

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

WAL-MART STORES, INC.

and

Case 13-CA-114222

**THE ORGANIZATION UNITED FOR RESPECT
AT WALMART (OUR WALMART)**

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

On June 4, 2015, Administrative Law Judge Geoffrey Carter issued his Decision finding that Respondent Wal-Mart Stores, Inc. violated Section 8(a)(1) of the Act by maintaining dress codes containing the following provision:

Wal-Mart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, hats, jackets or coats are also permitted.

ALJ Carter found that the language restricting employees to “small” and “non-distracting” logos or graphics violated the Act because it was overly broad, not justified by special circumstances and an unlawful restriction on employees’ right under Section 7 to wear union insignia. (ALJD 1).

Respondent has submitted 33 Exceptions to Judge Carter’s Decision challenging nearly every one of the Judge’s key factual findings, legal analysis and conclusions. Counsel for General Counsel submits that Respondent’s Exceptions fail to support overturning Judge Carter’s Decision in a case where there are no factual disputes and in which he relied on longstanding Board precedent. Respondent’s Exceptions should be denied in their entirety.

JUDGE CARTER APPROPRIATELY RELIED ON BOARD PRECEDENT TO DECIDE THAT RESPONDENT’S RESTRICTION ON ITS EMPLOYEES’ EXERCISE OF SECTION 7 RIGHTS VIOLATED SECTION 8(A)(1) OF THE ACT

The ALJ relied on the holding in *Boch Honda*, 362 NLRB No. 83 (2015) to support his conclusion that Respondent violated Section 8(a)(1) by prohibiting employees from wearing union insignia in the workplace in the absence of special circumstances. (ALJD at 7 25-30) In *Boch Honda*, the Board set out an analytical framework to be utilized to determine whether an employer’s restriction on the display of union insignia violated Section 8(a)(1) of the Act. *Boch Honda*, 362 NLRB at 2. The Board stated “ .a rule that curtails employees’ Section 7 rights to wear union insignia in the workplace must be narrowly tailored to the circumstances justifying the maintenance of the rule, and the employer bears the burden of proving such circumstances.” *Id.* Judge Carter concluded that Respondent’s rule prohibiting employees from displaying logos or insignia that it deemed to be “distracting” and/or are larger than Wal-Mart’s 2.25 by 3.5 inch nametags, was not narrowly tailored; but was instead overly-broad as it interfered with employees’ lawful exercise of their Section 7 rights. (ALJD at 8: 34-40 – 9: 1-3.)

Judge Carter further found that Respondent failed to establish that there were special circumstances justifying its restriction on the exercise of Section 7 rights. An employer may only restrict its employees’ right to display of union insignia by presenting substantial evidence of special circumstances sufficiently important to outweigh Section 7 guarantees.¹ The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378, 379 (2004). Further, the special circumstances exception is narrow and “a rule that curtails an employee's right to wear union insignia at work is presumptively invalid.” *E & L*

¹ *Eckerd’s Market, Inc.*, 183 NLRB 337, 338 (1970) (finding the “vague general evidence” of customer complaints presented by the employer did not constitute substantial evidence of “special circumstances” warranting removal of the union buttons worn by its employees). See also *Albis Plastics*, 335 NLRB 923, 924 (2001) (“the Board and courts balance the employee’s right to engage in union activities against the employer’s right to maintain discipline or to achieve other legitimate business objectives”), *enfd.* 67 Fed. Appx. 253 (5th Cir. 2003).

Transport Co., 331 NLRB 640 fn. 3 (2000). Judge Carter correctly determined that Respondent's concerns about employee identification and minimizing employee and customer distractions did not constitute special circumstances justifying the maintenance of dress code restrictions

Respondent argues that its dress code rule provision should be analyzed under the standard enunciated by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In *Lutheran Heritage Village-Livonia*, the Board stated the following standard for determining whether an employer's maintenance of a "work rule" violates Section 8(a)(1): If the rule explicitly restricts Section 7 activity, it is unlawful. *Id.* at 646. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. In applying these standards, the Board does not read particular phrases in isolation, and it does not presume improper interference with employee rights. *Id.* at 646. Respondent contends that the dress code provision would be found lawful under this analysis.

