

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NEW VISTA NURSING & REHABILITATION ,**

**Employer,**

**and**

**CASE 22-RC-13204**

**1199 SEIU, UNITED HEALTHCARE WORKERS,  
EAST NEW JERSEY REGION,**

**Petitioner.**

**EMPLOYER’S REQUEST FOR REVIEW OF  
REGIONAL DIRECTOR’S DECISION OF MARCH 9, 2011**

**I. BACKGROUND**

On January 24, 2011, the Petitioner (“1199”) filed the petition in Case 22-RC-13204 seeking to be certified as the exclusive bargaining representative for all full-time and regular part-time licensed practical nurses (“LPN’s”) employed by the Employer. On February 14, 17 and 18, 2011, a hearing was held before Hearing Office Eric Pomianowski. At the hearing, the Employer took the position that all the petitioned-for LPN’s are statutory supervisors because they discipline and effectively recommend discipline with respect to the Employer’s Certified Nurse Aides (“Aides”). The parties stipulated that LPN’s who are employed as “Unit Managers” were statutory supervisors. 1199 argued that all other petitioned-for LPN’s are not supervisors within the meaning of Section 2(11) of the Act; and, the Regional Director determined in his March 9, 2011 Decision and Direction of Election that these other petitioned-for LPN’s were employees under the Act and ordered an election be held for them.

## II. BASIS FOR SEEKING REVIEW

Review is appropriate in this case because it involves a substantial question of law because of the Regional Director's departure from officially reported precedent and his failure to take into account the Board's precedent for Employers with progressive discipline systems. While the Employer relied on the Board's reported decisions in Oak Park Nursing Center, 351 NLRB 27 (2007); Wiltshire at Lakewood, 345 NLRB 80 (2004), as amended 345 NLRB 1050 (2005); Mountaineer Park, Inc., 343 NLRB 145 (2004); and Bredero Shaw, 345 NLRB 782 (2005), as well as Extendicare Health Services, Inc. v. NLRB, 182 Fed.Appx. 412 (6<sup>th</sup> Cir. 2006); Kentucky River Community Care v. NLRB, 193 F.3d 444 (6<sup>th</sup> Cir. 1999), *aff'd. in relevant part* 532 U.S. 706 (2001); NLRB v. Attleboro Associates, Ltd., 176 F.3d 154 (3<sup>rd</sup> Cir. 1999); Passavant Retirement & Health Care Center v. NLRB, 149 F.3d 243 (3<sup>rd</sup> Cir. 1998), the Regional Director did not address, analyze or distinguish any of these precedents dealing with determination of supervisory status relating to discipline under progressive discipline systems. The Regional Director instead relied on an incomplete paraphrase of prior Board precedent relating to when evidence of the frequency of exercising supervisory authority is required, including reliance on language in an ALJ decision affirmed by the Board in 2009 that, pursuant to a decision of the Supreme Court of the United States in 2010, is invalid for lack of the necessary quorum and is inapposite in any case under relevant Board precedents.

## III. FACTUAL BACKGROUND

New Vista Nursing & Rehabilitation is a 340-bed nursing home, with resident

rooms on three (3) floors (3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup>), each with two (2) wings (Tr. 15), Sides A and B (Tr. 158). In each resident care wing, there are 5-6 Aides and either a RN or LPN during each of three (3) shifts (Tr. 16). The Director of Nursing (DON) is Victoria Alfeche, RN (Tr. 11). She normally works from 8:30 am through 6:00 pm (Tr. 14). The Nursing Department at New Vista includes the Aides (Tr. 13), who are supervised by either a RN or LPN (Tr. 13), who are supervised by a Unit Manager or Nursing Supervisor, depending on the shift involved (Tr. 14), who are supervised by the DON (Tr. 14), who has the assistance of a consultant, the Vice President of Operations, three days a week (Tr. 13-14). The DON reports to the Administrator (Tr. 13-14). There is also an assistant director of nursing (ADON) (Tr. 37). The facility operates with three (3) shifts: 7 am – 3 pm (morning), 3 – 11 pm (evening), and 11 pm to 7 am (night) (Tr. 17-18). There are currently only three (3) Unit Managers, one for each resident floor, while previously there were six (6) (Tr. 143). The Unit Managers work the morning shift. On the evening and night shifts, there is only one Evening or Night Supervisor sharing supervisory responsibilities with the LPNs (Tr. 17-19, 87) after the DON leaves for the day.

