DISTRICT COURT, DENVER COUNTY, COLORADO Denver City and County Building 1437 Bannock St. Denver, Colorado 80202	
Plaintiffs: ANTHONY LOBATO, et al. and **Plaintiff-Intervenors:** ARMANDINA ORTEGA, et al. v. **Defendants:** THE STATE OF COLORADO, et al.	
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PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE DEFENDANTS' SECOND, THIRD, AND FOURTH AFFIRMATIVE DEFENSES AND REQUEST FOR ORAL ARGUMENT

Plaintiffs Anthony Lobato, *et al.* ("Plaintiffs") submit this reply in support of Plaintiffs' Motion to Strike Defendants' Second, Third, and Fourth Affirmative Defenses and Request for Oral Argument. ("Motion").

INTRODUCTION

In their combined response to the Motion and Plaintiff-Intervenors' Motion to Strike ("Response" or "Resp."), Defendants the State of Colorado, et al. ("Defendants"), do not dispute many of the arguments set forth in the Motion. For example, Defendants fail to refute Plaintiffs' demonstration that the absent parties indentified by Defendants do not fall within any of the three categories of necessary parties under C.R.C.P. 19(a). (Motion at 6-12). Defendants argue only that absent individuals and school districts are necessary parties because they are interested in the outcome of this action and that the General Assembly is a necessary party to afford Plaintiffs complete relief. As explained below in Section I, Defendants' arguments suffer from misconceptions of individual constitutional rights and mischaracterizations of Plaintiffs' claims.

Also, in support of their affirmative defenses based on lack of standing, Defendants simply ask this Court to disregard binding precedent as wrongly decided. For the reasons explained below in Section II, the Court should decline Defendants' request to second guess the Supreme Court.

ARGUMENT

I. DEFENDANTS FAIL TO IDENTIFY ANY ABSENT PARTY WHO IS NECESSARY UNDER RULE 19.

Plaintiffs demonstrated in the Motion that the absence of parents, children, and school districts not presently parties to this action, as well as the absence of the General Assembly, would neither prevent Plaintiffs from obtaining complete relief, impede or impair the rights of

nonparties, nor subject parties to risk of multiple or inconsistent obligations. (*See* Motion at 7-9 (Rule 19(a)(1)); 9-11 (Rule 19(a)(2)(A)); 11-12 (Rule 19(a)(2)(B)). In response, Defendants dispute Plaintiffs' argument on only two grounds: (1) that the interests of nonparty individuals and school districts will be impaired due to their absence (Resp. at 6-11); and (2) that the absence of the General Assembly prevents Plaintiffs from obtaining complete relief (Resp. at 11-12). Both attempts fail because the ability of absent parties to protect their interests will not be affected by this action (*infra* § I.A.), and because Plaintiffs do not seek or require an injunction against the General Assembly or any other absent party (*infra* § I.B.).

A. A Determination Of Plaintiffs' Rights Will Have No Legal Impact On The Ability Of Absent Parties To Protect Their Interests.

The absent parties have no particularized interest in the determination of Plaintiffs' constitutional rights beyond the interests of the general public. *See Harmelink v. City of Arvada*, 580 P.2d 841, 842 (Colo. App. 1978). In addition, the absent individuals and districts are able to protect any interest that they have in this action. *See Lujan v. Colorado State Bd. of Educ*. 649 P.2d 1005, 1010, 1022-23 (Colo. 1982) ("Intervenor-Appellants are 26 school districts within Colorado who challenge the trial court's declaration" and successfully argued that the objective of the public school finance system is local control). Specifically, as described in the Motion, to the extent absent parties share interests with the parties to this case, those interests will be adequately protected. And, to the extent absent parties have dissimilar interests, the disposition of this action in their absence will not affect their ability to protect those interests because they are not prohibited from intervening or filing their own lawsuit. (Motion at 10 & n.2). Indeed, absent districts have no problem intervening in lawsuits brought to challenge the public school finance system. *See Lujan*, 649 P.2d at 1010.

