IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-00236-REB-MEH

THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, on behalf of its members, and MARGARET DENNY, on behalf of herself and a proposed class of similarly situated persons defined below,

Plaintiffs,

v.

SAGE HOSPITALITY RESOURCES LLC, SAGE OXFORD, INC., WALTER ISENBERG, and JOHN DOES 1-5,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANT SAGE HOSPITALITY RESOURCES' MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND MEMORANDUM OF LAW (DKT. NO. 23, FILED MARCH 23, 2015)

Defendant Sage Hospitality Resources LLC ("Sage Hospitality") represents on its website that it manages more than 75 hotels, and owns others. Among the hotels It claims to manage are the 12 hotels identified in Plaintiffs' complaint as examples of Defendant's consistent, widespread violations of accessible transportation requirements, including the two hotels contacted by plaintiff Margaret Denny, The Oxford Hotel ("The Oxford") and the TownePlace Suites by Marriott Boulder Broomfield ("TownePlace Suites"). This is why Plaintiffs named Sage Hospitality as a defendant.

Sage Hospitality asserts that it does not own, lease or operate either of these two hotels and thus it is not a proper defendant. It does not explain why it holds itself out on its website as managing these hotels, or what its role is in operating these hotels. It

simply submits management agreements, van leases and ownership-related documents (some of which appear out of date) and argues that since it is not identified on any of these documents, it is not a proper defendant. It urges dismissal without any discovery as to these unanswered questions and untested assertions.

The Court should deny Defendant's Motion for a number of reasons. First, Defendant relies on a false legal premise: that it is not covered by Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq*., if it is not a direct party to the management agreements, van leases, or ownership documents attached to its Motion. This is not the case. Second, plaintiffs have filed an amended complaint ("FAC") adding two defendants, Sage Oxford Inc. ("Sage Oxford") and Walter Isenberg, as well as John Doe defendants, and should be allowed discovery as to the proper defendants. Finally, Defendant's arguments that Plaintiffs lack standing to seek relief for the hotels at issue in the complaint and that the Court should strike the class action allegations are contrary to precedent in this Circuit.

BACKGROUND

I) Legal Background.

Title III of the ADA generally requires that owners, lessors, lessees and operators of hotels that provide transportation services to guests must also provide accessible transportation to their guests who use wheelchairs. *See generally* 49 C.F.R. §§ 37.101, .105 & .171. Plaintiffs' investigation revealed consistent, widespread noncompliance by Defendant with these requirements in numerous hotels.

Much of Defendant's Motion turns on the circumstances under which an entity is considered to be owner, lessor, lessee or operator for purposes of Title III. *See* 42 U.S.C. § 12182(a). This phrase encompasses both individuals and companies. *See, e.g., Howard v. Cherry Hills Cutters, Inc.*, 979 F. Supp. 1307, 1309 (D. Colo. 1997) ("Nearly every court that has decided the issue has found that individuals can be held responsible for violations of Title III 'if they "own, lease[ ] (or lease[ ] to) or operate[ ]" a place of public accommodation.'").

To "operate" under Title III means 'to put or keep in operation,' 'to control or direct the functioning of,' or 'to conduct the affairs of; manage.'" *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85, 91 (2d Cir. 2010) (citations omitted); *see also Dahlberg v. Avis Rent A Car Sys., Inc.*, 92 F. Supp. 2d 1091, 1102 (D. Colo. 2000).

A defendant can be covered by Title III even if it is not a signatory to a deed, lease or operating agreement. For example, numerous courts have held that individuals who exercise significant control over a corporation are liable under Title III even if the corporation is the direct owner or operator of the public accommodation. In *Bowen v. Rubin*, 385 F. Supp. 2d 168 (E.D.N.Y. 2005), residents of an adult care home brought suit under Title III against corporations who were contractually obligated to provide home healthcare services at the home, as well as the sole shareholder and president of those corporations. The court rejected the shareholder's argument that he was not a proper defendant under Title III. *Id.* at 180 ("There is no dispute that Kleinman is the sole shareholder and president of the Americare Defendants. As such, he is subject to liability as the owner of a place of accommodation."). Likewise, courts have found

individuals covered by Title III as "operators" of corporations. "Courts which have found individuals personally liable under Title III have made the initial necessary finding that those individuals controlled the actions or directed the affairs of the corporate entity which owned the public accommodation, or had the power to facilitate any necessary accommodation." *Hoang v. DeKalb Hous. Auth.*, 2014 WL 1028926, at *3 (N.D. Ga. Mar. 19, 2014); *see also Rodriguez v. Barrita, Inc.,* 2012 WL 3538014, at *15 (N.D. Cal. Mar. 1, 2012) on reconsideration in part, 2012 WL 2308069 (N.D. Cal. June 18, 2012).

