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12 *and Maricopa County Elections Director*

13 IN THE UNITED STATES DISTRICT COURT

14 FOR THE DISTRICT OF ARIZONA

15 Maria M. Gonzalez, et al.,

16 Plaintiffs,

17 v.

18 State of Arizona, et al.,

19 Defendants.

NO. CV06-1268-PHX-ROS (LEAD)
NO. CV06-1362-PCT-JAT
NO. CV06-1575-PHX-ROS
(Consolidated)

**MOTION AND MEMORANDUM
FOR SUMMARY JUDGMENT BY
DEFENDANT MARICOPA
COUNTY RECORDER AND
ELECTIONS DIRECTOR**

(Assigned to the Honorable
Roslyn O. Silver)

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1 Pursuant to Fed. R. Civ. P. 56(b), Defendants Maricopa County Recorder
2 and Maricopa County Elections Director (“Maricopa County”) submit this Motion
3 for Summary Judgment on all claims asserted in Case No. CV 06-1268 by all
4 Plaintiffs (“Plaintiffs”), because the State has a compelling interest in protecting
5 the integrity and reliability of the electoral process. This motion is supported by
6 the following memorandum of points and authorities, the separate statement of
7 undisputed facts, and attachments thereto, which are filed herewith and
8 incorporated herein by this reference. Maricopa County also joins the *Motion for
Summary Judgment Directed to the Gonzalez Plaintiffs By Defendants State of
Arizona and the Arizona Secretary of State.*

9 MEMORANDUM

10 Legal Argument

11 I. THE APPLICABLE LEGAL STANDARD.

12 Summary judgment is appropriate upon a showing that “there is no
13 genuine issue as to any material fact and that the moving party is entitled to
14 judgment as a matter of law.” Fed. R. Civ. P. 56(c); see *Celotex Corp. v.
15 Catrett*, 477 U.S. 317, 322-23 (1986). “Only disputes over facts that might affect
16 the outcome of the suit under the governing law will properly preclude the entry
17 of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
18 (1986). Once a defendant has identified those parts of the record that indicate
19 an absence of an issue of material fact, the nonmoving party must identify
20 specific facts to show that there is a genuine issue for trial. *Brinson v. Linda
Rose Joint Venture*, 53 F.3d 1044, 1048 (9th Cir. 1995) (quoting *Celotex*, 477
21 U.S. at 324).

22 II. STATE HAS A SPECIFIC, COMPELLING STATE INTEREST IN PREVENTING ELECTION FRAUD AND SECURING THE ELECTION PROCESS

The Supreme Court has maintained that states must structure the
electoral process “to maintain the integrity of the democratic system.” *Burdick v.
Takushi*, 504 U.S. 428, 441 (1992)(quoting *Anderson v. Celebrezze*, 460 U.S.

1 780, 788 (1983)). Every election provision “inevitably affects - at least to some
2 degree - the individual's right to vote and his right to associate with others for
3 political ends.” *Anderson*, 460 U.S. at 788. “Nevertheless, the state's important
4 regulatory interests are generally sufficient to justify reasonable,
nondiscriminatory restrictions.” *Id.*

5 In its recent decision upholding Indiana’s voter identification law, the
6 Supreme Court reiterated this theme by stating that even if the law imposed a
7 limited burden on voters, Indiana’s asserted interest was unquestionably
8 relevant to its interest in protecting the integrity and reliability of the electoral
9 process. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).
10 Similarly, Arizona’s voter requirements are justified because of the compelling
interest in preventing election fraud, ensuring only eligible voters are registered
to vote, and maintaining public confidence in the electoral system.

11 **A. States Must Take Preventative And Preemptive Measures To
12 Secure Elections Against Voter Fraud.**

13 Even the threat or perception of election fraud can damage the integrity of
14 an election. In 1982 the Supreme Court held it would not “second guess a
15 legislative determination as to the need for prophylactic measures where
16 corruption is the evil feared.” *Federal Election Commission v. National Right to
17 Work Committee*, 459 U.S. 197, 210 (1982). While that case dealt with
preventing campaign finance corruption, lawmakers must make the same type
of determination in attempting to prevent corruption in the election process.

