16-1368

IN THE
UNITED STATE COURT Of APPEALS
FOR THE TENTH CIRCUIT

Carl Genberg,

Plaintiff-Appellant,

— v. —

Steven S. Porter,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, CASE NO. 1:11-cv-02434-WYD-MEH HONORABLE WILEY Y. DANIEL

BRIEF FOR THE NATIONAL WHISTLEBLOWER CENTER AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICUS CURIAE

The National Whistleblower Center ("NWC" or the "Center") is a nonprofit, non-partisan, tax-exempt organization dedicated to the protection of employees who lawfully report fraud or illegal conduct. *See www.whistleblowers.org.*

Since 1984, the Center's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject — including the first-ever published legal treatise on whistleblower law. In 2016, the Center was named a Grand Prize winner of the Wildlife Crime Tech Challenge for its innovative solution to encourage whistleblowers to report violations of illegal wildlife trafficking. The Challenge was sponsored by the U.S. Agency for International Development, in partnership with the Smithsonian Institution, National Geographic, and TRAFFIC.

As part of its core mission, the Center files *amici* briefs to help courts understand complex issues raised in whistleblower cases. Since 1990, the Center has participated as *amicus curiae* before the U.S. Supreme Court, courts of appeal and administrative agencies in cases that directly impact the rights of whistleblowers, including *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. United States. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House*, *Inc.,* 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S.

614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014); *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); and *Universal Health Svcs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

The Center has also participated as an amicus before the U.S. Courts of Appeal and administrative agencies in other cases directly dealing with the issue of a "reasonable" disclosure under the Sarbanes-Oxley Act ("SOX"). *See Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 DOLSOX LEXIS 39, 2011 WL 2165854 (U.S. Dept. of Labor May 25, 2011) (en banc) (NWC participated in oral argument); *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013) (NWC Ex. Dir. Stephen Kohn argued the "reasonable standard" issue on behalf of the petitioner at oral argument).

The NWC has also assisted Congress in drafting whistleblower protection legislation. *See* Whistleblower Protection Enhancement Act of 2012*,* S. REP. NO. 112-155, at 11 (citing to testimony of NWC Ex. Dir. Kohn). In 2001-2, the NWC provided assistance to the Senate Judiciary Committee in drafting the SOX. *See* S. REP. NO. 107-146, at 19.

The issue raised in this appeal is of exceptional interest to the National Whistleblower Center and the clients it serves. Numerous whistleblower laws may be impacted by the precedent set by this decision in cases outside of the Sarbanes-

Oxley Act, such as environmental and nuclear protection, wildlife trafficking laws and various whistleblower laws administered by the U.S. Department of Labor.

CONSENT OF THE PARTIES

All parties to this appeal have consented to the National Whistleblower Center's filing an amicus brief in this case concerning the issue of what constitutes "reasonable" disclosures under the SOX whistleblower protection statute.

CORPORATE DISCLOSURE STATEMENT

The National Whistleblower Center ("NWC") is a non-profit tax-exempt educational and charitable publicly supported non-partisan organization. The NWC has no shareholders, is not publicly owned and has no parent corporation.

29(a)(2) STATEMENT

(i) No party's counsel authored the brief in whole or in part;

(ii) No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) No person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

This case concerns the "reasonableness" standard required of employees in order to set forth a valid protected disclosure under the whistleblower provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514(A)(a)(1) ("SOX").[1] The lower court focused on a document prepared by the whistleblower (Appellant Carl Genberg) known as the "Salamon email," and concluded that this email did not constitute a protected disclosure because it failed to meet the "reasonableness" test mandated under SOX. *Genberg v. Porter,* 1-cv-cv-2434-WYD-MEH, 6 (U.S.D.C. Col. Aug. 11, 2016)(Plaintiff-Appellant's Addendum, 6). The focus on whether or not the the Salamon email constituted a protected disclosure is relevant to this case on two grounds: First, whether or not Mr. Genberg can establish a prima facie case of retaliation; Second, the defendant (Appellee Steven Porter) justified the adverse action, in part, on the fact that Mr. Genberg wrote the email. *Id.* at 9.

The National Whistleblower Center maintains that the lower court used the wrong standard in evaluating whether or not the Salamon email constituted a

[1] In relevant part SOX states as follows: Employees are protected who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee *reasonably believes* constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514(A)(a)(1) (emphasis added).

protected disclosure. The lower court relied upon an erroneous standard in defining the level of specificity required in a protected disclosure in order to reach the "reasonable" requirement mandated under SOX. The lower court used the "definite and specific" standard, which contradicts the legislative history of SOX and which has been discredited by the U.S. Department of Labor and the U.S. Courts of Appeal for the Second, Third, Sixth and Eighth Circuits. The Tenth Circuit must remand to determine if the Salamon email was a protected disclosure under the correct *Sylvester* reasonableness standard.

