**No. 12-1398**

**IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN PETROLEUM INSTITUTE, *et al.*,

*Petitioners*,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

*Respondent*,

and

OXFAM AMERICA,

*Intervenor-Respondent*.

On Petition for Review of an Order of the Securities and Exchange Commission

# BRIEF OF UNITED STATES SENATOR BENJAMIN CARDIN, FORMER SENATOR RICHARD LUGAR, AND UNITED STATES SENATOR CARL LEVIN AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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## CERTIFICATE AS TO PARTIES, RULING AND RELATED CASES

### A. Parties

All parties and intervenors appearing before the Commission and this Court are listed in Petitioners' brief. All *amici* appearing in this Court are listed in Respondent's brief, except Senator Carl Levin, who joined this brief as an additional signatory after Respondent filed its brief. Former Senator Lugar joins this brief as a private citizen.

### B. Rulings Under Review

The ruling under review is set forth in Respondent's Brief.

### C. Related Cases

The related case is set forth in Respondent's Brief.

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[1] This brief does not chiefly rely on any one or more authorities.

## LEGISLATIVE MATERIALS

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## PERIODICALS



## MISCELLANEOUS

## GLOSSARY

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|---|---|
| E.I.T.I. | Extractive Industries Transparency Initiative |
| E.S.T.T. | Energy Security Through Transparency Act |
| S.E.C. | Securities and Exchange Commission |

## STATUTES AND REGULATIONS

The pertinent statutes and regulations for this brief may be found as an Addendum to Petitioners' Brief.

## STATEMENT OF INTEREST

As the United States Senators who were the authors and sponsors of Section 1504 (hereinafter "the Cardin-Lugar Amendment") of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203, July 21, 2010 (hereinafter the "Dodd-Frank Act"), *amici curiae* have direct knowledge of the development and drafting of the text and the Congressional intent behind the substance of the bill, including the consistency of the Securities and Exchange Commission ("S.E.C." or "Commission") final rule ("Final Rule") with the substance and intent of the Cardin-Lugar Amendment. [2]

[2] In compliance with F.R.A.P. 29(c)(5), no party's counsel authored the brief in whole or part, and no one, other than *amici* listed herein, their members, or their counsel, contributed money to fund the preparation or submission of this brief. *Amici* file their separate brief pursuant to this Court's January 11, 2013 ruling.

## INTRODUCTION

The Cardin-Lugar Amendment furthers the critical public policy goals of i) protecting United States interests in both national and energy security, ii) ensuring investor awareness and protection, and iii) promulgating American core principles of transparency, integrity and good governance worldwide. Members of Congress and the Executive Branch, on a bipartisan basis, have long supported transparency through comprehensive disclosure of payments made by resource companies to foreign governments on extraction projects undertaken abroad. This bipartisan dialogue culminated in the Cardin-Lugar Amendment and its implementing rule issued by the S.E.C.

Petitioners seek to contest whether the rule issued by the Commission was consistent with the text and intent of the statute or was promulgated with proper procedural analysis, but they also challenge the power of the United States Congress to require resource companies to disclose information regarding payments to foreign and U.S. federal officials. This raises for this Court whether Congress can require United States issuers to disclose such payments, a question which fundamentally implicates the ability of the legislature to make judgments regarding the national and energy security of the United States, its ability to insist upon the transparency and integrity of its securities markets to protect investors, as well as its ability to spread the values of transparency and integrity to other

countries as a matter of foreign policy judgment. *Amici* submit that this Court should strongly affirm that the Cardin-Lugar Amendment is clearly within the ambit of legislative power and does not implicate Petitioners' First Amendment rights in any way.