Defendants make no attempt to explain how the disposition of this action in the absence of individuals and districts will impair or impede the absentees' ability to protect their interests. Instead, Defendants merely speculate that some absentees may have interests that diverge from interests already represented by the parties. This is not enough to rebut Plaintiffs' argument. The affirmative defense based on these absentees fails as a matter of law because, even if true, Defendants' assertion that individuals and districts may have divergent interests does not establish that the absent parties' interests will be directly impacted or that the absent parties' ability to protect those interests would be impaired should Plaintiffs obtain their requested relief. *See* C.R.C.P. 19(a)(2)(A).

1. Plaintiffs' Claims Do Not Pit Students And Districts Against One Another.

Defendants premise their argument on the false dilemma that, due a purported lack of resources, someone's constitutional right to an education must be violated. (Resp. at 7-8). However, Defendants' view that individuals and districts are akin to creditors fighting over a fixed pool of assets that is insufficient to satisfy all creditor claims is inaccurate for at least two reasons.

First, Defendants fail to point to any legal authority that restricts education funding. To be sure, TABOR, Colo. Const. art. X, sec. 20, acts as a restriction on the General Assembly's ability to raise general funds or increase overall state expenditures. But nothing in TABOR or any other constitutional provision prohibits the General Assembly from reallocating existing revenue streams. And nothing in TABOR prevents voters from increasing revenue to address any undesirable impacts on other state services. Any lack of resources necessary to fulfill the constitutional rights of Plaintiffs – without violating the rights of absent parties – is a function of

Defendants' view that the General Assembly will lack the political courage to allocate existing revenue streams in a constitutional manner when the current system is declared unconstitutional. The political will (or lack thereof) of the General Assembly is not a legal impediment to providing both Plaintiffs and absent parties a constitutionally adequate educational opportunity. Thus, as a legal matter, fulfillment of Plaintiffs' constitutional rights has no effect on an absent party's own constitutional right to a thorough and uniform education.

Second, even if the General Assembly elects to violate the constitutional rights of absent parties in response to a declaration that the current system of public schools is unconstitutional, the disposition of this action will have no adverse effect on the absentees' ability to enforce their own constitutional rights in a future lawsuit.[1] This is so, in part, because Plaintiffs do not request an injunction establishing the particulars of a public school system. The General Assembly will be charged with crafting that system by legislative action, *see Lobato*, 218 P.3d at 374 & n.21, and, whatever system of public schools exists after this case, the ability of absent parties to challenge that system will be unobstructed by *res judicata* principles.[2]

A party is not necessary under Rule 19 simply because that party's interests may be indirectly affected by intervening events. Rather, Rule 19(a)(2)(A) is concerned with the absentee party's *ability to protect* an interest that will be directly affected by the outcome of a case. *Compare* C.R.C.P.19(a)(2)(A) (person required to join if "claiming an interest relating to

[1] In fact, the absent parties' ability to enforce their rights under the Education and Local Control Clauses is now firmly established in Colorado due to Plaintiffs' efforts in this action. *See Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009) ("[P]laintiffs' constitutional challenges to Colorado's public financing scheme present appropriate claims and are justiciable.").

[2] Absent parties also will continue to have the ability to advance their interests in the legislative process by influencing the General Assembly when it creates and funds a new constitutional system.

the subject of the action and … the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest"), *with* C.R.C.P. 20(a) ("All persons may join in one action as plaintiffs if they assert any right to relief … in respect of or arising out of the same … series of transactions or occurrences …."), *and* C.R.C.P. 24(b) (Permissive Intervention); *see also Bd. of County Comm'rs v. Roberts*, 159 P.3d 800, 808 (Colo. App. 2006) ("Not every person who has an interest in issues raised in a particular civil action must be joined as a party to that action.") (quoting *Brody v. Bock*, 897 P.2d 769, 778 (Colo. 1995)). Even the authority cited by Defendants acknowledges that an absent party falls under Rule 19(a)(2)(A) if his interest may be impacted by the lawsuit *and* the party's ability to protect that interest will be impaired. *Jacobucci v. Dist. Court*, 541 P.2d 667 (Colo. 1975) ("Their ability to protect those individualized interests would surely be impaired if this action were allowed to proceed in their absence.") (Resp. at 8). If it were otherwise, Rules 20(a) and 24(b) would be superfluous.

