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STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203</td><td rowspan="3">▲ COURT USE ONLY ▲</td></tr>
<tr><td>On Certiorari to the Colorado Court of Appeals
Hon. John D. Dailey, Steven L. Bernard, and Richard L. Gabriel, Judges, Case No. 2012CA1130

District Court, City and County of Denver
Hon. Brian Whitney and Edward D. Bronfin, Judges, Case No. 2010CV8380</td></tr>
<tr><td>OASIS LEGAL FINANCE GROUP, LLC; OASIS LEGAL FINANCE, LLC; OASIS LEGAL FINANCE OPERATING COMPANY, LLC; and PLAINTIFF FUNDING HOLDING, INC., d/b/a LAWCASH,

Petitioners,

v.

JOHN W. SUTHERS, in his capacity as Attorney General of the State of Colorado; and JULIE ANN MEADE, in her capacity as the Administrator, Uniform Consumer Credit Code,

Respondents.</td></tr>
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AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE DENVER METRO CHAMBER OF COMMERCE IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners Oasis Legal Finance Group, LLC, Oasis Legal Finance LLC, Oasis Legal Finance Operating Company and Funding Holding, Inc. LLC d/b/a LawCash ("petitioners") are lawsuit lenders. That is, as the Colorado Court of Appeals correctly held, petitioners lend money to plaintiffs in personal injury cases and charge interest on that loan.

The circumstances and financial terms of lawsuit lending unnecessarily prolong personal injury litigation, and thus occupy court and business resources that could be better utilized. The ultimate beneficiary is the lawsuit lender. To avoid the problems caused by unregulated lawsuit lending, petitioners' conduct should be regulated by the Colorado Uniform Consumer Credit Code ("UCCC"), C.R.S. § 5-6-101 *et. seq*. (2012). The Court should affirm the court of appeals' decision.

INTEREST OF *AMICI CURIAE*

Amicus Curiae Denver Metro Chamber of Commerce ("Denver Metro Chamber") is a leading voice for over 3,000 Denver-area businesses and their 300,000 employees, providing advocacy for more than 150 years at the federal, state and local levels and helping shape Colorado's economic and public policy.

Amicus Curiae Chamber of Commerce of the United States of America ("the U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the executive branch, and federal and state courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in – or it initiates – cases that raise issues of vital concern to the nation's business community.

This brief will refer to the Denver Metro Chamber and the U.S. Chamber collectively as "the Chambers."

Amici are well suited to speak to the negative effects of the rapidly expanding and opaque practice of unregulated contingent lawsuit lending. This largely unregulated industry increases the volume of lawsuits, incentivizes the

litigation of frivolous claims, prolongs litigation, and increases settlement costs – all at the expense of not only both tort lawsuit plaintiffs and defendants, but also the business sector in general and the court system.

Amici support the position of the Attorney General and Administrator that consumer lawsuit lending is subject to regulation under the UCCC. It is not only the right legal conclusion; it is also the right policy. Regulation of this industry under the UCCC will help to curb the myriad ills caused by lawsuit lending, and will bring the practice into conformity with other regulated consumer lending activity. Because the court of appeals is among the first courts in the country to have determined that petitioners' conduct constitutes lending and is subject to regulation under the UCCC, this case is of critical importance not only to businesses and borrowers in Colorado, but throughout the nation.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The question presented in this case is whether petitioners' lawsuit lending is subject to the UCCC. This brief addresses the assumptions underlying petitioners' policy implications of petitioners' conduct that support its regulation under the UCCC.

STATEMENT OF THE CASE

The Chambers hereby incorporate by reference the Statement of the Case as set forth in the Attorney General and Administrator's Answer Brief.