# ARGUMENT

## I. The Cardin-Lugar Amendment and Its Implementing Regulations Serve the Government's Interest in Protecting National and Energy Security

The Cardin-Lugar Amendment addresses a major threat to U.S. interests: that abundance of natural resources in developing countries has frequently led to poverty and instability in those countries and, as a result, jeopardizes the national and energy security of the United States. Extensive Congressional study concluded that the "resource curse" of countries with resource-driven economies has created a critical mass of resource-rich countries that are plagued by misallocation of resources, disastrous inequality, the stunting of other domestic industries and endemic corruption. Many of these countries are plagued by collapsing governance, upheaval and terrorism. Reliance on such dangerous countries for resources raises the twin specters of insecurity of energy supply and terrorist threats posed by nationals of failed or failing states. The Cardin-Lugar Amendment, as implemented by the S.E.C., addresses those threats through enhanced transparency and integrity in the payment and allocation of resource revenues.

### A. The Status Quo for Resource Rich Countries Threatens U.S. National and Energy Security Interests

In a 2008 report to the Senate Committee on Foreign Relations analyzing the so-called "resource curse," Senator Lugar stated: "Too often, oil money that should go to a nation's poor ends up in the pockets of the rich or it may be squandered on the trappings of power and massive showcase projects instead of being invested productively and equitably."[3] Senator Lugar continued: "This 'resource curse' affects us as well as producing countries. It exacerbates global poverty which can be a seedbed for terrorism, it dulls the effect of our foreign assistance, [and] it empowers autocrats and dictators."[4]

Lawmakers analyzing the "resource curse" have focused equally on the related issue of protecting energy security. Senator Cardin noted: "Countries that are mired in corruption are not reliable sources of energy. . . The result has been increasing political instability, and in some cases violent attacks on pipelines and refineries."[5] Lack of transparency in the oil, natural gas and minerals sectors and unreliability in resource access leads to commodity price volatility, thereby

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[3] S. COMM. ON FOREIGN RELATIONS, 110TH CONG., "THE PETROLEUM AND POVERTY PARADOX: ASSESSING U.S. AND INTERNATIONAL COMMUNITY EFFORTS TO FIGHT THE RESOURCE CURSE" v (Comm. Print 2008) (hereinafter "Foreign Relations Report").

[4] *Id.*

[5] Energy & Democracy: Oil and Water?: Hearing Before the Comm'n on Sec. and Cooperation in Europe, 110th Cong. 28 (2007) (statement of Sen. Cardin).

threatening U.S. economic activity.[6] This is particularly true in oil markets, which have historically low spare capacity (the extra supply cushion), leaving them vulnerable to relatively minor disruptions.[7]

### B. Greater Transparency About Resource Investments Mitigates Security Risks

Presented with such national and energy security problems, Members of Congress and the executive branch coalesced around transparency as the most effective practical measure for the United States to mitigate these national and energy security risks.[8] When resource revenues can be tracked, the United States government, United States citizens, and citizens of countries in which extraction is occurring can more effectively combat corruption, encourage economic development, and safeguard capital investments through rule of law.

Conversely, lack of transparency is well-documented as an enabler of corruption, poor governance, and tax evasion, thus harming citizens of many nations and undermining critical U.S. national security, foreign policy and humanitarian interests. Lack of transparency regarding the extractive industry's

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[6] Foreign Relations Report, at 10.

[7] Foreign Relations Report, at 2-3; U.S. Energy Info. Admin, OPEC SPARE CAPACITY IN THE FIRST QUARTER OF 2012 AT LOWEST LEVEL SINCE 2008 (May 24, 2012) http://www.eia.gov/todayinenergy/detail.cfm?id=6410

[8] *See* Foreign Relations Report, at 10; MINORITY STAFF OF THE S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 108TH CONG., "MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT" 210 (Comm. Print 2004).

payments to governments can also undermine U.S. interests in reducing the burden of foreign aid, as improved governance can stimulate foreign governments' own domestic tax collection.[9]

Based upon their findings, Members of Congress linked transparency in oil payments to achieving greater security of energy supply and stability of energy prices.