18 By approving the Arizona Taxpayer and Citizen Protection Act in the
19 November 2004 General Election, Arizona’s voters chose to counteract the
20 danger of election fraud by requiring proof of citizenship for voter registration
21 and voter identification at the polls. This decision was not made in a vacuum, but
22 was done based on one of the consequences of illegal immigration. The ballot
measure’s Findings and Declaration provide as follows: “This state further finds
that illegal immigrants have been given a safe haven in this state with the aid of

1 identification cards that are issued without verifying immigration status, and that
2 this conduct contradicts federal immigration policy, undermines the security of
3 our borders and demeans the value of citizenship.” Proposition 200, November
4 2, 2004 General Election.

5 Acting on the initiative power granted by the Arizona Constitution, Ariz.
6 Const. art. IV, §1, the voters recognized two problems in their voting system that
7 did not have adequate detection or prevention mechanisms: (1) the lack of
8 verification of a potential registrant’s United States citizenship; and (2) the lack
9 of verification of a voter’s identity on election day. Arizona voters took
10 appropriate proactive and preemptive steps to prevent these problems from
11 developing into widespread fraud by approving Proposition 200, which is a
12 reasonable, non-discriminatory method for verifying legitimate voters and
13 detecting fraudulent efforts.

14 **B. Errors in voter registry make voter fraud easier, and increase
15 the need for strong verification requirements.**

16 Maintaining a current and accurate voter registration list is a constant
17 challenge for election officials due to voters moving without updating their voter
18 registration, a voter's death, or a voter becoming ineligible to vote based on a
19 criminal conviction. A.R.S. § 16-165. [SOF 9] When reasonable measures to
20 verify eligibility are not conducted before a name is added to the registry, it
21 fosters fraudulent registrations and the inclusion of ineligible persons, including
22 those not citizens. [SOF 9,11,14] The magnitude of inaccurate and fraudulent
registrations requires election officials to work diligently and spend considerable
resources seeking to maintain current and accurate voter rolls. [SOF 9]
Requiring that a person seeking to register to vote prove his or her citizenship
assures the State and its citizenry that the person on the roll is in fact a living,
real person and provides some assurance that that person is actually eligible to
vote.

If not for the proof of citizenship requirement Arizona's current voting

1 registration rolls would be full of ineligible, inaccurate, and fraudulent
2 registrations. [SOF 11] In recent years voter registration organizations have
3 submitted thousands of completed voter registration forms for persons who do
4 not exist and forms from persons who did not consent to the registration. [SOF
5 10] As a result of Arizona strengthening its voter registration process,
6 thousands of these bogus voter registrations and the registrations of ineligible
7 persons have not been added to the voter registration database. [SOF 11, 14]

8 Among the more egregious examples of fraudulent registrations, is a far-
9 reaching scheme in which *legal* resident aliens endeavoring to become U.S.
10 citizens have been duped into registering to vote. [SOF 7] Maricopa County
11 learned of this practice after being contacted by the U.S. Citizenship and
12 Immigration Services (USCIS) inquiring as to whether certain alien residents
13 were registered to vote and, if so, their voting history. [SOF 12]

14 In her deposition, Karen Osborne expressed her frustration with the voter
15 registration organizations that have mislead legal residents, who were not yet
16 U.S. citizens, into registering to vote. [SOF 12] The paid voter registration
17 circulators are using unscrupulous tactics, in an effort to earn a few dollars for
18 each completed registration, and are successfully convincing non-citizens to
19 register to vote. [SOF 12] To counter any misinformation about voter
20 registration eligibility, Maricopa County increased its voter registration and
21 outreach efforts. [SOF 12] However, under the old system, a non-citizen who
22 registered to vote, regardless of the intentionality, had nothing to stop that
registration from being processed. [SOF 13] Once processed, the non-citizen
has violated the law and could be deemed ineligible for citizenship.¹ [SOF 13]

¹ *In Re Centi*, 211 Fed. 559 (W.D. Tenn. 1914)(non-citizen that was registered to vote and voted was not of good moral character and not entitled to be admitted as a citizen). *But see* 8 U.S.C.A. § 1101(f) (A finding of absence of good moral character may not be made in the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a federal, state, or local election in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien is or was a citizen, the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen).