Judge Carter rejected the Respondent's contention that its rule should be analyzed under *Lutheran Heritage Village-Livonia*. The Judge submits that *Boch Honda* provides the appropriate basis for analyzing whether an employer's restrictions on the display of union insignia violates the Act and that it would be incorrect to rely on a hybrid analysis consisting of the *Boch Honda* and *Lutheran Heritage Village-Livonia* standards. (ALJD 7: 46-47 – 8: 1 – 10).

Counsel for the General Counsel does not find fault with Judge Carter's reliance on *Boch Honda* as the basis for finding a violation. The General Counsel submits however that the same

result would be reached applying *Lutheran Heritage Village-Livonia*, as the dress code provision at issue in this case is unlawful on its face. Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful.² See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enforcement denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003) (work rule that prohibited “disrespectful conduct towards [others]” unlawful because it included “no limiting language [that] removes [the rule's] ambiguity and limits its broad scope.”) Here, Respondent’s earlier versions of the rule does not define the term “small” or “non-distracting” nor does it provide any guidance to employees as to the application of these terms. Respondent has presented no evidence that it clearly communicated to its employees an intent to apply the restrictions in a lawful manner. As such, employees would reasonably construe the requirement that logos be small and non-distracting to preclude the wearing of all union-identify insignia on their clothes, and the restriction is therefore unlawful. See *Chinese Daily News*, 353 NLRB 613 (2008) (dress code rules unlawful where so ambiguously worded that employees may reasonably construe it as prohibiting all employees from wearing union-identifying clothing at the workplace).

Respondent’s recent addition of language to the dress code permitting logos if they are no larger than an employee’s name badge continues to represent an unlawful infringement on the employees’ Section 7 rights. As noted by Judge Carter in his December 9, 2014, Decision referencing the same dress code provisions, the Board upholds the right of employees to wear union insignia in a variety of sizes including sizes much larger than Respondent’s limitation that

² For example, the Board found that a rule proscribing “negative conversations” about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity. See, e.g., *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005).

logos be smaller than its employees' name badges. *Wal-Mart Stores, Inc.*, 201 L.R.R.M. (BNA) 2115, slip op. at 29 (December 9, 2014) citing *Serv-Air, Inc.*, 161 NLRB 382, 401-402, 416-417 (1966) (finding that the employer violated the Act by prohibiting assorted union insignia that included: an improvised, crudely printed, paper badge that was 3 inches in diameter; a 2.25 inch red button; and 14-inch signs that two employees taped to their backs), enf'd. 395 F. 2d 557 (10th Cir. 1968), cert. denied, 393 U.S. 840 (1968). Based on the foregoing, Counsel for the General Counsel submits that applying *Lutheran Heritage Village-Livonia*. would lead to the finding of a violation as the dress code provision is unlawful on its face as it explicitly restricts Section 7 activity. Id. at 646

NO ONE IS ARGUING IN SUPPORT OF AN EMPLOYEE'S RIGHT TO WEAR LARGE DISTRACTING UNION INSIGNIA WHILE WORKING IN A RETAIL ENVIRONMENT

Respondent has repeatedly argued that the Act does not protect large, distracting union insignia in a retail environment. (R's brief 1, 13 – 16). This argument was aptly laid to rest by Judge Carter in his Decision in which he stated: "This argument misstates the positions of the General Counsel and Charging Party, who merely maintain that Wal-Mart's February 2013, May 2014 and September 2014 dress codes restrictions on logos are unlawfully broad. If the General Counsel and Charging Party prevail on that point, such a result does not mean that anything goes when it comes to union insignia. To the contrary, Wal-Mart would remain free to craft a revised dress code that addresses its concerns and complies with the Act." (ALJD at 8: fn 8).