Corporate-veil-piercing principles do not apply in determining whether an individual or entity "operates" a corporation for purposes of Title III; the relevant inquiry is whether that individual controls, manages, directs the functioning of, or conducts the affairs of, the corporation. *See, e.g., Mayers v. Taylor*, 2009 WL 2423746, at *2 (N.D. Cal. Aug. 5, 2009) ("While Defendant relies on numerous cases involving the general law regarding piercing the corporate veil, Plaintiffs are not attempting to pierce the corporate veil or impose liability on a mere shareholder. Rather, they seek to hold Defendant liable as an operator of the traffic school.").

II) Factual and Procedural Background.

A) Events Leading to Plaintiffs' Complaint.

The Civil Rights Education and Enforcement Center ("CREEC") is a nationwide nonprofit organization based in Denver whose mission includes ensuring that persons with disabilities participate in our nation's civic life without discrimination, including in the opportunity to benefit from the services provided by hotels. FAC ¶ 8. Plaintiff Denny is a member of CREEC and is disabled, using a wheelchair for mobility. *Id*. ¶ 9.

In 2014, after receiving reports that numerous hotels were violating accessible transportation requirements, CREEC began investigating this issue. This investigation included, among other steps, calling a sampling of Defendant's hotels that provide transportation to their guests to see if they provide equivalent wheelchair-accessible transportation. Ms. Denny called two local hotels, The Oxford and the TownePlace Suites, and another CREEC member called a sampling of hotels in other states. *Id*. ¶¶ 27-39. This investigation revealed widespread noncompliance. *See id*.

Defendant did not respond to CREEC's letter asking that it address its ADA violations. *Id*. ¶ 42. Plaintiffs then filed suit, CREEC based on associational standing, and Ms. Denny as a tester and based on her personal interest in ensuring that hotels comply with accessible transportation requirements. *Id.* ¶¶ 9, 41.

B) Defendant's Motion to Dismiss.

During the parties' Rule 26(f) conference, Defendant asserted that Sage Hospitality was not a proper defendant. Defendant refused Plaintiffs' request to provide documentation supporting this position, or to identify the owners and managers of the hotels at issue. Defendant filed its Motion on March 24th.

Defendant's argument relies on several declarations, leases, and other contracts, all attached to its Motion,[1] some of which appear to be out of date. For example, Exhibit 6 is a 2011 lease between Alamo Leasing Company, Inc. and JER ES Broom, LLC. In August 2013, however, JER ES Broom, LLC filed a "Statement of Foreign Entity

[1] Several of Defendant's exhibits are missing many pages. Defendant has refused to provide full copies of these exhibits.

Withdrawal" with the Colorado Secretary of State, in which it represented that it would "no longer transact business or conduct activities in Colorado." McGarry dec. at ¶¶ 3-6, ex. 1. In addition, Defendant's Exhibit 8 is a record from the City of Denver's assessor's office, which Defendant asserts "indicates that Oxford 2005 LLLP [is] the property owner" of The Oxford. Def.'s ex. 7 ¶ 2. However, according to the last page of Defendant's Exhibit 2, Oxford 2005 LLLP is no longer the owner of The Oxford.

C) Plaintiffs' First Amended Complaint.

On April 14, 2015, Plaintiffs filed their FAC under Rule 15(a)(1), which permits amendment as a matter of course within 21 days after service of a Rule 12(b) motion to dismiss. *See, e.g., Reiskin v. Reg'l Transp. Dist.*, 2015 WL 738636, at *1 (D. Colo. Feb. 19, 2015). The FAC adds as defendants Sage Oxford, Walter Isenberg, and John Does one through five. As set forth below, the FAC provides detailed factual allegations as to why these defendants were named.

ARGUMENT

I) Plaintiffs Have Properly Named the Defendants.

A) Defendant's Motion Should Be Converted to a Motion to Dismiss Under Rule 12(b)(6) or a Motion for Summary Judgment Under Rule 56.

Defendant's argument that Sage Hospitality is not a proper defendant relies on documents extrinsic to the complaint. Although Rule 12(b)(1) generally gives courts the discretion to consider extrinsic evidence to resolve disputed jurisdictional facts, there is "a widely recognized exception to this rule. If the jurisdictional question is intertwined with the merits of the case, the issue should be resolved under 12(b)(6) or Rule 56."

