusive control of the defendants. The defendants make a great deal of the fact that the motion was filed close to mid-night the prior day. The defendants do not reflect on why the plaintiffs would file at that time when there was no deadline for such a motion. The answer is simple. Given the record by the Trial Court of creating procedural hurdles for the plaintiffs, counsel for plaintiffs fully expected the Trial Court to issue the order on summary judgment after the motion to amend was filed and thus have plausible deniability. Plaintiffs guessed correctly that despite the pre-written order, the Trial Court would not issue the summary judgment order early since it appeared to want to evade judicial review, but would issue it immediately if plaintiffs filed a motion to amend. Thus, counsel for plaintiffs waited until enough time had passed that an issuance on the same day the motion to amend was docketed would defy statistical chance. Unfortunately, counsel was correct on all assumptions.

Far from being accidental, it appears to continue a pattern by the Trial Court of denying the plaintiffs an opportunity to prove their case. Basic fairness and due process requires that the Court not impose a requirement on the plaintiffs to engage in a futile action that is not required by law.

## **II. THE DEFENDANTS DID NOT MEET THEIR INITIAL BURDEN**

**FOR THE GRANTING OF SUMMARY JUDGMENT. THUS, PLAINTIFFS DID NOT NEED TO PROVIDE EVIDENCE OR EVEN FILE A PLEADING IN OPPOSITION. DESPITE THIS, THE PLAINTIFFS FILED EVIDENCE AND A PLEADING SUFFICIENT TO OPPOSE THE MOTION FOR SUMMARY JUDGMENT.**

It is the movant's burden to demonstrate that no genuine issues of material fact exist prior to the non-movant having to offer evidence demonstrating the existence of these disputes. See *Universal Money Centers, Inc. v. American Telephone and Telegraph* 22 F.3d 1527, 1529 (10<sup>th</sup> Cir. 1994). The most critical issue in the case at bar is whether defendant UTA is denying the TRAX employees their legal right to choose a representative for their appropriate bargaining unit. Thus, the dispute of the determination of the appropriate bargaining must be resolved prior to any granting of summary judgement. The NLRB has created a test for determining bargaining units that is the "community of interest" test. *Baltimore Sun v. National Labor Relations Board*, 257 F.3d 419, 429 (4<sup>th</sup> Cir. 2001). In order to show that there was no dispute on a material fact, i.e., that the TRAX employees were within an appropriate bargaining unit, defendant UTA had to show that all the factors used in that test pointed in their direction. UTA had to show, by presenting evidence or by pointing to a lack of evidence by the plaintiffs after an adequate time for discovery, that no dispute existed.

Of course, UTA could not satisfy this requirement since the plaintiffs had already presented evidence on two important factors in the community of interest

test, i.e., that the TRAX employees had separate supervisors and separate facilities. *International Brotherhood of Electric Workers v. Aubrey, Jr.*, 42 Ca. App. 4<sup>th</sup> 861 (Ct. App. 2<sup>nd</sup> Appellate Dist., Div. 4 1996).<sup>3</sup> These two factors alone in plaintiffs favor precluded the granting of summary judgment in this case since UTA's defense to all the claims was that it had negotiated with the appropriate bargaining unit. A reasonable jury could find for the plaintiffs on the issue just based on the two factors being in the plaintiffs' favor.

Plaintiffs plead their complaint based on the "community of interest" test. They notified the Trial Court of the correct test when defendant UTA opposed their initial motion for an injunction and also pointed out the correct test in their opposition to summary judgment. See companion case No. 05-4079 Aplt. App. A at 10, ¶ 2. Also, Aplt. App. A at 137-138.