### C. Transparency Legislation Adopted

To implement these critical objectives, Members of Congress made concerted bipartisan efforts over a number of years to enact enhanced transparency measures.[10] The Senate Foreign Relations and Judiciary Committees held hearings on natural resources and transparency in late 2008, hearing nine witnesses, including State Department Representatives.[11]

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[9] *See, e.g.*, Letter from Eric G. Postel, Assistant Admin'r, Bureau of Econ. Dev., Agric., and Trade, U.S. A.I.D., to Elizabeth M. Murphy, Sec'y, S.E.C. (Jul. 15, 2011) (available at http://sec.gov/comments/s7-42-10/s74210-101.pdf); The Link Between Revenue Transparency and Human Rights: Hearing Before the Comm'n on Sec. and Cooperation in Europe, 111th Cong. 23 (2010) (testimony of Ian Gary, Senior Policy Advisor/Manager, Extractive Industry, Oxfam America) (hereinafter "2010 Helsinki Comm'n Hearing").

[10] *See* Promoting transparency of natural resource revenues in resource-rich developing countries, H. R. Res. 995, 109th Cong. (2006); H.R. 6066, 110th Cong. (2008); S. 3389, 110th Congress (2008).

[11] Resource Curse or Blessing? Africa's Management of its Extractive Industries: Hearing Before the Sen. Foreign Relations Comm., Subcomm. on African Affairs, 110th Cong. (2008) (hereinafter "Foreign Relations Hearing"); Extracting Natural Resources: Corporate Responsibility and the Rule of Law: Hearing Before the Sen. Judiciary Comm., 110th Cong. (2008).

In 2009, Senators Lugar and Cardin introduced the Energy Security Through Transparency Act ("E.S.T.T."), gathering 12 additional Senate co-sponsors.[12] In 2010, a section of that legislation was modified and debated in the Senate as the Lugar-Cardin Amendment,[13] and ultimately adopted as an amendment offered by Senator Patrick Leahy to the conference report that became the Dodd-Frank Act. [14]

The agencies in the Executive Branch that routinely confront the consequences of lack of transparency have endorsed the approach of the Cardin-Lugar Amendment. The State Department said the Cardin-Lugar Amendment "directly advances our foreign policy interests."[15] The European Union is now following the U.S. lead in mandatory disclosures and is expected to soon finalize rules similar to the Cardin-Lugar Amendment.[16]

Indeed, many of the same companies represented by Petitioners have recognized the critical value of mandated transparency rules. [17] Lord Browne, former Chief Executive Officer of BP, recently said, "Transparency is the best way

[12] S. 1700, 111th Congress (2009).
[13] S.A. 4050 to S. 3217, 111th Cong. (2010).
[14] Leahy amendment to conference report for Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) (enacted as 15 U.S.C. § 78m(q)).
[15] Sarah N. Lynch and Timothy Gardner, *U.S. State Dept backs rule on foreign payments by firms*, REUTERS (Jan. 10, 2013).
[16] *Consultation on Financial Reporting on a Country-by-Country Basis by Multinational Companies*, COM (2010), http://ec.europa.eu/internal_market/consultations/2010/financial-reporting_en.htm.
[17] *See generally*, the Extractive Industries Transparency Initiative, organization website (last visited January 15, 2013) http://eiti.org.

to overcome the 'resource curse' faced by too many of the world's people. But voluntary disclosure by energy companies is no longer sufficient." [18] In passing the Cardin-Lugar Amendment, Congress determined that voluntary transparency measures are not sufficient to protect U.S. national and energy security goals or U.S. investors. This is the kind of legislative judgment that is made regularly by Congress through the legislative process.

## II. The Cardin-Lugar Amendment Intended to Require Mandatory, Full, and Specific Disclosure

To make a transparency approach effective, Congress determined that disclosure had to be mandatory, and took a granular approach to the data to be disclosed. Transparency requires disclosure by issuer and project, allowing issuers flexibility in applying the statutory term "project" to any particular extractive activity. These were Congressional judgments, and the S.E.C. rule is fully consistent with the language and intent of the Cardin-Lugar Amendment.