The LPNs and the Aides are direct care givers for the residents of New Vista (Tr. 15). The Aides are under the supervision of the LPNs (Tr. 15). During the day, there is a Unit Manager for each floor, while during the night shift there is only an additional Night Supervisor for all three (Tr. 17-18). One of the Unit Managers is a LPN (Grace Tumamak), who works on the 3<sup>rd</sup> floor; and, who also previously worked as a LPN for a wing on one shift and a Unit Manager on a different shift (Tr. 236-237; 140); and, an LPN is in charge of each of the wings of the 3<sup>rd</sup> floor (Tr. 197). On the 5<sup>th</sup> floor, there is

a RN for one of the wings and a LPN for the other during the 3-11 pm shift (Tr. 157). An LPN is in charge of one wing of the 4<sup>th</sup> floor during the 7 am – 3 pm shift (Tr. 225).

The LPN's Job Description, Exhibit E-2 at Item 2, expressly provides that the LPNs "Supervise and evaluate all direct resident care provided and initiate appropriate action as necessary." The Job Description at Item 26 expressly provides that LPN's "Counsel supervised staff and recommend disciplinary action to Director of Nursing." All of the LPN's received job evaluations that included scores related to these job responsibilities (Exhibit E-5, E-8, E-12, E-13, E-15, E-16).

The LPNs must make sure that the Aides have completed their assigned jobs for the care of the residents (Tr. 24). Their Job Description, Exhibit E-2 at Item 20, expressly provides that the LPNs "Provide clinical supervision to nursing assistants and monitor for completion of assigned duties." (Tr. 41-42). The LPNs are responsible for supervising the Aides who work in their wing to make sure all work assigned is done properly (Tr. 23-24, 41-42).

New Vista has a progressive discipline process and policy defined in its Employee Manual (Exhibit E-7 at pages 42-44, 51-52; Tr. 148) which sets forth violations in work-related and attendance-related classes each with its specified progressive disciplinary steps. The procedures for work-related violations (at page 42) permit any employee's supervisor to begin disciplinary action at any step in the process, whether the LPN, the Unit Manager, a RN or other Nursing Supervisor (Tr. 125) The progressive discipline steps include: (a) Verbal warning; (b) Written warning; (c) Suspension without pay for up to 5 days (depending on the severity of the violation); (d) Suspension without pay pending a departmental hearing on discharge; and, (e) discharge/termination. The New

Vista Administrator must be notified of any recommendation for discharge. *Id.* at page 42. The level of severity of the discipline imposed is a function of both the nature of the specific violation (Group) and whether the Employee has received prior discipline within the 1 year before the new violation. Employees receive a copy of the Employee Manual when they are hired (Tr. 153). New Vista also has a collective bargaining agreement (CBA) with the Union, under which the Union is involved in the discipline process and permitted to grieve disciplinary actions taken without “good cause.” (Tr. 119, 122, 155-156).

For work-related disciplinary actions, a LPN may determine whether an Aide has committed a disciplinary violation (Tr. 29, 37, 87); and, if such a determination is made, whether to “write up” that Aide for the offense (Tr. 29, 36-37, 87). A LPN may counsel an Aide rather than initiating discipline (Tr. 29, 42, 205; Exhibit E-2 at Item 26, relating to job duty to counsel supervised staff). Once an LPN determines that a write up for an offense is appropriate, the LPN initiates the write up using New Vista forms (Tr. 86). The level of discipline to be issued is determined by the DON based on her determination of what is required for the violation charged by the LPN under the progressive disciplinary policy in the Employee Manual, including the number of days for any suspension (Tr. 86; 148; 155). When the DON is not available, the ADON or the Night Supervisor acts as her designee (Tr. 37). The discipline then is issued to the Employee and, where required, the Union; and, thereafter, the write up is made a part of the Employee’s personnel file (Tr. 86; 149-150).