JUDGE CARTER DID NOT IGNORE RESPONDENT'S ATTEMPT TO JUSTIFY ITS MAINTENANCE OF THE DRESS CODE PROVISION INCLUDING INSURING THAT AN EMPLOYEE'S CLOTHING ADORNMENTS DO NOT DISTRACT OTHER EMPLOYEES FROM WORKING OR CUSTOMERS FROM SHOPPING

Contrary to Respondent's arguments, Judge Carter did not ignore the evidence Respondent presented to justify its maintenance of the rule. (R's brief at 3, Questions 2 and 3).

Respondent submits that the rule is justified in order to insure that an employee's "clothing adornments" don't distract other employees from working. (R's brief at 8) Here lies the recurrent problem with Respondent's efforts to justify its rule, it is entirely subjective and without meaning. How large is too large? At what point does a display of union insignia become "distracting" and fall within the prohibition? Where is the evidence showing that an employee's display of union insignia larger than an employee's name badge distracts other employees from performing their jobs or distracts customers from completing their purchases? Similarly, Respondent failed to present evidence to support its contention that its rule insures the easy identification of employees by customers and other employees. The undersigned notes that in addition to their name badges, employees are required to wear khaki pants, blue shirts and, more recently Wal-Mart labeled vests while they are working.

The Board has consistently held that "customer exposure to union insignia, standing alone, is not a special circumstance that permits an employer to prohibit display of such insignia.

Nor is the requirement that employees wear a uniform. ³ Indeed, the Board recently has reiterated that "[a]n employer cannot avoid the 'special circumstances' test by simply requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia."⁴ The Board will find special circumstances, however, in cases where the display of union insignia "unreasonably interfere[s] with a public image which the employer has established, as a part of its business plan" through strict dress code requirements for its employees.⁵ Nevertheless, a work rule based on special circumstances must be narrowly

³ *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 34-35 (2007) (citations omitted).

⁴ *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 1, n.3 (2014) (quoting *Stabilus, Inc.*, supra, (referencing *Great Plains Coca-Cola Bottling Co.*, supra, and *Meijer, Inc.*, 318 NLRB 50, 56-57 (1995), enf.d.130 F.3d 1209, 1217 (6th Cir. 1997)).

⁵ *Meijer, Inc.*, supra at 50 (internal quotation marks omitted) (citing *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. den. 41 F.3d 1068 (6th Cir. 1994)) (employer's ban on union pins unlawful where employer offered no

drawn to restrict the wearing of union insignia only in areas or under circumstances that would justify the rule.⁶

The ALJ correctly found that the Respondent failed to provide substantial evidence to establish the requisite special circumstances to justify the restrictions in its dress code.⁷ As discussed below, Respondent has not provided substantial evidence to establish the requisite special circumstances to justify the restriction that logos be “small and non-distracting” and smaller than the 2X3 name badges as required by its dress codes. Jt. Ex. 1-11. Nor has Respondent established that the display of union insignia would “unreasonably interfere with a public image which the employer as has established, as part of its business plan” through strict dress code requirements for its employees.⁸

In contrast to cases where the requisite special circumstances have been found, Respondent does not supply its employees with a professionally designed uniform.⁹ In the

evidence that pins interfered with company’s public image and did not enforce its policy in a consistent and nondiscriminatory manner).

⁶ See, e.g., *Albertsons, Inc.*, 272 NLRB 865, 866 (1984) (finding employer’s prohibition on display of union buttons “unlawfully broad because it applies to nonselling as well as selling areas of the stores and applies to employee breaktime as well as time when employees are working”). See also *Eastern Omni Constructors, Inc.*, 324 NLRB 652, 652 fn.2 (1997) (although employer had legitimate concerns about inflammatory decals some employees had been wearing on their hard hats, it could have promulgated a rule more narrowly drawn and that lawfully addressed the problem rather than broadly proscribing the wearing of all non-company insignia), enf. den. 170 F.3d 418, 424-26 (4th Cir. 1999).