1 Proposition 200 provides a mechanism for stopping these errant registrations
2 without imposing any penalty on the registrant.

3 The deplorable tactics used against resident aliens are not the only type
4 of voter fraud that has occurred in Arizona. Ms. Osborne also testified about
5 one voter registration organization that in 2004 submitted completed voter
6 registrations forms she described as “garbage.” [SOF 14] Following the
7 passage of Proposition 200, the rate of rejection of voter registrations was high
8 at first, then declined in 2006, but went back up in 2007. [SOF 14] Ms. Osborne
9 attributed the spike of voter registration rejection in 2007 to another large voter
10 registration organization that pays its circulator a set dollar amount per
11 completed form. [SOF 14]

12 Ms. Osborne then explained that voter registration forms rejected prior to
13 passage of Proposition 200 could only be rejected based on the face of the
14 registration, such as detecting forgery or clear fabrication. [SOF 14] Thus, it is
15 likely that many of the 2004 “garbage” forms were entered into the voter rolls,
16 despite the strong suspicion that were not the result of a live person choosing to
17 register. With the implementation of the proof of citizenship requirement, the
18 registrant must prove that he or she is the person completing the form, rather
19 than a forger, and the registrant is a person that actually exists. [SOF 14] While
20 the Plaintiffs argue that the rejection of voter registration forms since the
21 implementation on Proposition 200 is attributed to the inability of qualified
22 individuals to obtain the documentation to prove citizenship, the empirical
evidence provides another explanation. [SOF 14] The rate of rejection is directly
related to the number of fraudulent voter registration forms since the
implementation of Proposition 200 because the proof of citizenship requirement
now gives election officials a mechanism to verify a registrant’s existence prior
to adding a name to the voter registration database. [SOF14]

1 Additionally, Arizona voters approved another method of preventing voter
2 fraud that could result from the numerous “garbage” registrations that may have
3 been added to the database prior to Proposition 200. By enacting the voter
4 identification law, the State is able to ensure that no ill-intending person may
5 vote using one or more of the names of non-existent voters that may have been
6 added to the voter registration database prior to the proof of citizenship
7 requirement. [SOF 15] Thus, the voter identification requirement allows the State
8 and its citizens to be assured that the person voting is in fact the same eligible
9 person who is registered on the voter rolls. [SOF 15] Both provisions further the
10 State’s interests by ensuring that only qualified electors are registered and
11 voting and by promoting public confidence in the electoral process.

12 **C. Election fraud is a significant threat to election integrity
13 because of the impact it can have on close elections.**

14 Extremely close elections happen often in local, state, and national
15 elections. [SOF 1] When this occurs, the results are closely scrutinized by the
16 candidates, the parties, the media and the public. [SOF 1,2] If the margin of
17 victory in a close election consists, even partly, of illegal ballots, doubt is cast on
18 the outcome of the election and the effect on the election system public
19 confidence can be very damaging. [SOF 2]. It is for precisely this reason that
20 the Supreme Court does not require an evidentiary showing of fraud in order to
21 uphold a reasonable restriction on voting. *Crawford*, 128 S. Ct. at 1617, 1619
22 (recognizing states’ interests in deterring and detecting voter fraud and
promoting public confidence in the integrity of the electoral process, even in
absence of any evidentiary showing of fraud in the state’s electoral process.)

 While actual fraud is not a required showing, Maricopa County has indeed
prosecuted numerous individuals that are either non-citizens or felons who are
illegally registered to vote and have subsequently voted in an election. [SOF 3]
The severity of fraud should not be measured by the total number of convictions, as
previously suggested by Plaintiffs, but by the margin of victory in any given

1 election race. Viewing voter fraud from the perspective of the candidates or
2 voters affected by the outcome of an election accentuates the need for voter
3 verifications to ensure that public confidence is not shaken.