Attendance-related disciplinary actions are initiated by a request from the DON after review of attendance records for other staff to prepare a write up (Tr. 152). Any

employee, including an Aide, can also trigger an investigation of the need for possible discipline or corrective action by filing a statement with a supervisor, including concerns covered by New Jersey's Conscientious Employee Protection Act (CEPA) (Tr. 83-85, 176-177, 277-278).

A write up is made using a form available at the nurse's station on each floor (Tr. 164, 203) on which the LPN states the basis for the write up (Tr. 130). The form to be used was recently changed (Tr. 146 comparing "Notice of Corrective Action" form with newer "Employee Warning Notice" form Exhibits E-4 and E-9). An LPN does not need anyone's permission to get the form or to write up an Aide (Tr. 39, 165). The write up is then usually taken to the Unit Manager for the floor to obtain documentation relating to the violation from the Aide involved and any witnesses (Tr. 147). The DON does not conduct an independent investigation of the LPN's basis for each write up (Tr. 120), but she does accept and obtain supporting documentation for the file, leaving to the grievance process any disputes concerning the underlying violation (Tr. 120-122). The forms and procedures used are the same, whether the disciplinary action is initiated by an LPN or a Unit Manager or any other Nursing Supervisor (Exhibits E-4, E-11, E-17, E-18 and P-1).

New Vista presented both testimony and documentation that LPN's have written up Aides (Exhibits E-4, E-11, E-17, and E-18).

LPN Marisol Roldan testified that she disciplines Aides who work in her wing and that she wrote up one Aide for insubordination and another for failure to properly reposition residents (Tr. 168-169; Exhibit E-4 at page 4). In the insubordination case, LPN Roldan testified that she recommended that the Aide be terminated and he was terminated (Tr. 169). In the failure to reposition case, she noted that the Aide had been

warned previously because she had given the prior warning (Tr. 166). She testified that in the insubordination case, she also ordered the Aide off the floor and the Aide left (Tr. 193).

LPN Simon Ramirez testified that he disciplines Aides who work in his wing and that he wrote up one Aide for excessive breaks (Exhibit E-11; Tr. 205). He also testified that he has recommended that an employee be terminated and that employee was terminated (Tr. 211 as to Employee DW). He testified that he could ask an Aide to leave the floor if the Aide was not following his directions, as well as in cases where resident abuse might be at issue (Tr. 203); and, that he has done so (Tr. 216).

LPN Agnes Ramirez testified that she writes up Aides who work in her wing and that she wrote up an Aide who did not comply with her care instructions (Tr. 228-229).

LPN Grace Tumamak, who has the same job description as to counseling and disciplining supervised staff as other LPN's, testified that she writes up Aides when they do something wrong (Tr. 238). She testified that she does write ups whether she is working as a Unit Manager/LPN or simply as a LPN in charge of a wing (Tr. 239-240). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 20) but only the top part of the page (Tr. 240). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 22), including checking off the "verbal warning" line because she was sure this was the Aides first offense (Tr. 242-243). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 25), again only the top part, and gave the completed form to the DON (Tr. 243). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 27) (Tr. 243-244). She testified that she filled out the "Notice of Corrective Action"

form (Exhibit E-4 at page 28), again only the top part, and gave the completed form to the DON (Tr. 244). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 33) (Tr. 244). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 46), just the top only (Tr. 245-246). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 47), again only the top (Tr. 246). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 66), again only the top (Tr. 246-247). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 68), again only the top (Tr. 247). She testified that she filled out the “Notice of Correction Action” form (Exhibit E-4 at page 79), again only the top (Tr. 247). She testified that she filled out the “Notice of Correction Action” form (Exhibit E-4 at page 83) (Tr. 247). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 85), again only the top (Tr. 248). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 86), including the check for “verbal warning,” after she determined that a warning was appropriate (Tr. 248-249). She testified that she filled out the “Notice of Corrective Action” (Exhibit E-4 at page 95), again only the top part (Tr. 249). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 104) (Tr. 249). She testified that she filled out the “Notice of Corrective Action” form (Exhibit E-4 at page 105), again only the top part (Tr. 249). She testified that she filled in the “Notice of Corrective Action” form (Exhibit E-4 at page 106) (249-250).