⁷ *Eckerd’s Market, Inc.*, 183 NLRB 337, 338 (1970) (finding the “vague general evidence” of customer complaints presented by the employer did not constitute substantial evidence of “special circumstances” warranting removal of the union buttons worn by its employees). See also *Albis Plastics*, 335 NLRB 923, 924 (2001) (“the Board and courts balance the employee’s right to engage in union activities against the employer’s right to maintain discipline or to achieve other legitimate business objectives”).

⁸ *Meijer, Inc.*, 318 NLRB 50 at 50 (1995)(citing *United Parcel Service*, 312 NLRB 596, 597 (1993), enforcement denied, 41 F.3rd 1068 (6th Cir. 1994)(employer’s ban on union pins unlawful where employer offered no evidence that pins interfered with company’s public image and did not enforce its policy in a consistent and nondiscriminatory manner).

⁹ Cf. *W San Diego*, 348 NLRB 372, 372-373 (2006) (finding special circumstances where employer “commission[ed] special uniforms for its public-contact employees” and spent considerable funds to purchase, clean, and replace those uniforms); *Con-Way Central Express*, 333 NLRB 1073, 1075-76 (2001) (finding special circumstances where “uniforms are supplied and cleaned by [employer]” to employees who have public contact;

introductory language of the February 7, 2013, dress code, Respondent's "emphasis is that each associate should be neat and clean and take pride in their appearance." Jt. Ex. 1. Employees are only required to wear blue shirts and khaki pants and they have only recently been required to wear blue Wal-Mart vests. When the various versions of the Respondent's dress codes are considered as a whole, it is clear that the public image it seeks to create is not so tightly controlled that it would be endangered by the addition of union insignia or that union insignia could be characterized as distracting.¹⁰

Moreover, the dress code does not distinguish between the public and non-public areas of Respondent's stores. Jt. 1-11, Tr. 113-114, 190-191. The Respondent admits the dress code continues to apply to employees even when their stores are closed to the public. Tr. 237, 252. The Board has long held that a rule that fails to consider such circumstances is unlawfully overbroad.¹¹ Respondent cannot show any special circumstances to support such restrictions in those areas and during those times.¹²

employer spent "1.5 million dollars on the cost, maintenance, and cleaning" of uniforms). Here Respondent does not provide specially designed uniforms to its employees.

¹⁰ Cf. *United Parcel Service*, 195 NLRB 441, 441 fn.2, 443 (1972) (ban on large union campaign button upheld where the employer's "emphasis on a special appearance of the delivery vehicle and the uniform of its employees ha[d] been a consistent policy of UPS since at least 1930[.]" the neat appearance of its drivers was featured extensively in its marketing materials, and the employer spent approximately \$3,750,000 annually on the purchase, maintenance, and cleaning of employee uniforms).

¹¹ See *Albertsons, Inc.*, supra at 866; *Starbucks Coffee Co.*, 354 NLRB 876, 888 (2009), affirmed and adopted, 355 NLRB 636 (2010), enf. denied 679 F.3d 70, 78 (2d Cir. 2012).

¹² See *W San Diego*, supra at 374 (although special circumstances permitted employer's restrictions on display of union button in public areas of hotel, same concerns did not justify extending restrictions to nonpublic areas).

JUDGE CARTER DID NOT ERR BY REJECTING THE TESTIMONY AND REPORT OF RESPONDENT’S “EXPERT” AND FINDING THAT RESPONDENT’S DRESS CODE RULE WAS NOT NARROWLY TAILORED TO ADDRESS ITS CONCERNS AND PRESERVE THE SECTION 7 RIGHTS OF EMPLOYEES

Judge Carter decided that Respondent’s “expert witness”, Dwight Hill, was not qualified, under Federal Rule of Evidence 702, to provide expert testimony that would assist him, as a trier of fact, to understand the evidence or to determine any fact in issue in the case. (ALJD 6: 33-47). In reaching this conclusion, the Judge noted that Respondent offered other witnesses who testified effectively on the same issues as Hill and that none of the matters raised by these witnesses was so complex that they required explanation by an expert. He also determined that Hill’s testimony and written report were cumulative and inadmissible for that reason. Counsel for the General Counsel fully supports Judge Carter’s determination.