4 Maricopa County makes every effort to recognize potential voter fraud.
5 When the jury commissioner receives juror affidavits, which state that the
6 recipient is not eligible to serve on the jury because he or she is not a citizen or
7 is a convicted felon, the commissioner promptly sends the affidavits to the
8 Elections Department. [SOF 4,6] Upon receipt of the questionnaire, that
9 individual is removed from the voter registration registry. A.R.S. §§16-101 & 16-
10 165(A). However, this cancellation is a retro-active step. The 33 non-citizens
11 that voted in the 2004 general election, but admitted to the jury commissioner
12 that they were not citizens, were able to register to vote because Arizona did not
13 require proof of citizenship to register at that time. [SOF 4,5] The frequency of
14 this occurrence reveals that voter fraud can quickly become a major problem,
15 even if the actual number of fraudulent ballots is only a small percentage of the
16 total votes.

17 In 2001 a gathering of election experts headed by former presidents
18 Jimmy Carter and Gerald Ford found: "In presidential elections since 1948,
19 nearly half of all the states have had at least one occasion when the winner of
20 their electoral votes was decided by less than one percent of the vote."² Arizona
21 has a compelling interest in avoiding the public confusion, delayed results and
22 drawn-out legal battles that occur when a close election is tainted by illegal
ballots. "There is no question about the legitimacy or importance of the State's
interest in counting only the votes of eligible voters." *Crawford*, 128 S. Ct. at
1619. While non-citizens and convicted felons who have not had their civil rights
restored may have unintentionally violated the law, the State has a compelling

² National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, at 51, August 2001, available at http://www.tcf.org/Publications/ElectionReform/99_full-report.pdf.

1 interest to ensure that the voter rolls contain the names of persons who are
2 actually eligible to vote.

3 **D. The rarity of prosecutions makes criminal penalties an
4 inadequate deterrent.**

5 Federal law provides criminal penalties for the practice of submitting a
6 false voter registration forms. Congress criminalized the unscrupulous practice
7 of fraudulent voter registration in 1993 when it enacted the National Voter
8 Registration Act ("NVRA"). Specifically, 42 U.S.C. § 1973gg-10(2) "criminalizes
9 submitting voter registrations or ballots that contain materially false information
with knowledge of the falsity." *United States v. Prude*, 489 F.3d 873 (7th Cir.
2007) (affirming the conviction of the defendant, a convicted felon who was
ineligible to vote and voted with knowledge of this ineligibility).

10 But the deterrence effect of criminal penalties is inadequate, because tight
11 resources and other priorities make prosecutions too rare. As Judge Posner
12 stated in the appellate decision in *Crawford*, "the absence of prosecutions is
13 explained by the endemic underenforcement of minor criminal laws (minor as
14 they appear to the public and prosecutors, at all events) and by the extreme
15 difficulty of apprehending a voter impersonator." *Crawford v. Marion County
Elections Board*, 472 F. 3d 949, 953 (7th Cir. 2007)(upholding Indiana photo
identification law), *cert. granted*, 128 S. Ct. 33(2007).

16 A 2006 report on voter fraud commissioned by the U.S. Election
17 Assistance Commission included a series of interviews with election experts
18 who were asked about election crime prosecutions. The general consensus was
19 that, "voting fraud and voter intimidation are difficult to prove and require
20 resources and time that many local law enforcement and prosecutorial agencies
21 do not have. Federal law enforcement ... have more time and resources but
22 have limited jurisdiction and can only prosecute election crimes perpetrated in
elections with a federal candidate on the ballot or perpetrated by a public official

1 under the color of law.”³ So it's not surprising that the election crime
2 prosecutions in Arizona’s recent history have been few despite the evidence of
3 hundreds of non-citizens and convicted felons who have registered to vote and
4 voted in an election. [SOF 3-5,7] The lack of prosecution for voter fraud should
not be construed to mean there is no danger of fraud.