ARGUMENT

I. PETITIONERS' LAWSUIT FUNDING TRANSACTIONS ARE LOANS SUBJECT TO THE UCCC.

Petitioners argue that they "buy potential proceeds of pending personal injury claims." How do petitioners "buy" these potential proceeds? They do not purchase or receive an assignment of the proceeds at a price certain and then attempt to obtain a higher value as a result of the underlying litigation. This would be a purchase of the proceeds. Rather, they enter into an arrangement that, despite its name, is in fact a loan. That is, petitioners provide personal injury litigation plaintiffs a sum of money, to be repaid pursuant to a payment schedule with interest-the rate and amount of which depends on how much time has passed since the money was provided—in exchange for a secured interest in a settlement or verdict. That is a loan.

Indeed, a number of the articles cited by Amicus Curiae Law Professors confirm this. *See, e.g.,* Ronen Avraham and Abraham L. Wickelgren, *Third Party Litigation Funding—A Signaling Model*, 63 DePaul L. Rev. 233, 237 (2013) ("These *loans* are *debt-based* because they involve a set amount of money to be

paid back with interest if the litigation is successful. … The money is advanced as a non-recourse *loan* where the firms charge a high fixed interest rate on the *loan*, usually between 2% to 5% monthly, to be paid only upon the plaintiff's recovery.") (emphasis added); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 Vill. L. Rev. 83, 86 (2008) ("The litigation financing firms make non-recourse loans to plaintiffs, in exchange for a share of the proceeds of the lawsuit."), *quoting* Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed, Not Outlawed*, 10 Fordham J. Corp. & Fin. L. 55, (2004); Maya Steinitz*, Whose Claim is This Anyway? Third-Party Litigation Funding,* 95 Minn. L. Rev. 1268, 1277 (2010) (identifying conduct like that of petitioners as "litigation lending… regarded by some as a form of subprime lending."), *citing* Martin, *The Wild West*, at 88; Terrance Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 Chi.-Kent L. Rev. 11, 15 (2014) ("[Litigation Finance Companies] should be regulated just like banks, credit card issuers, payday lenders and lenders in the fringe credit industry.").

Moreover, according to statements on its website, it appears that petitioner Oasis Legal Finance LLC is expressly subject to regulation as a lender under the laws of California, Illinois, and Missouri. *See* Oasis website,

http://www.oasislegal.com/legal/terms_and_conditions, Addendum, Exhibit 1, at p. 3. Oasis has also been the subject of regulatory enforcement activity due to its lending activities in Maryland.[1] Regulation of petitioners as lenders in Colorado would be consistent with the treatment of Oasis by sister states.

The law professors' brief highlights, surely unintentionally, the obfuscation that is both petitioners' business model and their attempts to avoid regulation. As noted above, the transactions at issue are loans. That is, the lawsuit lender provides a lawsuit plaintiff a sum of money, to be repaid, pursuant to a payment schedule, with the interest dependent on how much time passes since the provision of the money, in exchange for a secured interest in a settlement or verdict.

To the law professors, however, the loan is really the "purchase" of an asset that is "[sold] on the open market." The UCCC's limit on the interest rate to be charged on the loan becomes a "limit on the price" at which lawsuit plaintiffs can

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[1] In 2009, the Maryland Commissioner of Financial Regulation issued a Summary Order to Cease and Desist in which the Commissioner, among other things "determined that [Oasis'] business activities constituted usurious and unlicensed consumer lending in violation of Maryland law, and that it was in the public interest that [Oasis] immediately Cease and Desist from making consumer loans to Maryland consumers." *See* Summary Order to Cease and Desist, Addendum, Exhibit 2. To settle the matter, Oasis agreed to cease doing business in Maryland so long as Oasis was subject to the consumer lending law, and paid a settlement amount in complete satisfaction of all penalties that could have been assessed in connection with the investigation. *See* Settlement Agreement and Consent Order, Addendum, Exhibit 3.

sell their property. Lawsuit lenders' inability to charge exorbitant interest rates becomes a denial of the lawsuit plaintiffs' ability to sell their "property."