The disciplinary actions initiated by LPN Grace Tumamak used the same forms and were limited to the same portions of the forms as with the disciplinary actions

initiated by all other LPNs. In the LPN Grace Tumamak cases, as with the other LPN-initiated disciplinary actions, the DON determined the applicable level of discipline to be imposed pursuant to the progressive discipline policies and procedures (Tr. 86; 148; 155). The Union has stipulated that LPN Grace Tumamak is a Section 2(11) Supervisor in that she now works as a Unit Manager. Board Exhibit 3.

LPN Wendy Thompson, a Union witness, testified that her job description includes supervision of the work of the Aides and recommending disciplinary action (Tr. 275), but that she takes her concerns to her Unit Manager, who was the LPN/Unit Manager, Grace Tumamak (Tr. 276). She testified that she does check that her Aides have done their work (Tr. 274) and has been able to resolve most of her problems with the Aides (Tr. 274). She testified that in two cases she was not able to resolve herself, she reported them to the LPN/Unit Manager and wrote out a statement of her concerns (Tr. 278-279). She also testified about the information she provided for the write up that is included in Exhibit E-4 at page 17 (Tr. 265-266), indicating that the information she provided was a transmittal of a resident concern and not a disciplinary action. The DON had already confirmed this in her testimony (Tr. 45). The types of disciplinary forms used by other LPNs to recommend discipline of Aides were used on the same floor that this LPN worked on by her Unit Manager, Grace Tumamak (Exhibit E-4; Tr. 238-250).

LPN Abosede Adekanmbi, the other Union witness, testified that the job description she signed as hers includes supervision of the work of the Aides and recommending disciplinary action (Tr. 306). She testified that in her capacity as a LPN she supervises the quality of the Aides' work during her rounds; and, if she is not satisfied with the explanation an Aide gives for poor work, she takes her concerns to her

Unit Manager or the Nursing Supervisor (Tr. 307, 309), sometimes filling out an “investigative report” form (Tr. 295, 310), leaving for them to determine what proper action to take. She also testified that she was not really aware of what authority she had as a LPN (Tr. 312). She also testified that she was aware of the DON requesting information from staff about the facts related to the write up that is included in Exhibit E-4 at page 1 (relating to January 27, 2011) (Tr. 290-291). She also testified that the information she provided for the write up included in Exhibit E-4 at page 102 was provided at the request of her LPN/Unit Manager, Grace Tumamak (Tr. 294). The write up about which LPN Abosede Adekanmbi testified, at Exhibit E-4 at page 1, resulted in a Suspension for 1 day with a note stating: “Next offense of being disrespectful to nurse will be terminated.” The Union witness testimony supports the facts reported by the LPN who wrote up the Aide and signed the “Notice of Corrective Action” form, Aliyicia Reese. The types of disciplinary forms used by other LPNs to recommend discipline of Aides were used on the same floor that this LPN worked on by her Unit Manager, Grace Tumamak (Exhibit E-4; Tr. 238-250).

The Employer’s examples of LPN disciplinary actions against Aides, in addition to those filed by LPN/Unit Manager Tumamak, contained in Exhibit E-4, include:

Page 1            Suspension for 1 day with note that “next offense of being disrespectful to nurse will be terminated.” (2011)

Page 2            Warning (2010)

Page 4            Warning with note that “next offense is suspension or as the case may be” (2008)

Page 5 & 73 Suspension pending admin. decision (note that under Employee Manual, the Administrator is involved when discharge has been recommended) (2010)

Page 15 First Written Warning (2008)

Page 92 Warning with note that employee must tell Unit Manager before he leaves the Unit or he will be suspended (2007)

Page 93 First Written Warning (2008)

Page 110 Warning (2006)

And the additional disciplinary actions by LPNs as to Aides in the other Exhibits include:

Exhibit E-11 Warning (2007)

Exhibit E-17 Suspension for 2 days (2009)

Exhibit E-18 Suspension for 1 day (2004)

#### IV. ARGUMENT

A. **The Regional Director Incorrectly Determined the Existence of Supervisory Authority Based on the Frequency of its use.** The Regional Director reached his decision to reject the evidence of the LPN's statutory supervisor authority and status because he "is reluctant to extinguish Section 7 rights here on such a slender record of disciplines over a six year stretch," citing Family Healthcare, Inc., 354 NLRB No. 29 (2009) at pages 6-7, a decision of two (2) sitting members of the Board. Such decisions were later declared invalid by the Supreme Court of the United States in New Process Steel, L.P. v. NLRB, 560 U.S. \_\_\_, 130 S.Ct. 2635 (2010).

In Family Healthcare, Inc., the Board affirmed the ALJ's decision without making further findings or rulings. The ALJ's decision at pages 6-7 discusses "assignment and

effectively recommending assignment,” not discipline; and, relied on Greenspan, D.D.S., P.C., 318 NLRB 70 (1995), enfd. mem. 101 F.2d 107 (2d Cir. 1996), to reject supervisory status “exercised too infrequently.” The ALJ, however, at page 7, took note that, while the Board did not overrule Greenspan in Oakwood Healthcare, Inc., 348 NLRB 686 (2006), the Board noted that it “has declined to find individuals to be supervisors based on alleged authority that they were never notified they possessed, where its exercise is sporadic and infrequent.”

In this case, the Record is clear that all of the LPN’s were notified of their authority in their Job Descriptions to initiate appropriate action and recommend disciplinary action to the Director of Nursing. These job descriptions must be considered in the determination of LPN supervisory status. *See: Grancare, Inc. v. NLRB*, 137 F.3d 372, 375 (6<sup>th</sup> Cir. 1998). In addition, all employees were notified through the Employee Manual of New Vista’s progressive discipline system (Exhibit E-7 at pages 42-44, 51-52; Tr. 148), under which work-related violations permit any employee’s supervisor, including the LPN’s, to begin disciplinary action. Therefore, the Regional Director’s paraphrase of the Board’s policies is incorrect and the reference inapposite. It is also inconsistent with the Board’s application of those policies in Oak Park Nursing Care Center, in which the Board determined that the authority to initiate disciplinary action as part of a progressive discipline system, as here, was sufficient evidence of statutory supervisor status. The Regional Director’s analysis fails to implement the Board’s precedent and policies for facilities with progressive discipline systems.

The Employer argued below that the Section 2(11) of the Act requires the existence of actual authority, not frequency of its exercise. This is consistent with the

Board's actual analysis in Oakwood Healthcare, Inc. and in Oak Park Nursing Care Center. *See also*: NLRB v. Hilliard Dev. Corp., 187 F.3d 133, 144 (1<sup>st</sup> Cir. 1999) ("the question under § 2(11) is whether authority exists, not how frequently it is exercised"). The Regional Director's Decision, at page 17, agrees ("the Act demands only the possession of Section 2(11) authority, not its exercise..."). The Regional Director conceded below, at page 24 of his Decision, that "The Record shows LPN involvement in actual progressive discipline of CNAs 33 times over a 6-1/2 year period." These disciplinary actions involved were all initiated by LPN's either filing New Vista's disciplinary forms (writing up the Aides) or by their taking their concerns to the Unit Manager for further action. The Regional Director, at page 26, conceded that the submission of these disciplinary forms resulted in discipline.

The Regional Director expressly found, at page 25, that:

- (1) LPN Simon Ramirez "initiated a notice of corrective action against at CNA in late December 2007 for repeatedly taking excessive breaks and for failing to properly care for a resident."
- (2) LPN Marisol Roldan "initiated an employee warning notice against CNA Stella Ighasa in October 2008 for failing to properly position a resident and for failing to empty a Foley catheter bag."