Respondent argues that Hill’s expert testimony established that its dress code rule is justified by special circumstances. (R’s brief at 21) It appears, however, that Judge Carter considered the special circumstances arguments raised by Respondent’s witnesses that paralleled the points made by Hill in his testimony. Namely, Respondent’s concerns about logos impacting nametag visibility and districting from the customer experience. However, Judge Carter did not find Respondent’s concerns over the visibility of name badges or evidence of customers being distracted to be supported by the evidence produced at the hearing. (ALJD at 9: 10-32). He also concluded that, even if Respondent had valid concerns about logos affecting nametag visibility and customer experience constituting special circumstances, its dress code rule was not narrowly tailored to address those concerns and preserve employees Section 7 rights. (ALJD at 9: 31-40). Judge Carter noted that the size restriction imposed by the rule is contrary to Board cases permitting the display of union insignia in a variety of sizes, including sizes much larger than those Respondent would allow. (ALJD at 10: 1-14). He also points out that Respondent’s

concerns become moot when it maintains the rule for employees with limited customer contact including those who work during periods that the stores are closed to the public.

JUDGE CARTER DID NOT ERR BY NOTING THAT RESPONDENT DID NOT PRESENT ANY EVIDENCE OF SIGNIFICANT AND WIDESPREAD PROBLEMS WITH EMPLOYEES WEARING UNION INSIGNIA OR OTHER LOGOS THAT MADE IT DIFFICULT OR IMPOSSIBLE FOR OTHERS TO SEE THEIR NAME BADGES OR WIDESPREAD PROBLEMS WITH CUSTOMERS BEING DISTRACTED BY LOGOS

Judge Carter did not solely rely on the lack of evidence showing that problems have occurred due to employee display of union insignia or logos as a basis for finding a violation in this case. His finding was instead based on Respondent's failure to establish that its restriction on the display of union insignia was based on recognizable and legitimate special circumstances that he listed in his decision. (ALJD at 9: 10-31)

It is notable that none of Respondent managers testified that any customers were confused with respect to the identity of the employees or distracted to a point where they forgot to conclude their sales transactions. The anecdotes provided by Respondent's managers merely show discrete and isolated incidents involving a negligible number of employees in a retail operation that involves over 4500 stores in the United States that average 300 to 500 employees per store. For example, Respondent witness Teresa King admitted that she did not witness any customers engage in any conversations with employees regarding the commemorative pins employees were wearing in response to the recent death of an employee. Tr. 204. Thus, these samples are statistically insignificant to serve as probative evidence with respect to the Respondent's application of the dress code and fail to demonstrate the existence of special circumstances.

THE ALJ DID NOT ERR BY FINDING THAT WALMART'S SEPTEMBER 2014 DRESS CODE WAS UNLAWFUL

Contrary to Respondent's argument, the Complaint that issued in this case was not confined to its 2013 dress code. A plain reading of the Complaint shows that the matter to be litigated involved Respondent maintenance of an overly broad provision in its dress code maintenance that prohibits employees from wearing anything beside "small non-distracting logos or graphics" The allegation at issue appears below:

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(a) At all material times since at least May, 2013, Respondent has maintained the following rule in its "Dress Code Guidelines" that applies to all states except those with a state specific policy:

"Wal-Mart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, hats, jackets or coats are also permitted, subject to the following: the logo or graphic must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional messaging."

Respondent's attorney was clearly aware of the factual issues to be litigated in the case as he proposed the following stipulation: "The only claim as we understand it and as we read the papers is that employees might understand the phrase small and non-distracting and might believe it bars union insignia." (Tr. 30). Counsel for the General Counsel affirmed that the case concerned Respondent's maintenance of a work rule restricting employees to small and non-distracting logos and graphics. (Tr. 31). There was no need to amend the Complaint as no other conduct was alleged to be unlawful.