Despite this, the defendants, with at least passive Trial Court approval, attempted to create a test for determining appropriate bargaining units that has no basis in law. The only evidence they provided were declarations that stated that the majority of other systems have similar bargaining units and that UTA and Local 382 had a contract agreeing on the unit and the representative. As stated in the plaintiffs'

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<sup>3</sup> Defendants attempt to misuse *Aubrey* by stating that it stands for the proposition that a system-wide unit is mandated for a bus-rail operation. A fair reading of the case demonstrates that an accretion analysis must be employed when bus employees are moved to rail positions. *Id.* The case clearly did not hold what the defendants contend.

initial brief and the filings in the companion injunction case, No. 05-4079, such a contract is illegal and thus is not grounds for summary judgment.<sup>4</sup> Defendant UTA tried to refute this fact of illegality with a treatise that addresses the creation of an initial bargaining unit and not a case in which a company and union are trying to accrete workers into an existing bargaining unit. In an initial bargaining unit test the NLRB must only choose an appropriate bargaining unit and not the most appropriate bargaining unit.<sup>5</sup> If a group of employees could be an appropriate bargaining unit alone, they cannot be accreted into an existing bargaining unit. *Baltimore Sun*, 257 F.3d at 427.

Thus, to be entitled to summary judgment, the defendants had to show in their

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<sup>4</sup>In the accretion context, an attempt to impose a bargaining unit or force an accretion of employees into an existing bargaining unit is prohibited. *NLRB v. Paper Manufacturers*, 786 F.2d 1163 (3<sup>rd</sup> Cir. 1986) (Citing *Chas S. Winner, Inc. v. Teamsters Local Union No. 115*, 777 F.2d 861 (3<sup>rd</sup> Cir. 1985)). Thus, UTA's reliance on the 1998 contract is misplaced. Additionally, the contract was entered into before a representative complement of TRAX employees was present; also a violation of law. *Aramak Services, Inc. v. NLRB*, 2002 NLRB Lexis 521 \* 12 (Oct. 21, 2002).

<sup>5</sup> As stated by the NLRB in *Frontier Telephone of Rochester, Inc.*, 344 NLRB No. 153 \*11 n.6 (July 29, 2005): "The test is different than the traditional community of interest test that the Board applies in deciding appropriate units in initial representation cases. In that context, the Board will certify any unit that is an appropriate unit, even if it is not the most appropriate unit. *Bartlett Collins*, 334 NLRB 484 (2001). In the accretion context, however, '[a] group of employees is properly accreted to an existing bargaining unit when they have no true identity distinct from it. *NLRB v. St Regis Paper*, 674 F.2d 104, 107-108 (1st Cir. 1982)."

summary judgment motion and memorandum that under the community of interest test none of the factors that would support a community of interest of the TRAX employees existed.<sup>6</sup> The existence of any evidence that the TRAX employees had a separate community of interest, such as existence of separate supervision, precluded such a finding. Plaintiffs provided affidavits demonstrating at least two factors; separate supervision and geographically separate facilities that were in favor of finding a separate community of interest. Aplt. App. A at 110, ¶¶ 5,6. Defendants' declarations ignored the issue of whether the TRAX employees could be a separate unit. Although by admitting in at least one declaration by Jerry Benson, a UTA administrator, that a few companies have separate bargaining units, UTA actually

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<sup>6</sup> UTA also attempts to use an alleged non-compliance with a local rule as justification for the granting on the summary judgment. While counsel has found no controlling authority on this issue, a Ninth Circuit case is very persuasive. In *Martinez v. Stanford*, the court held that despite the non-movant failing to file its opposition papers in a timely manner, summary judgment could not be granted pursuant to a local rule unless the movant has first met his/her burden to show that there were no genuine issues of material fact. 323 F.3d 1178, 1182 (9<sup>th</sup> Cir. 2002). The court stated that: "a nonmoving party's failure to comply with local rules does not excuse the moving party's affirmative duty under *Rule 56* to demonstrate its entitlement to judgment as a matter of law. *Fed. R. Civ. P. 56*. Short of that, we turn the summary judgment rule into a mere sanction for noncompliance with local rules." *Id.* In the case at bar, plaintiffs pointed to actual material factual disputes supported by their evidence as well as disputes that were clear based on the complaint and answers. The movant, UTA, had not even addressed these disputes in their motion and thus had failed to meet their burden. Thus, contrary to their assertion on those issues the non-movant had no obligation to provide evidence but had the right to alert the Trial Court that the disputes existed. This is particularly clear where the non-movant has asked for discovery pursuant to Rule 56(f) in order to obtain evidence on disputed facts.

supported plaintiffs' opposition to summary judgment since the few situations clearly demonstrated that TRAX can be an appropriate bargaining unit as well. See companion case No. 05-4079 Aplt. App. A at 127,

¶13.