The lower court erred in ignoring the legislative history of SOX, where the official report of the Senate Judiciary Committee (the committee that wrote the SOX statute) explicitly defined the meaning of "reasonableness" in the SOX statute. The lower court compounded this error by also ignoring the specific U.S, Court of Appeals case cited to in the legislative history as correctly setting forth the controlling authority for interpreting the "reasonableness" standard in SOX. COMMITTEE ON THE JUDICIARY, THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, S. REP. NO. 107-146, at 19 (May 6, 2002)(citing to *Passaic Valley Sewerage Commissioners v. Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993)), Addendum 19. The *Passaic Valley* standard can be summarized as protecting "non-frivolous" complaints.

It is well established in this Circuit and as a general matter of law that when Congress, in its controlling legislative reports, cites to a judicial decision as guidance for interpreting the statute at issue, that guidance should be given deference. *Kansas Gas & Electric v. Brock*, 780 F.2d 1505, 1511 (10th Cir. 1985). The lower court committed error when it failed to apply the standard mandated by Congress.

Furthermore, during the early administrative and judicial adjudication of SOX, some courts, without reliance on the legislative history, developed an alternative standard for "reasonableness." This standard is at war with the Congressionally approved *Passaic Valley* standard. Generally, it set forth a very high bar for a disclosure to meet the "reasonableness standard," and required an employee's disclosure be "definite and specific" in order to be protected.

Because of the issues raised by requiring employees to meet the exceptionally high "definite and specific" standard, the U.S. Department of Labor Administrative Review Board ("ARB") conducted an *en banc* adjudication of this issue in a case known as *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 DOLSOX LEXIS 39, 2011 WL 2165854 (U.S. Dept. of Labor May 25, 2011) (en banc)(attached as Addendum at 55). The Department of Labor, which has original jurisdiction over all SOX cases, invited numerous parties to file briefs, including

the National Whistleblower Center (which was also granted permission to participate in the oral argument).

The ARB's decision in *Sylvester* completely and unequivocally rejected the "definite and specific" standard, and set forth a standard consistent, for the most part, with the *Passaic Valley* standard. After the Department of Labor clarified this issue, every Court of Appeals that has reviewed the standard for reasonableness has followed *Sylvester*.

The lower court in this case completely ignored the legislative history of SOX, the *Passaic Valley* standard, and the ruling of the Labor Department in *Sylvester*, along with the holdings of the courts that have followed *Sylvester*. Moreover, instead of relying on the controlling legal authorities, the lower court cited to a 2009 pre-*Sylvester* district court case from the Southern District of New York, as the source of its authority for dismissing Mr. Genberg's case due to the failure of the Salamon email to meet the "definite and specific" standard. Further compounding its flawed analysis, the lower court also failed to cite to the U.S. Court of Appeals for the Second Circuit's post-*Sylvester* decision in which that court rejected the "definite and specific" standard, implicitly overruling the 2009 holding of the Southern District.

Finally, the lower court fundamentally failed to understand why Congress enacted SOX, the policies behind the *Passaic Valley* standard, and the Department

of Labor precedents for which *Passaic Valley* was based. The Senate Judiciary Committee report unanimously approving the language in SOX was clear: "This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity." S. Rep. 107-146, 5, Addendum 5. Congress's concerns were seconded by leading industry trade groups. For example, the Association of Certified Fraud Examiners ("ACFE"), in its highly respected Global Fraud Study, recommended that all companies institute an internal anti-fraud program that encourages employees to "report suspicious activity" "without fear of reprisal," and that these reports should be made *before* the validity of the concerns are "evaluated." ACFE, "Report to the Nations on Occupational Fraud and Abuse 2010," 80, *available at* http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf.

The lower court's decision must be reversed and remanded to the district court with instructions to apply the *Passaic Valley* standard of reasonableness, or, in the alternative, the *Sylvester* standard of reasonableness.

ARGUMENT

I. Reasonableness is Explicitly Interpreted in the Statute

This case concerns statutory construction of the interpretation of reasonableness in the Sarbanes-Oxley Act of 2002 ("SOX") 18 U.S.C. § 1514A. The district court erred as a matter of law when it applied the wrong standard and failed to cite to or mention the legislative history of SOX, which explicitly sets for the standard for reasonableness.