The law professors' brief, other than tautologically, does not support this argument or petitioners' case. First, as noted above, much of the literature cited by the professors assumes that the transactions involved here are loans. Second, much of the remaining authority the professors cite addresses true sales of legal claims, *see* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 Yale L.J. 697 (2005), institutional underwriting of multimillion dollar litigation, *see* Maya Steinitz, *Whose Claim is this Anyway? Third-Party Litigation Funding,* 95 Minn. L.Rev. 1268 (2010), or financing of corporations' *defense* of claims. *See* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. Chi. L. Rev. 367 (2009). That authority is simply inapposite here.

It is not surprising that the professors' brief, which in essence advocates for a robust market to purchase and sell legal claims, is virtually bereft of authority that supports petitioners' arguments. In the transactions at issue here, there is no "purchase" of "property." Lawsuit lenders don't "purchase" the "value" of a lawsuit from a lawsuit plaintiff at a price certain, and then try to achieve a better outcome with the tort defendant. Lawsuit plaintiffs don't "sell" anything, and there is no "market" in which such "shares" of litigation are sold.

The professors attempt to articulate a social good from the lending practice: "Litigation investment provides plaintiffs with funds so that they can resist settlement pressure from defendants and their insurers." However, this theory is directly at odds with petitioners' claim in their brief that the amount loaned to [or in petitioners' world purchased by] lawsuit plaintiffs is usually less than $1500.

There is no record cite for this proposition, and it appears that petitioners make the claim for the first time in their opening brief before this Court. Even if it is true, $1500 dollars will not "allow [a personal injury plaintiff] to pursue their litigation with greater equality than had there been no funding," or provide "consumer personal injury plaintiffs a tool to resist delaying tactics employed by the insurers and lawyers who organize the defense of personal injury defendants," as the professors also contend. The professors either have never litigated even a basic state court matter, or do not understand how far $1500 will (or will not go) during the course of such a lawsuit. According to a legal finance publication,

> The average length of time for tort lawsuits was 23 months, with 20 months on the average for automobile accident cases, and 31 months on the average for medical malpractice cases. Premises liability cases and intentional tort cases had a median length of 24 months and 25 months, respectively.

Stacy A. Terry, *Personal Injury Lawsuits in the U.S.: A Brief Look*, Legal Finance Journal (August 26, 2011) *See* Legal Finance Journal website,

http://legalfinancejournal.com/personal-injury-lawsuits-in-the-u-s-a-brief-look/, Addendum, Exhibit 4.

Even assuming an extraordinarily speedy disposition of a civil matter (one year), $1500 at most may pay one or two months rent, or several car payments, or a few months of groceries. But under no circumstances will such sum allow a lawsuit plaintiff materially to prolong her battle with the defendant.

On the other hand, an amount like $1500 in the hands of litigation lenders, grows exponentially over time, which necessarily forces personal injury plaintiffs to demand higher settlements, simply to repay the litigation lender, as demonstrated below.

The following table shows the "Oasis Ownership Amount ("Payoff Amount") in 6-month intervals as set forth in the Oasis Agreement (which assumes a hypothetical "purchase price" of $1,234.00). *See* Oasis Agreement, Purchase Agreement, CD, p. 83. The Chambers will use this number to demonstrate the impact of petitioners' loan on a typical litigation plaintiff.

Payment Schedule on $1,234.00	**Oasis Ownership Amount**
August 24, 2011 to February 23, 2011	$ 1,851.00
February 24, 2011 to August 23, 2011	$ 2,035.10
August 24, 2011 to November 23, 2011	$ 2,776.50
November 24, 2011 to February 23, 2012	$ 3,085.00
February 24, 2012 to August 23, 2012	$ 3,393.50
August 24, 2012 to February 23, 2013 three years	$ 4,010.50