The TRAX unit clearly has separate supervision and separate facilities for the bus and TRAX units. These facts preclude any possibility of rebutting the presumption of TRAX being a separate bargaining unit and clearly distinguish this case from *Aubrey*. Finally, defendants try to raise the issue of a merger of the two bargaining units which has no factual basis in the record. Plaintiffs addressed this issue in the briefings on the denial of the injunction. However, plaintiffs do remind this Court that recent NLRB case law requires that the employees be notified about a planned merger and have an opportunity to challenge the merger in an election. *West Lawrence Care Center, Inc.*, 305 N.L.R.B. 212 \*\* 26, 26 n.5. (1991). Since this did not occur in the case at bar, no merger can be found as a matter of law. *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971) also limits Local 382's ability to merge the units contrary to wishes of the TRAX employees.

### **III. THE PLAINTIFFS PROVIDED THE TRIAL COURT WITH**

**SUFFICIENT EXPLANATION WHY ADDITIONAL DISCOVERY WAS NEEDED IN THEIR 56(F) AFFIDAVIT AND PROVIDED ADDITIONAL CLARIFICATION AT ORAL ARGUMENT.**

Under Tenth Circuit Case law a 56(f) motion should be liberally treated.

*Committee For the First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992) (internal citations omitted). The Tenth Circuit has also recognize that under United States Supreme Court precedent, summary judgment should be refused when the “non-moving party has not had the opportunity to discover information that is essential to his opposition,” if the “non-moving party files an affidavit explaining why he or she cannot present facts to oppose the motion.” *Universal Money Centers, Inc. v. American Telephone & Telegraph Co.*, 22 F.3d 1527, 1536 (10th Cir. 1994) (citing *Dreiling v. Peugeot Motors of Am. Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988)). The defendants’ entire defense is based on the assertion that Local 382 has majority support in a system-wide unit. The plaintiffs believe that this is incorrect and the petition filed by them in this case supports an inference that Local 382 does not have majority support. See companion case No. 05-4079 Aplt. App. A at 153-164. The 56(f) affidavit states:

In discovery, plaintiffs intend to ask both the Utah Transit Authority and Amalgamated Transit Union, Local 382, the exact number of union members system-wide. If the number is under 50% then even if a system-wide union could be an appropriate bargaining unit, a contention vehemently denied by plaintiffs, then defendants have an inadequate defense.  
Aplt. App. A at 147, ¶ 6.

The 56(f) affidavit clearly states what the plaintiffs intended to discover and why it was important and that no discovery has occurred because all answers had not been filed. Interestingly, both UTA and Local 382 have the information about majority status in their possession but have never filed an affidavit stating that Local 382 does indeed have majority support.<sup>7</sup> Another critical paragraph in the 56(f) affidavit, ¶ 8 states:

Plaintiffs have obtained information that Steve Booth, the union president, and John English, UTA general manager, had a meeting in which Steve Booth's company benefits and position were restored to him after having been terminated about three years earlier by the previous UTA general manager. Plaintiffs intend to conduct depositions of both individual to determine whether plaintiffs' freedom of association rights were compromised by the meeting.

These two critical paragraphs were also discussed in detail at the oral

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<sup>7</sup> The issue of majority status is material to the case and thus needs to be determined. Defendant UTA had an opportunity to at least claim in its response that Local 382 had majority support but did not do so. However, UTA did raise the issue of whether plaintiffs Burke and Carper has voted for the 1998 contract. That is legally irrelevant since the TRAX facility was not open and the TRAX workers had not been hired in 1998. UTA ignores that after *Sheraton* and *Boire* the ability to accrete, by contractual agreement, a group of employees that could be a separate bargaining unit is prohibited. *Sheraton –Kauai Corp. v. N.L.R.B.*, 429 F.2d 1352, 1356 (9<sup>th</sup> Cir 1970); *Boire v. Intern. Brotherhood of Teamsters* 479 F.2d 778, 789 (5<sup>th</sup> Cir. 1973). “An accretion is an attempt to add new employees or **present employees in new positions** to an existing bargaining unit.” *NLRB v. Superior Protection, Inc.*, 401 F.3d 282, 287 (5<sup>th</sup> Cir. 2005) (emphasis added). After the employees changed positions, what they did as bus employees was legally irrelevant since they were not part of that existing bargaining unit as a matter of law. However, they, in fact, did vote against the 1998 contract.

argument. Aplt. App. B at 308-309 & 321-322. The affidavit raised several other factual disputes that needed discovery and any reasonable fact-finder would find that the 56(f) affidavit was adequate, particularly since no discovery was conducted in the case.