Instead, the lower court applied the standard for "reasonableness" set forth in an unpublished district court decision, *Fraser v. Fiduciary Trust Co. Int'l*, 2009 WL 2601389, at *5 (S.D.N.Y. Aug. 25, 2009), holding that "protected activity" under SOX "must relate to the substantive law protected by SOX 'definitively and specifically.'" Plaintiff-Appellant's ADD-6. The lower court completely ignored the rule Congress said should be used as the standard to interpret the term "reasonableness." Ignoring the legislative history of SOX in interpreting "reasonableness" constituted error. The error was compounded by the lower court's reliance on a standard set forth in a 2009 district court decision, which has been subsequently rejected by the Court of Appeals in the circuit for which that district court sits. *See* Section II of this brief, discussing *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014).

When Congress drafted SOX, they did not write on a blank slate. In the official Senate Report approved by the drafters of the whistleblower provision, Congress explicitly defined the term "reasonableness" it used in the statute. COMMITTEE ON THE JUDICIARY, THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, S. REP. NO. 107-146, at 19. Congress wanted to make sure there was no misunderstanding on how to interpret reasonableness:

> [A] reasonableness test … is intended to compose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (See generally *Passaic Valley Sewerage Commissioners* v. *Department of Labor*, 992 F. 2d 474, 478).

The Judiciary Committee unanimously approved this interpretation of reasonableness. *Id.* at 23.

In order to make sure there was absolutely no misunderstanding as to what Congress meant by the term reasonableness, Congress directly cited to a well-established whistleblower case, affirming a prior ruling of the Department of Labor that defined the term "reasonableness." Congress directed the Department of Labor and future courts to the precise decision that they intended to be followed when addressing the "reasonableness" issue by citing the Third Circuit's decision in *Passaic Valley Sewerage Commissioners* v. *Department of Labor*, 992 F. 2d 474, 478 (3d Cir. 1993).

Passaic Valley's standard for "reasonableness" is straightforward: "[A]n employee's non-frivolous complaint should not have to be guaranteed to withstand

the scrutiny of in-house or external review in order to merit protection." *Id.* This standard can also be fully understood by looking at the underlying decision of the Secretary of Labor that was affirmed by the Third Circuit. *See Guttman v. Passaic Valley Sewerage Commissioners*, 85-WPC-2 (Sec'y Mar 13, 1992) (See Add. at 39).

In *Guttman,* the Secretary of Labor held that even though a complainant's basis for reporting "may have been shown … to be wrong, narrow, misguided, or, … ill-formed and not based on direct knowledge, …[it] does not render *Complainant's communication of his views* unprotected." Add. at 46. (emphasis added in original). Disclosures are still protected when "there was never any contention that they were frivolous or brought in abuse of the statute." *Id.*

The Secretary reasoned that the term "reasonableness" needs to be broad to encourage the protection of whistleblower reporting. *Id.* at 47 (a narrow rule defining reasonable disclosures would "chill the reporting of violations as to virtually eviscerate the statute."). Consistent with this reasoning, Congress enacted SOX to change the corporate "culture" of "silence" and encourage employees to report concerns without fear of retaliation: "[t]his corporate culture must change, and the law can lead the way." Add. at 5, 10. As the Secretary of Labor explained in *Guttman* (a holding affirmed by *Passaic Valley*), having a low threshold for "reasonableness" effectuates the "paramount purpose of the whistleblower

provision" by ensuring that good faith disclosures are not stripped of protection, thereby creating a debilitating "chilling effect." Add. at 45, 47.

The fact the Senate Committee that drafted SOX explicitly approved the *Passaic Valley* standard in interpreting the term reasonable is extremely significant to the outcome of this case. It is a well-established rule, followed by this circuit, that when Congress ratifies a judicial interpretation of a statute, that ratification is entitled to great deference. This Court, along with others, in interpreting similar terms in similar statutes has cited to the legislative history, and to cases cited in the legislative history, as important tools for interpreting the statutes. See *e.g. Kansas Gas & Electric Co. v. Brock,* 780 F.2d 1505 (10th Cir. 1985), cert. denied, 478 U.S. 1011, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986) (The Court examined the cases cited in the legislative history of the Federal Mining and Safety Act as critical guidance for interpreting the Energy Reorganization Act). Significantly, the SOX statute and the ERA have similar legislative histories and are part of a larger body of statutory protections for which the Department of Labor has original jurisdiction. *See https://www.whistleblowers.gov* (OSHA website setting forth the DOL whistleblower laws, including SOX and the ERA). *Stone Webster Eng'g Corp. v. Herman,* 115 F. 3d 1568, 1576 (11th Cir. 1997) ("The legislative history of the 1992 Energy Policy Act, too, makes clear that Congress intended the amendments to codify what it thought the law to be already"); *Willy v.*