Wheeler v. Hurdman, 825 F.2d 257, 259 & n.5 (10th Cir. 1987). The jurisdictional claim is intertwined with the merits "[w]hen subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case." *Id.*

Wheeler was an employment discrimination action in which the defendant argued that the court lacked subject matter jurisdiction because the plaintiff was not an "employee" under the relevant statutes. *Id*. at 258. The Tenth Circuit held that because the jurisdictional issue turned on whether the plaintiff met the definition of "employee," the jurisdictional issue and the merits were intertwined and the district court properly refused to consider the matter under Rule 12(b)(1). *Id*. at 259.

Here, as in *Wheeler*, Defendant's argument that this Court lacks subject matter jurisdiction turns on whether Plaintiffs' claims satisfy requirements set forth in the underlying substantive statute, the ADA. The question that must be resolved to address Defendant's subject matter jurisdiction must also be resolved for the merits of Plaintiffs' claims: that is, whether Sage Hospitality, Sage Oxford and Walter Isenberg own, lease (or lease to) and/or operate, as those terms are used in Title III, the hotels at issue here. Because Defendant's subject matter jurisdiction argument is intertwined with the merits of Plaintiffs' claims, its motion should be converted to a motion to dismiss under Rule 12(b)(6) or a summary judgment motion under Rule 56. Under either standard, Defendant's motion should be denied.

B) Plaintiffs Have Adequately Pled That Defendants Are Covered by Title III.

As set forth above, Defendants are covered by Title III if they, directly or indirectly, own, lease or lease to the hotels at issue, and/or if they "operate" the hotels

because they "direct the functioning of," "conduct the affairs of, or manage" the hotels. *See* supra Sec. I. Plaintiffs' obligation is to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). The FAC's allegations easily meet this standard:[2]

The FAC continues to name Sage Hospitality, and adds two additional defendants, Sage Oxford and Walter Isenberg.

Sage Hospitality: Based on Sage Hospitality's website and an affidavit from its Co-Founder, President & CEO, the FAC alleges that Sage Hospitality manages more than 75 hotels in various states, including The Oxford and the TownePlace Suites, and that it has acquired others. FAC ¶¶ 10-14. These allegations allow the reasonable inference that Sage Hospitality owns and/or operates the hotels at issue.

Sage Oxford: Based on Defendant's Exhibit 2 and a document filed with the Securities and Exchange Commission, the FAC alleges that Sage Oxford owns and/or manages at least 44 hotels in at least 19 states, including The Oxford, and that Sage Oxford is the sole and exclusive manager to supervise and direct the operations of some or all of the hotels it manages, as well as their ancillary facilities. *Id*. ¶¶ 14-19.

[2] The allegations concerning Defendants are based on "information and belief." There is a good faith basis for every such allegation. Because Defendant has refused to provide Plaintiffs with requested documents that would allow more conclusive assertions, "information and belief" allegations are proper. *See, e.g., Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard, which applies to all civil actions, does not prevent a plaintiff from 'pleading facts alleged "upon information and belief"' where the facts are peculiarly within the possession and control of the defendant." (citation omitted)).

These allegations allow the reasonable inference that Sage Oxford owns and/or operates the hotels at issue.

Defendant Isenberg: Based on Sage Hospitality's website, documents filed with the Colorado Secretary of State, property records, and a document filed with the SEC, the FAC alleges that Defendant Isenberg: (1) is the Co-Founder, President and Chief Executive Officer of Sage Hospitality, which operates The Oxford and the TownePlace Suites; (2) "directs all company operations, including property management, development and finance;" (3) is the President and Director of Sage Oxford, which as set forth above, owns and/or manages at least 44 hotels in at least 19 states, including The Oxford; (4) is one of two people who control Oxford 2005 LLLP, which Defendant indicates owns The Oxford; and (5) is the Vice President, Secretary, Treasurer and Director of Sage Management Services, Inc., which manages a number of entities that operate hotels in various states, including the TownePlace Suites. *Id*. ¶¶ 20-25. These facts allow the reasonable inference that Defendant Isenberg owns and/or operates the hotels at issue. Thus Defendant's Motion should be denied under Rule 12(b)(6).

C) It Is Premature to Address Defendant's Motion Under Rule 56.

Resolving Defendant's argument under Rule 56 is premature as Plaintiffs have not received any discovery from Defendant.[3] Pursuant to Rule 56(d), Plaintiffs have

[3] If this Court chooses to rule on Defendant's Motion under Rule 12(b)(1), it would be an abuse of discretion to grant that motion without giving Plaintiffs an opportunity to conduct discovery on the issues raised. *See, e.g., Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) ("'When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion.' . . . [A] refusal to grant discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant . . .") (citation omitted).

submitted a declaration identifying the discovery they need in order to respond to Defendant's motion. This discovery includes responses to the four discovery requests propounded by Plaintiffs as permitted by this Court, and, depending upon those responses, additional depositions and/or discovery requests may be necessary.