February 23, 2013 and thereafter	$ 4,219.00

The Oasis Agreement does not disclose an Annual Percentage Rate ("APR"). However, the calculation of the nominal APR amount is possible. This number is derived by adding the contractual interest and fees ("subsequent case review" fee of $20, "case servicing fee" of $30 every six months, $20 subsequent case review for additional funding, and $25 fee for facsimile and photocopying costs per funding) and dividing that number by the original amount of the loan. That number is multiplied by 365 / the amount of days before repayment to find the APR. Stated as a formula, nominal APR = ((Final payment – Beginning Value) + Additional Charges) / Beginning Value) * (365 / Number of Days before Repayment). The table below shows the nominal APR a borrower would pay at the six-month intervals of the Oasis Payment Schedule:

Beginning Value	**Final Payment**	**Start Date**	**End Date**	**#Days**	**Interest Paid**	**Additional Charges**	**Interest Plus Fees**	**Nominal APR**
$ 1,234	$ 1,851	8/24/2010	2/23/2011	183	$ 617	$ 75	$ 692	111.85%
$ 1,234	$ 2,036	8/24/2010	8/23/2011	364	$ 802	$ 105	$ 907	73.71%
$ 1,234	$ 2,777	8/24/2010	11/23/2011	456	$ 1,543	$ 105	$ 1,648	106.87%
$ 1,234	$ 3,085	8/24/2010	2/23/2012	548	$ 1,851	$ 135	$ 1,986	107.20%
$ 1,234	$ 3,394	8/24/2010	8/23/2012	730	$ 2,160	$ 165	$ 2,325	94.19%
$ 1,234	$ 4,011	8/24/2010	2/23/2013	914	$ 2,777	$ 195	$ 2,972	96.16%

If the consumer pays at any time within any particular six-month period, he is charged the Payoff Amount for the *entire* six-month period. *See* Oasis Agreement, Purchase Agreement, CD, p. 83. Thus, for example, if the consumer

pays one day later than the first six month period, the entire payoff amount for the twelve month period is owed, even if the money was used for six months and one day. This is illustrated in the chart below by the difference in interest rates if the payment is made on August 23, 2011, versus August 24, 2011. The former, made 364 days after the loan was made, yields an interest rate of 73.71%. The latter, made 365 days after the loan was made, yields an interest rate of 133.51%.

Indeed, an Oasis executive has stated variously that Oasis typically recovers between 1.4 and 1.8 times the amount of money it advances, and that Oasis charges customers up to 250 percent of the loan amount. *See* Julia Reischal, *As Pre-settlement Financing Takes Hold in Massachusetts, Lawyers Spar Over Pros and Cons,* Mass. Law. Wkly., July 28, 2008, Addendum, Exhibit 5; Binyamin Appelbaum, *Lawsuit Lenders Try to Limit Exposure to Consumer Rules*, N.Y. Times, Mar. 9, 2011, Addendum, Exhibit 6. The LawCash Agreement, § 2.(1.), requires the borrower to pay a 3.50% "monthly fee" of the funded amount, or at least 42% annually, if not compounded. *See* LawCash Agreement, CD, p. 97.

Thus, not only does a nominally small loan not go very far in terms of keeping a struggling litigation plaintiff afloat for the typical length of litigation, if the litigation persists for two years, the loan amount increases at an APR of over

94. So, the "advantage" to the lawsuit plaintiff who enters into a transaction with a lawsuit lender is that the food he purchased for $1234 now becomes "worth" (in other words, the plaintiff owes) far more. The party who receives the "value" is the litigation lender. This is very far from the allegedly increased economic options described by the law professors. *See* Law Professors' Brief at pp. 20-21.

The same fundamental flaws plague the professors' argument that the nature of the "sale" of his or her "asset" makes no difference to a litigation plaintiff. A plaintiff who literally sells his or her claim to a purchaser knows exactly what he or she is getting. A plaintiff with a $50,000 claim who sells the claim for $20,000 knows that he has $20,000 and that the risk of litigation is over. That same plaintiff who borrows money from a litigation lender like petitioners must continue with the litigation and contend with the reduction in value of that money (or, stated another way, the growth in what is owed via excessive interest rates) as times goes on and the concomitant need to increase his settlement to offset that loss.