Administrative Review Bd., 423 F.3d 483, 489 n.11 (5th Cir. 2005)(reliance on Congressional clarification of the ERA to interpret the Clean Air Act's similar whistleblower provision).[2]

Congress carefully weighed and determined the standard for reasonableness under SOX. That is the controlling standard for which the District Court was bound to apply, and that is the standard for which this Court should apply. It was clear and reversible error for the lower court to disregard the legislative history of SOX and the key case for which defines the meaning of "reasonableness" under that law.

II. In the Alternative, the Court Must Follow the *Sylvester* Standard

Even if this court were to reject the clear and unequivocal guidance of Congress and ignore both the holding of *Passaic Valley*, applying the *Sylvester* standard would also require a reversal of the district court.[3]

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[2] The rule applied in these three cases is extremely well settled law: "Prior judicial constructions have special force, and are *prima facie* evidence of legislative intent." Sutherland Statutes and Statutory Construction § 22:23 (7th ed.). These types of legislative endorsement of prior judicial decisions carries "great weight and courts presume it is correct." *Id.* Further, committee reports like the ones cited in this case are of "great significance for purposes of statutory interpretation." Sutherland Statutes and Statutory Construction § 11:14 (n.1).

[3] Although the holdings and analyses in *Sylvester* and *Passaic Valley* are not identical, the rationales and standards promulgated are far more similar than they are distinct. The analysis in *Sylvester* is more detailed than but parallel to the *Passaic Valley* analysis.

In 2011, the Administrative Review Board (ARB) sat en banc and unanimously articulated the "reasonable belief" standard for establishing protected activity under SOX. See *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, 2011 DOLSOX LEXIS 39, 2011 WL 2165854 (U.S. Dept. of Labor May 25, 2011) (en banc)(Add. at 55). In *Sylvester*, the ARB resolved and clarified the reasonableness standard used in SOX.[4]

The ARB held that it was error to apply the "definite and specific' evidentiary standard." Add. at 71. The ARB further held that the "definite and specific" standard is "not only […] inappropriate, but […] also presents a potential conflict with the express statutory authority of § 1514A." *Id.*

The lower court erred in relying on *Fraser v. Fiduciary Trust Co. Int'l*, 2009 WL 2601389, at *5 (S.D.N.Y. Aug. 25, 2009) and *Fraser*'s "definitive and specific" standard to evaluate whether Genberg engaged in protected activity under § 1514A. The Second Circuit has explicitly rejected the holding of *Fraser* and the "definitive and specific" standard. *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 221 (2d Cir. 2014)("We conclude that the ARB's reasoning in *Sylvester* to the effect that the 'definitively and specifically' requirement […] should be abrogated

[4] Of interest, in its analysis of SOX, the ARB continually relied on case law interpreting statutes within the Department of Labor's family of statutes, all of which have similar origins and overlapping provisions. See, e.g. references to the Surface Transportation Assistance Act (Add. at 70) and the Energy Reorganization Act (Add. at 71).

is persuasive.") The lower court erred in its failure to consider how the Second Circuit treated the "reasonableness" issue.

The Second Circuit is not alone in its rejection of the "definite and specific" standard. Post-*Sylvester*, "no circuit court has rejected the 'reasonable belief' standard for protected activity under Sarbanes-Oxley" set forth in *Sylvester. Erhart v. Bofi Holding, Inc.*, No. 15-cv-02287-BAS(NLS), 2016 U.S. Dist. LEXIS 131761, at *30 (S.D. Cal. Sep. 26, 2016). See, e.g. *Beacom v. Oracle Am., Inc*., 825 F.3d 376, 380 (8th Cir. 2016), *Rhinehimer v. U.S. Bancorp Invs., Inc*., 787 F.3d 797, 806 (6th Cir. 2015), and *Wiest v. Lynch*, 710 F.3d 121, 131-32 (3d Cir. 2013).