That is all that is required under the Oak Park Nursing Care Center to confirm statutory supervisory status in progressive discipline system cases. The Regional Director's requirement of additional involvement in the process after initiating the disciplinary action by filing the required disciplinary form is error. The Record demonstrates that

LPN's have the authority and discretion to initiate the progressive disciplinary system process or to seek to resolve their concerns through other methods.

The Regional Director's conclusion, at page 26, that LPN's "are barely on the margins of the disciplinary process" ignores the fact, conceded in his decision, that each of the disciplinary actions involved as initiated by a decision of an LPN to trigger the progressing discipline system process by filing the required form or bringing a disciplinary complaint to a superior instead of resolving the issue on their own by counseling the Aide or doing nothing. This is patently more than "simply reporting factual findings" (page 26). The conclusion is therefore contrary to Board's precedent in Oak Park Nursing Care Center; Sheraton Hotels & Resorts Worldwide, 350 NLRB 1114 (2007); and Progressive Transportation Services, 340 NLRB 1044 (2003), in which the Board determined that, where the filing of progressive discipline forms is an integral part of the Employer's progressive discipline system and there is evidence that they are a prerequisite to discipline, Section 2(11) supervisor status was established. The Record in this case supports the same result.

**B. The Regional Director Applied the Wrong Legal Standard to Determine Whether the LPN's Had Supervisory Authority Effectively to Recommend Discipline.** The Regional Director's Decision, at page 26, erred as a matter of law when he rejected Section 2(11) status based on the LPN's authority effectively to recommend discipline on the basis of his conclusion that the incidents involved were not subject to independent investigation by superiors. This conclusion is contrary to the express holding otherwise in Extendicare Health Services, Inc. v. NLRB, 182 Fed.Appx. 412 (6<sup>th</sup> Cir. 2006) and Caremore, Inc. v. NLRB, 129 F.3d 365, 370 (6<sup>th</sup> Cir. 1997), as well as

with the Board's analysis in Sheraton Hotels & Resorts Worldwide, in which the Board found Section 2(11) supervisory status based on discipline for an employer using "corrective action forms" under similar facts; and, in Mountaineer Park, Inc., in which the Board found Section 2(11) supervisory status based on effectively to recommend discipline, noting that, even where such submittals were investigated by upper management, where the manager, as in this case, routinely signed off on the recommendation for discipline where they were justified. The issue in the Board's precedent is whether the determination by the LPN that discipline is required is "effective" (i.e., that it usually results in discipline). In Progressive Transportation Services, the Board found Section 2(11) supervisor status based on effectively to recommend discipline where the supervisor initiated the disciplinary process by bringing disciplinary issues to the attention of the department director, who decided the level of discipline based on the supervisor's account.

The Regional Director conceded, as noted above, that LPN's here initiate the disciplinary process. The Record is clear (Exhibit C-4) that such disciplinary actions become part of the employee's personnel file laying a foundation for future discipline, as required in Oak Park Nursing Care Center, 351 NLRB at 28-29, *citing* Promedica Health System, 343 NLRB 1351 (2004), *enf. in relevant part* 206 Fed.App. 405 (6<sup>th</sup> Cir. 2006), *cert. den.* 127 S.Ct. 2033 (2007). The Regional Director erred by not applying the Board precedents to find these facts sufficient to establish the LPN's Section 2(11) supervisory status in this case.

Given the LPN's express authority to take such actions and make such recommendations in their Job Descriptions and the Employee Manual, the Record

contains all the evidence required by the Act and by the Board's controlling precedents. The Regional Director reluctance to apply controlling precedent was error and should be reviewed and reversed by the Board.

## V. CONCLUSION

Based on the foregoing, the Regional Director erred in finding that the remaining petitioned-for LPN's were not statutory supervisors as defined by Section 2(11) of the Act and in ordering an election instead of dismissing the petition. Accordingly, the Employer requests that his March 9, 2011 decision be reversed and the petition dismissed.

Respectfully submitted,

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DATE: March 23, 2011

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 23<sup>rd</sup> day of March 2011, a true and correct copy of the foregoing EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION OF MARCH 9, 2011 was served on the following by the method designated:

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