According to a leading treatise, "[o]ne of the most common reasons offered under Rule 56(f) for being unable to present specific facts in opposition to a summary-judgment motion is insufficient time or opportunity to engage in discovery. 10B Fed. Prac. & Proc. Civ. § 2741 (3d ed.). This is especially true where, as here, "the relevant facts are exclusively in the control of the opposing party. Indeed, the majority of the continuances granted under Rule 56(f) involve cases in which one party has exclusive knowledge of the relevant facts." *Id.* The court should deny as premature Defendant's Motion as construed under Rule 56.

III) Defendant's Standing Arguments Must Be Rejected.

A) Defendant's Argument Concerning Ms. Denny's Standing Is Irrelevant.

Defendant argues that Ms. Denny has no standing on her own behalf to challenge barriers at hotels she has not contacted and has no intention of visiting. This is irrelevant, as Ms. Denny does not claim to have personal standing to challenge such barriers, nor does she seek a nationwide injunction on her own behalf. Rather, she seeks a nationwide injunction to remedy the injuries of the nationwide class she seeks to represent.

Defendant's argument is foreclosed by the Tenth Circuit, which rejected the same argument in *Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765

F.3d 1205 (10th Cir. 2014). *Abercrombie* was a Title III class action, and the defendant argued that because the named plaintiff did not intend to visit every store covered by the nationwide class, she lacked standing to obtain a nationwide injunction. *Id.* at 1212-13. The Tenth Circuit rejected this argument, holding that whether a named plaintiff in a nationwide class action could obtain a nationwide injunction was not a question of standing, but instead a question of whether the class met the requirements of Rule 23. *Id.* at 1216. "The question whether an injunction may properly extend to Hollister stores nationwide is answered by asking whether [the named plaintiff] may serve as a representative of a class that seeks such relief. All that is necessary to answer this question is an application of Rule 23." *Id.* at 1213.[4] Thus, whether an injunction may extend to all hotels covered by the proposed class here will be determined when the Court addresses whether the class meets the requirements of Rule 23.[5]

B) CREEC Has Adequately Alleged Associational Standing.

Plaintiffs' allegations are clearly sufficient to establish associational standing. An organization seeking associational standing must have members who would have standing to sue in their own right. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977). Defendant does not contest that CREEC has associational

[4] Defendant's cases are in accord. Three cases did not involve class actions. *See Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000); *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069 (7th Cir. 2013); *Equal Rights Ctr. v. Hilton Hotels Corp.*, 2009 WL 6067336 (D.D.C. Mar. 25, 2009). The other two addressed individual standing to seek injunctive relief, but held that it was premature to determine the scope of class relief. *See Clark v. McDonald's Corp.*, 213 F.R.D. 198, 226, 230 (D.N.J. 2003); *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334, 343-45 (D.N.J. 2003).

[5] Defendant argues that the Court should ignore 10 hotels that were alleged "on information and belief." Def.'s Mot. 4, 8 & 9. Plaintiffs make clear in the FAC that before filing suit, they called these hotels and confirmed they are not in compliance.

standing to challenge hotels contacted by its members before filing suit. *See* Def.'s Mot. 10. In its FAC, CREEC identifies twelve such hotels. *See* FAC ¶¶ 27-36,38-39. Defendant argues that CREEC's associational standing is limited to the hotels identified in the complaint. As a matter of standing law, Defendant's argument is seriously flawed.[6] Because Defendant challenges the sufficiency of the allegations of the complaint, however, the Court need not address the substantive standing issue. Rather, it must only determine whether Plaintiffs' allegations are sufficient.

They clearly are. "[I]f even one member of the association would have had standing to sue in his or her own right, that is sufficient" to establish associational standing. *Utah Ass'n of Counties v. Bush*, 455 F.3d 1094, 1099 (10th Cir. 2006). Here, the FAC identifies two CREEC members who contacted noncompliant hotels before filing suit. Defendant argues that Plaintiffs were required to include allegations that CREEC members contacted every hotel at issue in this case. This is simply incorrect.

The party invoking federal jurisdiction must establish standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Courts have repeatedly held that allegations less comprehensive than those here sufficiently allege associational standing. For example, in *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*,

[6] *See Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013) ("The district court misapplied the law when it rejected SUWA's standing on the basis that the affidavits failed to show its members have visited each of the leases at issue. Neither our court nor the Supreme Court has ever required an environmental plaintiff to show it has traversed each bit of land that will be affected by a challenged agency action.").