The introduction of the 2014 versions of the dress code rule into evidence did not present new matter to be litigated as the revised rules continued to maintain language restricting the

employees' Section 7 right to display logos and graphics, including union insignia. The 2014 versions of the rule differed slightly in that they referenced name badges:

Wal-Mart logos of any size are permitted. Other small, non-distracting logos or graphics on shirts, pants, skirts, capris, skorts, dresses, hats, jackets or coats are also permitted, if they are no larger than the size of your associate name badge. (Jt. Exh 10 and 11).

It is disingenuous for Respondent to claim that the ALJ consideration of the 2014 versions of the rule denied it due process. The language restricting the display of logos and graphics to a size no larger than employee name badges was a key component of Respondent's defense. Respondent's attorney in his opening statement argued the importance of restricting union pins and buttons to a size no larger than the names badges worn by employees. (Tr. 38-39). Thereafter, Respondent offered testimony through its witnesses that, beginning in 2012 and continuing to at least 2014, employees as to the reasons that employees were prohibited from wearing logos and graphics larger than their names tags. (Tr. 85, 94, 161, 165-166, 198, 201, 207, 212, 231) Accordingly, there should be no question that Respondent's maintenance of the rule since 2013 was fully litigated.

JUDGE CARTER'S REMEDIAL ORDER REQUIRING RESPONDENT TO RESCIND THE UNLAWFUL DRESS CODE PROVISION AND REPUBLISHING THE DRESS CODE WITHOUT THE UNLAWFUL PROVISION AND A NOTICE POSTING AT ALL OF ITS AFFECTED STORES IN THE UNITED STATES CONSTITUTES AN APPROPRIATE REMEDY FOR THE ALLEGED VIOLATION

Counsel for the General Counsel submits that it is seeking an Order requiring Respondent to post notices at all of its stores in the United States where the dress code provision at issue in this case was applied. As Judge Carter noted, and as alleged in paragraph V(a) of the Complaint, there are states that maintain state specific dress codes. The specific content and application of the dress codes in states with state specific dress code policies was not a subject of the litigation in the instant case. Accordingly, there is insufficient evidence to support requiring stores located

in states with state specific dress codes to be encompassed by the remedial order that issues in this case. The General Counsel submits, however, that the Complaint is not confined to the 2013 version of the dress code, as the Complaint encompasses the continuation of the unlawful provision “at all material times since at least 2013,” which would include the 2014 versions of the dress code that maintain the unlawful provision. A remedial order should require to rescind the unlawful provision from its dress code at all of its stores in the United States, except for those with state specific policies, and to post an Notice to remedy its violation of the Act.

CONCLUSION

Counsel for the General Counsel submits that Judge Carter Decision finding that Respondent violated Section 8(a)(1) of the Act is fully supported by Board law and the evidentiary record. The General Counsel seeks an Order requiring Respondent to rescind its dress code provision unlawfully restricting employees from exercising their Section 7 right to display union logos and insignia, including the requirement that such displays be “small and non-distracting” and/or no larger than employee name badges. General Counsel further seeks an Order requiring Respondent to post a Notice at all of its stores in the United States except for those stores that maintain state specific dress code policies.

DATED at Chicago, Illinois this 29th day of July, 2015,

Respectfully submitted,


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UNITED STATES OF AMERICA
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THE ORGANIZATION UNITED FOR RESPECT
AT WALMART (OUR WALMART)

CERTIFICATE OF SERVICE

I certify that I have caused a true and correct copy of the foregoing Counsel for the General Counsel's **Answering Brief to Respondent's Exceptions** to be served upon the following via NLRB's e-filing system on July 29, 2015:

NLRB Office of the Executive Secretary **E-FILING**

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I further certify that I have caused a true and correct copy of the above referenced document to be served on the following by U.S. Mail or e-mail on July 29, 2015:

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