### A. Transparency Objectives Required Mandatory Disclosure

Congress's intent to strengthen, not replicate, the Extractive Industries Transparency Initiative's ("E.I.T.I.'s") voluntary approach was clear in the legislation. In a floor statement, Senator Lugar stated that S. 1700 "will *complement* multilateral transparency efforts such as the Extractive Industries

[18] Lord John Browne, *Europe Must Enforce Oil Sector Transparency*, FINANCIAL TIMES.COM, (Apr. 24, 2012).

Transparency Initiative."[19] Other Members of Congress commented on the valuable goal but practical inadequacy of the E.I.T.I.[20] Senator Cardin noted: "too many countries and too many companies remain outside this [E.I.T.I.] voluntary system."[21]

Petitioners suggest that the E.I.T.I. provided "an obvious and widely-admired alternative" to the final rule that was both "less intrusive" and "less costly."[22] Petitioners' own brief acknowledges that Congress created requirements that "deviate" from the E.I.T.I. standard.[23] The statutory language indicates that Congress intended to go beyond the E.I.T.I. disclosure regime and the Commission, although borrowing from E.I.T.I., recognized that intent. Indeed, the E.I.T.I. itself is not a single model but rather sets a minimum standard that compliant countries may exceed in whatever way they see fit. The E.I.T.I., moreover, describes disaggregated reporting by company as a *best practice*.[24]

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[19] 156 Cong. Rec. S3801-02 (daily ed. May 17, 2010) (statement of Sen. Lugar) (emphasis supplied).
[20] *See* Foreign Relations Report, at 13; Foreign Relations Hearing, at 2-3 (statement of Sen. Feingold): See "Resource Curse or Blessing? Africa's Management of its Extractive Industries": Hearing Before the Sen. Foreign Relations Comm., Subcomm. on African Affairs, 110th Cong. Page (2008) (statement of Sen. Feingold); 2010 Helsinki Comm'n Hearing, at 29 (statement of Cong. Christopher Smith).
[21] 156 Cong. Rec. S3801-02 (daily ed. May 17, 2010) (statement of Sen. Cardin)
[22] Pet. Br. at 36-37.
[23] Pet. Br. at 13.
[24] EITI International Secretariat, EITI GOOD PRACTICE NOTE NO 1: HOW TO IMPROVE EITI REPORTS (Sept. 2009), http://eiti.org/files/Good%20practices%20-

Thus, Congress has chosen to codify and mandate the best practices of the E.I.T.I., and expand upon other minimum standards in enacting expanded transparency requirements pursuant to American interests.[25]

### B. Exemptions Undermine the Intent of the Law and Are Unnecessary

Petitioners discuss the liability they would face in the absence of exemptions for countries with disclosure bars and assert the applicability of the *Charming Betsy* canon of construction.[26] The *Charming Betsy* canon, however, has nothing to do with conflicts with the domestic laws of other countries. It only applies with respect to construction of ambiguous statutes where one construction conflicts with *customary international law*, *i.e.*, the universally recognized principles that constitute the law of nations, such as the bar against torture or prohibitions against human trafficking or terrorism.[27] There is no universal principle that foreign countries can prohibit transparency in their resource sector and other countries are obliged to honor that prohibition. Rather, petitioners appear to confuse the *Charming Betsy* canon with comity, which is a discretionary doctrine regarding the

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%20EITI%20Reporting.pdf (recommending "from existing best practice in existing EITI Reports").

[25] The E.I.T.I., for example, was not designed to provide company-specific information that investors can use to evaluate their securities investments, as is the case with the Cardin-Lugar Amendment.

[26] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Pet. Br. at 15, 56.