**IV. CONTRARY TO LOCAL 382'S ASSERTION, THE EMPLOYEES RAISED THEIR OBJECTIONS IN A TIMELY MANNER.**

Local 382 claims in its filing that the plaintiffs untimely challenged the action by UTA and Local 382 since they filed their lawsuit almost six years after the 1998 contract. As explained above, the 1998 contract could not and did not legally define the bargaining unit or choose the bargaining representative for the TRAX employees. However, NLRB precedent did both initially. Under *Gitano Group, Inc.*, 308 NLRB 1172 (1992), when the new facility opened, a new bargaining unit was created. *Id.* at \* 13-14. Thus, the remaining question was, who would represent the new bargaining unit. *Gitano* also answers that question. Since the majority of the workers had been represented by Local 382 when they were transferred to the new bargaining unit, Local 382 initially had a right to represent the new bargaining unit (TRAX), as well as the initial bargaining unit (bus). *Id.* at \* 14. Local 382 owed fiduciary duties to both units. The contract signed in 1998 was for five years and negotiations for the new contract ran about one year after the expiration of the old contract. During this time the TRAX employees did complain to their Local 382

shop representatives and to the union President, Steve Booth, about the seniority system and complained about their unfair pay scale. Based on these conversations, they fully expected that their concerns would be addressed in the new contract. Only after they were shown, in the summer of 2004, the newly negotiated tentative contract, did they fully understand the extent of the breach of fiduciary duty by Local 382.

The TRAX employees then placed UTA on notice that they wanted to exercise their right to replace Local 382 as their bargaining representative. It was not obvious that UTA was violating their free association, Section 13 and state rights until UTA refused to allow them to replace the bargaining representative for their separate unit, and that did not occur until August of 2004. Soon after that UTA began to violate their free speech rights by refusing to allow them to post information about their efforts to decertify the union as their bargaining representative. UTA and Local 382 want to confuse the two very separate concepts of bargaining “unit” and bargaining “representative.” A bargaining unit is a “community of interest” that sets the “voting district.” The bargaining representative is the union that the members of the bargaining unit choose to have represent them. The TRAX employees have the clear legal right to change this representative.

## CONCLUSION

The Court should reverse the granting of summary judgment and remand the case. Summary judgment should not have been granted when a valid motion to amend was before the court, there were disputed material facts, discovery was requested and necessary and the Trial Court was applying the wrong legal standard to the facts. Finally, the case should not have been closed prior to the Trial Court addressing the subject matter jurisdiction question over Local 382.

Dated this \_\_\_ day of December, 2005.

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Daniel G. Moquin

## **STATEMENT REGARDING ORAL ARGUMENT**

Counsel request oral argument. Plaintiffs request that the oral argument be combined with the oral argument requested for Docket No. 05-4079. Many of the issues in this case are first impression. They implicate First Amendment and labor law policy for transit districts within and outside the Tenth Circuit. The issues are complex and the Court will benefit from oral argument.

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Daniel G. Moquin

## **CERTIFICATE OF DIGITAL SUBMISSION**

This document complies with Tenth Circuit rules for electronic filing and violates no privacy rules. It has been scanned with a current Norton Antivirus program.

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Daniel G. Moquin

**CERTIFICATE OF COMPLIANCE WITH RULE 32**

This brief complies with the type-volume limitation of Fed. R. App. P. 32 because this brief contains 4,207 words.

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Daniel G. Moquin

## CERTIFICATE OF MAILING

I hereby certify that on this \_\_\_\_\_ day of December, 2005, I caused to be mailed, postage prepaid, the foregoing **APPELLANTS' REPLY BRIEF** to the following:

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