Indeed, under the application of Rule 19 advanced by Defendants and where the validity of a statute is challenged as unconstitutional, "the valuable remedy of declaratory judgment would be rendered impractical and indeed often worthless for determining the validity of legislative enactments, either state or local, since such enactments commonly affect the interests of large numbers of people." *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 583 (Pa. 2003) (quoting *Town of Blooming Grove v. City of Madison*, 81 N.W.2d 713, 717 (Wis. 1957)). Defendants' argument here is even more absurd because Defendants offer no limiting principle that restricts its argument to declaratory judgment actions. Under Defendants' logic, a plaintiff seeking to enforce a contract against a corporate entity would have to join, at least, all of the

corporation's creditors, shareholders, employees, and customers because those parties may be indirectly impacted by a money judgment against the corporation. Such a result is clearly not the law. *See, e.g.*, *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 890-91 (Colo. 1986) (shareholders without individualized interests in action are not necessary parties).

Thus, even if the General Assembly elects to violate the rights of some absent parties to fulfill the rights of others, nothing in Plaintiffs' requested relief forecloses or frustrates the ability of absent parties to enforce their own rights. In other words, a declaration of Plaintiffs' rights is not binding in a subsequent or collateral action to determine the rights of absent parties.

2. The Outcome Of This Action Will Have No Direct Impact On The Interests Of Absent Parties Or Impair Their Ability To Protect Those Interests.

Because the ability of absent parties to enforce their own constitutional rights will not be affected by the outcome of this action, the cases cited in the Response are of no help to Defendants. For example, in *Constitution Associates v. New Hampshire Ins. Co.,* the court held that an injured party was properly joined as a defendant to an anticipatory declaratory judgment action between an insurer and the insured while the underlying action by the injured party against the insured was pending. 930 P.2d 556, 561-62 (Colo. 1996). Because the injured party had an interest in whether its injury was covered by an existing insurance policy *and* because the injured party would be unable to protect that interest if it were not a party to the declaratory judgment action, the injured party was properly joined pursuant to C.R.S. § 13-51-115. *Id.* at 562. By contrast here, a judgment declaring the rights of Plaintiffs would have no legally binding effect on a future action concerning the rights of absent parties and, therefore, absent parties will be able to protect their interests regardless of the outcome of this case.

Similarly, in *Lyon v. Amoco Production Co.*, a sovereign Indian tribe that held tribal mineral leases was a necessary party to a contamination action alleging that wells subject to the leases caused contamination. 923 P.2d 350, 356 (Colo. App. 1996). An injunction interfering with the operation of the wells entered in the absence of the tribe would impair its ability to protect its interest in receiving money under the leases. *Id.* at 356-57. Again, by contrast here, a declaration that the system of public school finance violates Plaintiffs' rights would have no legally binding effect on absent parties' ability to enforce their rights to a constitutionally compliant education (and likely would *support* any future efforts by absent parties to pursue such a case). The tribe in *Lyon* is also very different from absent individuals and districts here because the tribe in *Lyon* resisted becoming a party to the state court action in order to protect the jurisdiction of its own tribal courts over disputes involving Indians and non-Indians on "Indian country." *Id.* at 352-55. Here, no absent party identified by Defendants must relinquish sovereign power in order to protect their interests in the current state court action or similar state court lawsuits.

Finally, *Mesa County Junior College Dist. v. Donner*, 371 P.2d 442 (Colo. 1962) and *People v. Baker*, 297 P.2d 273 (Colo. 1956) both hold that an absent party holding an interest that will be affected by the potential outcome of the case are parties permitted to intervene (*Donner*) or necessary parties (*Baker*), but in both cases the claimed interest would have been directly impacted as a matter of law as a direct result from the requested relief. *See Donner*, 371 P.2d at 443 (error to deny motion to intervene where absent parties would necessarily lose funds if relief granted); *Baker*, 297 P.2d at 276, 279 (action could not proceed in absence of parties that would necessarily lose licenses if relief granted). By contrast here, Defendants have failed to

point to any authority, and Plaintiffs are aware of none, that links as a matter of law Plaintiffs' requested relief to the interests of absent individuals and districts. To the contrary, any impact on the interests of absent parties subsequent to this action would be the direct result of legislative action, not the direct result of a court judgment. Thus, any effect on the absent parties' interests would be at most an indirect, rather than direct, result of Plaintiffs' requested relief.