[27] *See generally* Note, *The* Charming Betsy *Canon, Separation of Powers, and Customary International Law*, 121 Harv. L. Rev. 1215 (2008).

degree of deference due to foreign laws. Comity "is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests."[28]

It is up to Congress to consider and decide whether to enact laws that may conflict with foreign laws, and Congress has regularly enacted laws which may do so.[29] Courts also routinely enforce American laws which conflict with foreign law, including U.S. laws mandating transparency over secrecy.[30]

In any event, Petitioners can point to no evidence that the final rule would *actually* conflict with the existing laws of any foreign country.[31] Absent that evidence, there is no practical basis even to consider an exemption, and if the agency allowed exemptions, this would provide an incentive for foreign governments to subvert U.S. law by passing laws that prohibited disclosure. In

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[28] *Hilton v. Guyot*, 159 U.S. 113,165 (1895).

[29] *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56; the Bank Secrecy Act, 31 U.S.C. 1051 *et seq.*; the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, *et seq.*

[30] *See, e.g., Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544 (1987) ("It is well settled that such [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.")

[31] Major companies backing the petitions failed to present documentation of conflicting laws during the legislative drafting and consultation process and failed to do so in subsequent communication with the S.E.C. *See In the Matter of Am. Petroleum Inst.*, S.E.C. Release No. 68197, at 7 (Nov. 8, 2012) (*available at* http://www.sec.gov/rules/other/2012/34-68197.pdf).

making no provision for exemptions, the S.E.C. acted consistently with the statutory language and purpose. On its face, the statute makes no provision for exemptions. In drafting the E.S.T.T., from which the Cardin-Lugar Amendment was derived, lead author Senator Lugar contemplated and ultimately rejected exemptions because of the perverse incentive it would create for the worst actors to enact laws to prohibit disclosure. Members of the House of Representatives who cosponsored the legislation and served as conferees during negotiations over the final law similarly instructed the S.E.C. that the Cardin-Lugar Amendment was intended to apply without exemptions.[32] In short, Petitioners' argument for exemptions based on conflict with foreign law is i) inconsistent with Congressional intent; ii) creates perverse incentives that reduce transparency; iii) does not offend U.S. law; and iv) is based on a false conflict that has no basis in the record.

### C. Only Public Disclosure by Issuers Serves Congressional Intent Regarding Transparency

The Cardin-Lugar Amendment on its face requires disclosure of data to be public and to reveal information specific to individual issuers. It follows the model of other federal securities laws aimed at disclosure: issuers file information with

[32] Letter from Cong. Barney Frank, *et al*. to the Hon. Mary L. Schapiro, *et al.*, Commissioners, S.E.C. (Feb. 15, 2012) (available at http://www.sec.gov/comments/s7-42-10/s74210-162.pdf).

the Commission in regular reports that are made public.[33] The statutory language emphasizes the law's disclosure obligations, entitling the new Section 13(q), "*Disclosure* of Payments by Resource Extraction Issuers," and entitling the primary subsections, "Disclosure" and "Public Availability of Information."[34] Petitioners' argument with respect to aggregation of data is similarly inconsistent with the statutory language and intent. The statute states that "the Commission shall make available online, to the public, a *compilation* of the information required to be submitted."[35] "Compile" and "aggregate" have distinct meanings. The plain meaning of "compile" is "collect and edit into a volume" with "materials from other documents."[36] In contrast, "aggregate" means, to "collect or gather into a mass or whole."[37] The former implies putting distinct items together while retaining their distinction; the latter implies creating one item out of many. That Congress chose the term "compilation" rather than "aggregation"—despite using the latter term in other legislation[38]—cannot be altered by Petitioners after the fact. The statute also includes language indicating that it envisions even more significant public access than many S.E.C. filings without aggregation: the statute