The professors euphemistically call this variance between the money borrowed and the money owed a "relative price advantage (if any) to the plaintiff on one type of sale versus another, which is a function in part of legal regulation." *See* Law Professors' Brief at p. 5. Of course, such legal regulation exists and in fact is the subject of this litigation: the UCCC, which provides exactly the

regulation necessary to make sure that the "relative price" (read: interest rates) do not disadvantage the borrowers in the legal lending context.

II. PUBLIC POLICY CONCERNS UNDERSCORE THE NEED TO REGULATE CONSUMER LAWSUIT LENDING

The exorbitant interest rates charged by plaintiffs necessarily make it significantly more difficult for their borrowers to settle their cases as the cost to do so is driven up by the loan costs, which can equal or exceed any proceeds from a lawsuit. This in turn artificially prolongs litigation, leads to cases going to trial that should not, which thus further burdens an already underfunded court system.

The resulting costs, borne ultimately by defendant businesses and the courts, underscore the need for regulation.

A. Unregulated Consumer Lawsuit Lending Will Hurt Colorado Businesses by Prolonging Litigation and Driving Up Settlement Costs

Because lawsuit lenders must extract exorbitant interest rates, unregulated consumer lawsuit loans impose significant pressure on borrowers to prolong litigation and to seek settlements that are influenced not by the strength of their cases, but by their onerous obligations to the lawsuit lenders. A case arising out of the Ohio courts provides a good example. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003). In *Rancman*, one lawsuit lender advanced the consumer $6,000 against her pending claim in a personal injury case, in exchange

for the first $16,800 she would recover if the case was resolved within 12 months, $22,200 if resolved within 18 months, or $27,600 if resolved within 24 months. A different lender advanced the plaintiff another $1,000, secured by the next $2,800 the consumer was expected to collect on her claim. As the *Rancman* court noted, with no superior liens, and assuming a 30% contingency fee charged by her personal injury attorney, the consumer would have received no funds from a settlement of $28,000 or less in the first twelve months. *Rancman*, 789 N.E.2d at 220-21. Further, the advances affected settlements above $28,000. For example, assuming the plaintiff presumptively would have settled for no less than $80,000 after payment of attorney's fees, as a result of the interest on the loans, the plaintiff would have to hold out for $98,000 (the sum of the desired $80,000, plus the two loan premiums, minus attorneys' fees on the premiums) assuming the settlement

occurred in the first twelve months). *Id.* at 221.[2] This number only increases as time passes.[3]

Numerous press accounts have highlighted examples of the extreme interest rates charged by lawsuit lenders. For example, according to a report by The New York Times, Larry Long borrowed $9,150 from Oasis to fund a lawsuit against a drug manufacturer. By the time Long received an initial settlement payment of $27,000, 18 months later, he owed Oasis $23,588. Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y Times, Jan. 16, 2011, at 1, Addendum,

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[2] It is true, as the professors note, that the plaintiff in *Rancman* settled her case for $100,000, which, assuming a thirty percent contingency fee, would have left her with around $50,000. The litigation loans may or may not have helped the plaintiff reach her settlement; we cannot tell from the opinion. The outcome in this particular case, does not, however, change the economic situation into which any plaintiff would have been placed by virtue of the lawsuit loans. The question this case concerns, however, is not whether a plaintiff receives some benefit from monies advanced, but the cost of those monies, and the policy implications that flow therefrom.

[3] The court in *Rancman* held that litigation advances were void as a form of champerty and maintenance. *Rancman,* 789 N.E.2d at 221 ("...a lawsuit is not an investment vehicle... An intermeddler is not permitted to gorge upon the fruits of litigation."). After the court's decision, the American Legal Finance Association, the litigation lending industry's trade association, successfully lobbied the Ohio state legislature to overturn Ohio's rule against champerty and maintenance. John P. Barylick & Janna Wims Hashway, *Litigation Financing: Preying on Plaintiffs*, 59 R.I. B. J., 5, 36 (Mar./Apr. 2011).