That the effect on an absent party's interest must be a *direct* result of requested relief to render the absent party necessary under Rule 19 is evident from the very case cited by Defendants in their attempt to discredit *Harmelink*. (Resp. at 9). In *Thorne v. Bd. of County Comm'rs*, the Court held that absent parties were not necessary because the claimed interest of the absent parties arose from contractual relationships, and was indirectly related to the special use determinations that were the subject of the lawsuit. 638 P.2d 69, 72 & n.5 (Colo. 1981) ("any indirect economic benefit does not sufficiently distinguish these landowners from those members of the surrounding community who also will derive an indirect economic advantage" from the challenged special use).

Moreover, far from "discrediting" *Harmelink*, the Court in *Thorne* merely stated that the Supreme Court has not considered a question similar to the issue in *Harmelink*, and never discussed the reasoning in *Harmelink* or even cited that case. *Thorne*, 638 P.2d at 72 n.5. The precedential value of *Harmelink* has never been questioned and, contrary to Defendants' suggestion, the case is binding here. *See also Bird v. City of Colorado Springs*, 489 P.2d 324, 325 (Colo. 1971) (cited in *Harmelink* as example of the rule that it is not necessary for one objecting to an ordinance to join as plaintiffs all other objectors); *Talbott Farms, Inc. v. Bd. of County Comm'rs*, 602 P.2d 886, 888 (Colo. App. 1979).

Further, Defendants attempt to create a distinction where none exists: Defendants argue that *Harmelink* is not on point because Plaintiffs challenge a statutory scheme here, but the plaintiff in *Harmelink* challenged a rezoning ordinance that could be characterized as a quasi-judicial action. Defendants have ignored *Talbott Farms* (cited in Motion at 7 & 9), which held that absent parties that "had no interest in the outcome of judicial review beyond that shared by all" need not be joined, even though the rule challenged there was the product of "a legislative action." *Talbott Farms*, 602 P.2d at 887-88. The point here is that not all individuals generally subject to a rule need be joined to an action challenging that rule, regardless whether the rule is legislative or quasi-judicial in nature.

Defendants' attempt to discredit *School District of City of Pontiac v. United States Department of Education*, 584 F.3d 253 (6th Cir. 2009), is misleading. The majority of the Sixth Circuit *en banc* panel agreed that Rule 19 did not require the plaintiff to join all individual states generally subject to the challenged legislation. (Motion at 10 n.3). In an attempt to discredit the Sixth Circuit's holding on the Rule 19 issue, the best Defendants can do is cite *Connecticut v. Duncan*, 612 F.3d 107, 115 (2d Cir. 2010), but they omit the fact that the court in that case *never considered* a Rule 19 defense or an analysis on necessary parties set forth in *Pontiac*. *Id.* at 114 & n.4 (agreeing with concurrence from *Pontiac* on ripeness and justiciability grounds).

Finally, the resolution by the Douglas County School Board of Education does not help Defendants' affirmative defense.[3] To the contrary, the resolution provides a clear illustration of

[3] Defendants mischaracterize the resolution. The resolution does not confirm Defendants' argument that "absent districts, parents, and students have disparate interests that may be adversely affected by a judgment in this action." (Defendants' Motion to Take Judicial Notice at ¶¶ 2-3). Beyond its failure to identify a single particular interest that is "unique" to Douglas County, the resolution says nothing about *adverse* impacts, and given that Douglas County was

Plaintiffs' argument that absent school districts have the ability to protect any interest not represented by the parties here. Without offering any particular disparity between Douglas County School District ("Douglas County") and Plaintiffs, the resolution merely concludes that the interests of Douglas County are not represented by Plaintiffs.

Even if correct, Douglas County is not a necessary party. If Douglas County agrees with Defendants that the current system of public schools is constitutional, then Defendants adequately protect Douglas County's interests. Presumably, this is not the case because Defendants hold Douglas County out as an absent *and* necessary party, and the only logical inference is that Douglas County believes the current system of public schools is unconstitutional. Nevertheless, if Douglas County disagrees with Defendants for reasons not addressed by Plaintiffs, Douglas County clearly has notice of this action and may intervene (like the 26 school districts in *Lujan*, 649 P.2d at 1010, and Plaintiff-Intervenors here), or Douglas County could file its own lawsuit. *See Lobato*, 218 P.3d at 374.