The district court ignored *Sylvester*'s widely accepted "reasonableness" standard and instead harped on the fact that "because none of the six enumerated laws of §1514A is referenced in the Salamon email, it does not qualify as protected activity, and Genberg cannot establish a prime facie case under SOX." Plaintiff-Appellant's Add. at 8. This holding directly negates the purpose of SOX and its whistleblower protection provisions. "The purpose of Section 806, and the SOX in general, is to protect and encourage greater disclosure. Section 806 exists not only to expose existing fraud … but also to prevent potential fraud in its earliest stages." Add. at 76. Instead, "a whistleblower complaint concerning a violation about to be committed is protected as long as the employee reasonably believes that the

violation is likely to happen … The employee need not wait until a law has actually been broken to safely register his or her concern." Add. at 70.

In fact, the *Sylvester* reasonableness standard protects an employee's whistleblower communication that is based on a "reasonable, but mistaken, belief that the employer's conduct constitutes a violation of one of the six enumerated categories of law." Add. at 70.

The lower court erred by failing to apply the *Sylvester* standard in defining "reasonableness" under SOX, and by also failing to cite to or rely upon the numerous post-*Sylvester* decisions that completely reject the "definite and specific" standard.

III. Congress' Intent to Broadly Construe the "Reassonablness" standard is Supported by the Experts

The Senate Judiciary Committee's rationale for broadly defining the term "reasonableness" in SOX and explicitly ratifying the Third Circuit's affirmation of the Department of Labor Decision in *Guttman* is supported by the findings of numerous expert studies.

First, Congress itself, after carefully reviewing the events surrounding the collapse of the corporate giants Enron and Worldcom, explained that the whistleblower provision was designed to take specific aim at the "'corporate code of silence'" which it determined "not only hampers investigations, but also creates

a climate where ongoing wrongdoing can occur with virtual impunity." S. Rep. 107-146, 5, Addendum 5.

Second, Congress's findings are consistent with those of major trade associations and ethics organizations with expertise on these issues. Their concerns were seconded by leading industry trade groups. For example, the ACFE determined that the "tip" from insiders (i.e. primarily whistleblowers) was the number one source of information on all fraud cases. ACFE, "Report to the Nations on Occupational Fraud and Abuse 2010," 17 (employees "most common source of fraud tips); 82 (ACFE membership), *available at* http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/rttn-2010.pdf. Moreover, "tips" were the source of the "initial detection" of corporate fraud in 40.2% of the cases studies, whereas the "police" only detected 1.8% of fraud. *Id.* at 16. This lead the ACFE to conclude that "tips were by far the most common detection method . . . catching nearly three times as many frauds as any other form of detection. … Tips have been far and away the most common means of detection in every study since 2002, when we began tracking the data." *Id.*

The Ethics Resource Center ("ERC") was the nation's oldest corporate ethics association. It's 2011 National Business Ethics Survey was sponsored by major corporations concerned about corporate ethics, including Walmart, Northrop Grumman, BP, PricewaterhouseCoopers, United Technologies, Lockheed Martin,

Raytheon, Southern Company and NASDAQ OMX. ERC, "2011 National Business Ethics Survey, *available at* https://berkleycenter.georgetown.edu/publications/2011-national-business-ethics-survey-workplace-ethics-in-transition.

The ERC study concluded that "retaliation against employee whistleblowers" had "rose sharply, and the "share of companies with weak ethics cultures" and "climbed to near record levels at 42 percent." *Id.* at 12. The study also looked back at past survey results and warned of the disastrous consequences that can occur due to a weak ethics culture: "Looking back, it is clear that the 2000 data were warning signs of conditions for a possible dip in ethics. The general accuracy was borne out by a wave of major corporate scandals that wiped out whole companies and cost thousands of employees their jobs. Given this history, there is reason to be concerned that the current weakness of ethics cultures could foreshadow a new surge in misconduct." *Id.* at 20.

The ERC's recommendations to corporate "Executives and Board of Directors" is completely consistent with the bi-partisan Congressional intent behind the SOX whistleblower law. Far from pressuring employees to remain silent until they assemble enough evidence to set forth a "definite and specific" allegation of criminal fraud or securities violations, companies were urged to

"revisit" their internal non-retaliation policies and create a culture where employees are "more likely" to "report misconduct." *Id.* at 52.

CONCLUSION

The decision of the lower court should be vacated and this case should be remanded with instruction that the term "reasonableness" in the SOX definition of a protected disclosure be defined as set forth in the *Passaic Valley* decision. In the alternative, the instruction on remand should require the lower court to apply the *Sylvester* standard on this issue.

Respectfully Submitted,

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I hereby certify that on this 6th day of January, 2017, a true and correct copy of the foregoing **Amicus Brief** was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following persons listed below, and mailed on the 6th day of January, 2017:

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ADDENDUM

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