Exhibit 7.[4] Money owed to a lawsuit lender can exceed proceeds received in litigation. The New York Times reported that one borrower owed her lenders $221,000 after receiving an award of $169,125 for a car accident. Binyamin Applebaum, *Investors Put Money on Lawsuits to Get Payouts,* N.Y. Times, Nov. 14, 2010, Addendum, Exhibit 8.

An example from North Carolina is also illustrative. Leslie Price sued George Shinn, the owner of the Charlotte Hornets, in a civil suit for sexual assault. Price turned down a settlement offer of $1,000,000 and held out for $1.2 million, forcing her attorney to take the matter to trial, which Price lost. Her attorney discovered that Price had received a litigation loan from Future Settlement Funding of Las Vegas, and her contract with Future Settlement would leave her with no money absent a settlement of $1.2 million or more. Price's attorneys sued Future Settlement. In its ruling denying defendants' motion to dismiss, the court stated:

"In a twist perhaps unique in law, a court loss resulting in no award of damages was better for the client than a million-dollar settlement." *Weaver,*

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[4] The professors point out that Long was expected to receive additional settlement sums ($53,000, not $63,000 as stated by the professors) and that therefore *only* 29% of Long's proceeds went to Oasis. Even if Long received the remaining money, the "value" of his "purchase" declined by nearly 29% as a result of the interest charged on the loan.

Bennett & Bland, P.A. v. Speedy Bucks, Inc., et al., 162 F.Supp.2d 448, 451 (W.D. N.C., Apr. 23, 2001).

Regulation of plaintiffs' conduct under the UCCC will insure that plaintiffs' business model will be licensed and transparent, and that plaintiffs will be prevented from charging interest rates that pervert the prosecution of personal injury cases.

B. Unregulated Lawsuit Lending Will Increase the Burden on Colorado Courts

The costs of an increase in the volume and duration of litigation will not be borne by the business community alone. As unregulated lawsuit lending unnecessarily prolongs often dubious litigation, courts will face even greater strains on their already scarce time and other resources. Between 2008 and 2011, 42 states – including Colorado – cut back on court budgets, and 29 states now face even greater case backlogs. *See* Heather Rogers, *Business-killing Cuts to State Court Systems*, Cal. St. B. J. (Nov. 2012), available at http://www.calbarjournal.com/November2012/TopHeadlines/TH1.aspx, *citing* COSCA Budget Survey Responses, Colorado, available at http://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/budget_survey_121811.ashx, Addendum, Exhibit 9.

Moreover, the lender-financed cases that will end up consuming judicial resources in trial are likely to be the cases with the least merit. As one plaintiff lawyer has noted, where the clients have borrowed more than may reasonably be obtained in mediation, "it ends up that the crummy cases are the ones going to trial." Jack Zemlicka, *Personal Injury Lawyers Face Issues with Loans*, Wis. L. J., July 6, 2009, Addendum, Exhibit 10. There is no question, therefore, that regulation of Plaintiffs' conduct under the UCCC is in the interest of the courts and the business community.

If unregulated consumer lawsuit lending – with its exorbitant interest rates – takes hold in Colorado, then Colorado courts will be compelled to spend more resources managing already crowded dockets; Colorado businesses will end up paying more money to plaintiffs to end lawsuits; and Colorado consumer plaintiffs will then have to turn right around and pay that extra money to the lawsuit lenders. Colorado businesses will lose, Colorado consumers will lose, and the Colorado court system will lose; the lawsuit lenders will be the only winners.

DATED: June 9, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 2014, a true and correct copy of the foregoing ***AMICI CURIAE*** **BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE DENVER METRO CHAMBER OF COMMERCE IN SUPPORT OF RESPONDENTS** was filed and served via ICCES properly addressed to the following:

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