Thus, assuming that neither Plaintiffs nor Defendants represent Douglas County's interests, the resolution shows at most that Douglas County may be a permissive party to this action, but does nothing to show that this action would impede or impair the ability of Douglas County to protect its interests. Douglas County will have complete legal and political recourse if Douglas County is unhappy with the public school system crafted by the General Assembly in response to a declaration that the current system is unconstitutional – it will be in the same

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considering the impacts of the lawsuit, the resolution certainly would have mentioned any concern over potential adverse impacts if such a concern exists. In any event, the Court need not consider Douglas County's legal conclusion.[3] *Cf. Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008) (on determination of motion to dismiss, "the court is not required to accept as true legal conclusions couched as factual allegations).

position it finds itself now. Thus, Douglas County and any other districts with similar interests are not necessary parties under Rule 19(a). *See, e.g.*, *Talbott Farms*, 602 P.2d at 887-88.

In sum, Defendants have failed to rebut Plaintiffs' argument that absent individuals and districts are not necessary parties. Defendants have only argued that some absent parties may have interests that could be indirectly impacted by the outcome of this case. Even if Defendants' factual assertion is true, such result would mean that the absent parties *may* be *permissively* joined. However, Defendants have failed to show that the absent parties are necessary because they have failed (1) to identify an absent party that would lose its ability to protect an interest that (2) would be directly impacted as a matter of law should Plaintiffs obtain their requested relief. C.R.C.P. 19(a)(2)(A). This failure is fatal to Defendants' affirmative defense based on absent individuals and districts.

B. Plaintiffs Neither Seek Injunctive Relief From The General Assembly Nor Require An Injunction Against The General Assembly.

Plaintiffs' Motion demonstrated that the absence of the General Assembly would not prevent Plaintiffs from obtaining complete relief. (Motion at 8-9). Defendants do not dispute Plaintiffs' contention that the absence of the General Assembly would not prevent Plaintiffs' from obtaining declaratory relief. *See, e.g.*, *Lujan*, 649 P.2d at 1010; *see also Lucchesi v. State*, 807 P.2d 1185, 1189-92 (Colo. App. 1990) (plaintiff stated valid claim challenging constitutionality of a statute even after General Assembly was dismissed as a party). Instead, Defendants first read into Plaintiffs' prayer for injunctive relief a request for an injunction against the General Assembly, and then argue that Plaintiffs should name the General Assembly a party to this case to pursue the injunction invented by Defendants. (Resp. at 11-12).

Defendants' argument fails because Plaintiffs seek injunctive relief only against the named defendants and do not require injunctive relief against the General Assembly.

In their Second Amended Complaint (at p. 36) Plaintiffs request injunctive relief as follows:

> 5. Enter interim and permanent **injunctions compelling Defendants** to establish, fund, and maintain a thorough and uniform system of free public schools throughout the state that fulfills the qualitative mandate of the Education Clause and the rights guaranteed to the Plaintiffs thereunder and that is in full compliance with the requirements of the Local Control Clause;
>
> 6. Enter interim and permanent **injunctions compelling Defendants** to design, enact, fund, and implement a system of public school finance that provides and assures that adequate, necessary, and sufficient funds are available to accomplish the purposes of the Education Clause and to do so promptly within a specified, reasonable period of time;

(Emphasis added). The language of the requests clearly seeks injunctions directed at "Defendants." Defendants' conclusory assertion that Plaintiffs seek an injunction "compelling corrective legislative action" not only ignores the plain language of the Second Amended Complaint, but also ignores the sweeping duties and powers that Defendants exercise in the provision of education services in Colorado. (*See, e.g.*, Resp. at 1; "The Governor, Board of Education, and Department of Education work every day to provide all Colorado children equal access to thorough and uniform educational opportunities.").

For example, the sweeping duties of the State Board of Education ("State Board") are set forth in C.R.S. § 22-2-106. Among others, the State Board's duties include the duty to

- supervise "the public schools of Colorado and the educational programs maintained and operated by all state governmental agencies;" § 106(1)(a);

- adopt "a comprehensive set of guidelines for the establishment of high school graduation requirements;" § 106(1)(a.5);

- "appraise and accredit the public schools and school districts" in Colorado; § 106(1)(c); and

- "order the distribution or apportionment of federal and state moneys granted or appropriated to the department for the use of the public schools of the state;" § 106(1)(e).