[33] *See, e.g.*, the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 *et seq.*
[34] 15 U.S.C. § 78m(q)(2) and (3) (2012) (emphasis supplied).
[35] 15 U.S.C. § 78m(q)(3)(A) (2012) (emphasis supplied).
[36] MERRIAM-WEBSTER.COM (last visited Nov. 24, 2012).
[37] MERRIAM-WEBSTER.COM , (last visited Jan. 7, 2012).
[38] *See, e.g.*, Earmark Transparency Act, S. 3335, 111th Cong. (2010) (as introduced).

states that the Commission "shall establish an interactive data standard for the information included in the annual report of a resource extraction issuer."[39] The statute contains no reference to an aggregation that blurs the identity of individual issuer annual reports.[40]

### D. "Project" Interpretive Guidance Accords with Congressional Intent

The Commission appropriately provided interpretive guidance of "project" in a manner that comports with the statute. The statute twice refers to project-level data, requiring disclosure of the "payments made for each project," and identification of "the project of the resource extraction issuer to which the payments relate."[41]

Project level reporting was included because many of the drivers of U.S. government interest in transparency occur at the local level. It enables the United States to monitor more closely its national and energy security goals and also enables investors more closely to monitor their investments. In addition, individual communities and localities that host resource extraction operations are at the front line of measuring whether resources are benefiting the population. Project level reporting enables those with the most information and best

[39] 15 U.S.C. § 78m(q)(2)(D)(i) (2012).
[40] *Id.* *See also* Letter from Sen. Cardin, *et al.*, to the Hon. Mary Schapiro, Commissioner, U.S. Securities and Exchange Comm'n (Jan. 31, 2012) (available at http://www.sec.gov/comments/s7-42-10/s74210-122.pdf).
[41] 15 U.S.C. § 78m(q)(2)(A)(i) and (D)(ii)(VI) (2012).

perspective on operations and, frequently, with most at stake in holding their governments to account to maximize use of the data disclosed.

The Commission's decision to issue interpretative guidance for the term *project* provides latitude to industry to tailor their disclosures reasonably to different types of projects. This is the essence of reasonable administrative discretion.

## III. The Cardin-Lugar Amendment Does Not Compel Protected Speech and Does Not Violate the First Amendment

Petitioners raise the remarkable proposition on appeal that Cardin-Lugar violates the First Amendment. Stated simply, there is nothing in the Cardin-Lugar Amendment that requires anything other than garden variety disclosure of factual, financial information by S.E.C. issuers to the public. These required factual disclosures are devoid of any ideological or political message. Congress is not asking any resource company to endorse a specific message or to alter the content of its message; nor does the Cardin–Lugar Amendment in any way infringe rights of association or belief.[42] Resource companies can believe whatever they wish and make any communication they wish about their payments to foreign governments, "the resource curse," or the benefits or costs of transparency; they have done so throughout this process. What resource companies may *not* do is impede the

[42] *Compare, e.g., U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001) (mushroom producer could not be compelled to pay assessment for advertising program).

power of the legislative branch to require disclosure of objective information to fulfill compelling public policy objectives, including the strengthening of American national and energy security and investor protections.

## CONCLUSION

For the foregoing reasons, *Amici Curiae* United States Senator Benjamin Cardin, Former United States Senator Richard Lugar, and United States Senator Carl Levin request that the Petition for Review by denied.

Dated: January 16, 2013

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that according to the word-count facility of Microsoft Word 2010, the program used to draft the foregoing brief contains 3499 words (excluding those portions excluded under Rule 32(a)(7)(B)(iii)), and therefore complies with the type-volume limitation contained in Rule 29(d).

Date: January 16, 2013

/s/ Eric L. Lewis
Eric L. Lewis

## CERTIFICATE OF SERVICE

I certify that on this day I caused a true copy of the above document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF and paper copies will be sent to those indicated as non-registered participants on the date indicated below.

Date: January 17, 2013

/s/ Eric L. Lewis
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