290 F.R.D. 409 (S.D.N.Y. 2012), a disability advocacy group brought an ADA suit against New York City. The court rejected the defendant's argument that the plaintiff's complaint was required to identify members on whose behalf they were suing, concluding that "[a]t this stage, it is enough that BCID alleges that it is a membership organization and that its members include people with disabilities." *Id.* at 416; *see also Clark v. McDonald's Corp.*, 213 F.R.D. 198, 215-16 (D.N.J. 2003) (rejecting argument that organization lacked standing to seek relief on behalf of members not identified in the complaint); *Gilkerson v. Chasewood Bank*, 1 F.Supp.3d 570, 597 (S.D. Tex. 2014) (holding that organization adequately pled associational standing based on allegation that one member encountered one inaccessible ATM).

C) Plaintiffs Have Adequately Alleged a Continuing Injury and a Real and Immediate Threat of Being Injured in the Future.

A plaintiff seeking injunctive relief must allege that she is "'suffering a continuing injury'" or that she is "'under a real and immediate threat of being injured in the future.'" *Abercrombie*, 765 F.3d at 1211 (citation omitted). Plaintiffs allege that Ms. Denny, as a tester, will continue to call hotels covered by the class and will stay at The Oxford and/or TownePlace Suites if told they have accessible transportation. *See* FAC ¶ 30-31, 35-36.

The Tenth Circuit has twice held that testers have standing to seek injunctive relief under the ADA, and that the "real and immediate threat" of future injury requirement is satisfied by allegations that the testers will continue their tests. In *Abercrombie*, this requirement was met by testimony that the tester would conduct tests "at least six times per year," and in *Tandy v. City of Wichita*, 380 F.3d 1277 (10th Cir.

2004) by testimony that the tester would conduct tests "several times per year." *Abercrombie*, 765 F.3d at 1211; *Tandy*, 380 F.3d at 1284. Here, Plaintiffs allege that Ms. Denny will continue testing hotels several times per year and will stay at the Oxford and/or TownePlace Suites if told they have equivalent accessible transportation. Plaintiffs' complaint adequately alleges threat of future injury.[7]

D) Defendant Has Not Shown that Class Certification Would Be Impossible.

Defendant moves to strike the allegations seeking class certification. Courts in this district routinely deny such motions,[8] recognizing that:

> [A] motion to strike class allegations is even more disfavored than other motions to strike under Rule 12(f). This is because it "requires a reviewing court to 'preemptively terminate the class aspects of . . . litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification.' " Consistent with this, federal courts across the country have denied motions to strike class allegations at the pleading stage. Thus . . . as to a motion to strike class allegations under Rule 12(f) that "[t]o prevail at this stage of the proceedings, *Defendant must 'demonstrat[e] from the face of plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove*.'"

Friedman, 2013 WL 5448078, at *2-3 (quoting *Francis*) (citations omitted) (emphasis added). In addition, Plaintiffs require class certification discovery so they can later demonstrate that certification is warranted, at which point the court must do a "rigorous" analysis that may "entail some overlap with the merits." *See Amgen Inc. v. Conn. Ret.*

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[7] Defendant's cases generally require that a plaintiff "must at least allege some fact that 'would move plaintiff's purported "desire to return" from a pure speculative proposition to a real and immediate threat of future injury.'" Def.'s Mot. 12. Plaintiffs have done so by alleging that Ms. Denny will continue to test hotels and will stay at a hotel if told that it has accessible transportation.

[8] *See, e.g., Friedman v. Dollar Thrifty Auto. Grp., Inc.*, 2013 WL 5448078, at *2-3 (D. Colo. Sept. 27, 2013); *Francis v. Mead Johnson & Co.*, 2010 WL 3733023, at *1 (D. Colo. Sept. 16, 2010); *Wornicki v. Brokerpriceopinion.com*, Inc., 2015 WL 1403814, at *5 (D. Colo. Mar. 23, 2015).

Plans & Trust Funds, 133 S. Ct. 1184, 1194-95 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

Defendant's only basis for seeking this extraordinary measure is its contention that the complaint only identifies two hotels in violation of the ADA. The FAC makes clear that before filing suit, Plaintiffs called the ten additional hotels listed in both the complaint and FAC and confirmed that they violate the ADA. Defendant cannot meet its burden of showing that class certification is impossible. Its Motion should be denied.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendant's Motion be denied.

Dated this 16th day of April, 2015.

Respectfully Submitted,

/s/ Timothy P. Fox

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to the following:

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