The sweeping powers of the State Board are set forth in C.R.S. § 22-2-107. Among others, the State Board's powers include the power to

- "perform all duties delegated by law" § 107(1)(a);

- "promulgate and adopt policies, rules, and regulations concerning the general supervision of the public schools;" § 107(1)(c); and

- "accept gifts, grants, and donations of any nature for the use of the department or the public schools;" § 107(1)(h).

The State Board also has the duty to "[a]dopt rules that prescribe performance-based standards of qualification, preparation, training, or experience that are required for the issuance of all licenses …." C.R.S. § 22-2-109(1)(g).

This non-exhaustive list of duties and powers demonstrates the considerable power and discretion exercised by Defendants over the public school system. By explicitly referencing Defendants, Plaintiffs' requested injunctive relief targets only these duties and powers. The requested relief would compel Defendants to exercise the discretion delegated to them by the General Assembly to supervise, accredit, and manage public school funds in a manner consistent with the Education and Local Control Clauses. Defendants would also be enjoined from implementing unconstitutional legislation. Plaintiffs need not name the General Assembly to obtain this injunctive relief against Defendants.

Because there is no dispute that Plaintiffs may obtain declaratory relief in the absence of the General Assembly and because Plaintiffs may obtain significant and complete injunctive relief compelling Defendants to exercise their considerable discretion in a constitutionally compliant manner, the General Assembly's presence in this case is immaterial to Plaintiffs' relief. Accordingly, the absence of the General Assembly is no basis for Defendants' Rule 19 defense, and that defense should be stricken.

II. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS.

Defendants are simply incorrect that Plaintiffs relied "exclusively on the law of the case doctrine" in demonstrating why Defendants' lack of standing defenses should be stricken. (Resp. at 13). Plaintiffs argued that the lack of standing defense "should be stricken as a matter of law because *binding precedent* and law of the case clearly hold that the Plaintiff parents have standing." (Motion at 13-14, emphasis added, citing *Lobato*, 218 P.3d at 367; *Lobato v. State*, 216 P.3d 29, 35 (Colo. App. 2008)). It is not just law of the case that controls here. The appellate decisions on standing are binding precedent on all Colorado courts, and there can be no serious dispute that they are factually on point here. Thus, to the extent this Court reconsiders whether Plaintiffs have standing, the Court need only consider the two *Lobato* decisions on standing. *Lobato*, 216 P.3d at 35 (parents have standing); *Lobato*, 218 P.3d at 367-68 (school districts may pursue same claims as plaintiff parents); *see also id.* at 368 n.9 (trial court needs to address school district standing only if school district inserts novel issues into case).

Notably, Defendants' argument that absent school districts that are aligned with none of the parties to this action must be joined (Resp. at 7-8) cannot be reconciled with Defendants' argument that school districts lack standing to be joined as Plaintiffs. By contrast, and contrary

to Plaintiffs' contention (Resp. at 14-15), under Plaintiffs' view that such districts (to the extent they exist) may be permissive parties to this action, there is no tension between Plaintiffs' arguments that all necessary parties have been joined and that the school districts may proceed in this action as explained by the Supreme Court. *Lobato*, 218 P.3d at 367-68.

Thus, for the same reasons supporting the Supreme Court's determination that all Plaintiffs may pursue the claims asserted in the Second Amended Complaint, Defendants' lack of standing defenses should be stricken.

CONCLUSION

WHEREFORE, and for the reasons set forth in the Motion, Plaintiffs request that the Court strike Defendants' Second, Third, and Fourth Affirmative Defenses. Plaintiffs additionally request that the Court hold oral argument on the Motion.

Dated: November 24, 2010

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The original, executed document is on file at the offices of Davis Graham & Stubbs LLP.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of November, 2010, a true and correct copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE DEFENDANTS' SECOND, THIRD, AND FOURTH AFFIRMATIVE DEFENSES AND REQUEST FOR ORAL ARGUMENT** was filed and served, via LexisNexis® File & Serve, addressed to the following:

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