5 **E. Voter fraud dilutes legal votes and is very difficult to remedy**
6 **after the fact.**

7 The State must protect the interests of the electorate up front rather than
8 attempting to remedy the harm once fraud has occurred. In *Reynolds v. Sims*
9 the Supreme Court equated vote dilution with voter disenfranchisement: “the
10 right of suffrage can be denied by a debasement or dilution of the weight of a
11 citizen's vote just as effectively as by wholly prohibiting the free exercise of the
12 franchise.” 377 U.S. 533, 555 (1964). The Supreme Court has continued this
13 theme in other election cases. “Not only can this right to vote not be denied
14 outright, it cannot, consistently with Article I, be destroyed by alteration of
15 ballots, . . . or diluted by stuffing of the ballot box, . . . No right is more precious in
16 a free country than that of having a voice in the election of those who make the
laws under which, as good citizens, we must live.” *Westberry v. Sanders*, 376
17 U.S. 1, 17 (1964)(internal citations omitted); see also *Purcell v. Gonzalez*, 549
18 U.S. 1, 127 S.Ct. 5 (2006).

19 The importance of preventing voters’ legal ballots from being diluted by
20 ballots cast by ineligible voters cannot be emphasized enough. Voter secrecy
21 laws make it nearly impossible to find and retract an illegal ballot once it has
22 been cast. Because of the compelling importance of preventing vote dilution
and the near impossibility of reversing its effects, Arizona is justified in requiring
a pre – registration security measure like proof of citizenship, and a pre-voting

³ Job Serebrov and Tova Wang, *Election Crimes: An Initial Review and Recommendations for Future Study*, U.S. Election Assistance Commission, December 2006, at 9.

1 law like voter identification to prevent illegal votes from being cast in the first
2 place.

3 **III. ARIZONA HAS A COMPELLING INTEREST IN ENSURING THAT VOTERS HAVE
4 CONFIDENCE IN THE INTEGRITY OF THE ELECTORAL PROCESS.**

5 In addition to being an essential component of our representative
6 democracy, “. . . public confidence in the integrity of the electoral process has
7 independent significance, because it encourages citizen participation in the
8 democratic process.” *Crawford*, 128 S. Ct. at 1620. Not only are legitimate
9 votes diluted when voter fraud is perpetrated, but voters' confidence in the
10 electoral process suffers harm.⁴ This confidence, when shaken, is very difficult
11 to restore.

12 Moreover, “[c]onfidence in the integrity of our electoral processes is
13 essential to the functioning of our participatory democracy.” *Purcell*, 127 S.Ct. at
14 7. Arizona's proof of citizenship for voter registration and voter identification
15 laws are a reasonable, non-discriminatory method for verifying legitimate voters
16 and detecting fraudulent efforts. Such election security measures enhance the
17 electorate's certainty that only legitimate ballots will be cast and counted. While
18 the State need only demonstrate an “important regulatory interest,” *Anderson*,
19 460 U.S. at 788, Arizona actually has a compelling interest in preserving the
20 integrity of its election process. See *Eu v. San Francisco County Democratic
21 Central Committee*, 489 U.S. 214, 231 (1989); *Rosario v. Rockefeller*, 410 U.S.
22 752, 761 (1973).

23 **A. Voter confidence is a fundamental component of ensuring
24 democratic participation.**

25 The right of citizens to select their representatives is one of the bedrocks
26 of our democracy. “No right is more precious in a free country than that of

27 ⁴ Stephen Ansolabehere and Nathan Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in
28 the Challenge to Voter Identification Requirements*, 121 Harv. L. Rev. 1737 (2008)(empirical research to evaluate
public perception on voter fraud).

1 having a voice in the election of those who make the laws under which, as good
2 citizens, we must live. Other rights, even the most basic, are illusory if the right
3 to vote is undermined.” *Wesberry*, 376 U.S. at 17. The Supreme Court has long
4 recognized the importance of an electorate confident in the integrity of its
5 election systems. “Preserving the integrity of the electoral process, preventing
6 corruption, and sustain[ing] the active, alert responsibility of the individual citizen
7 in a democracy for the wise conduct of government are interests of the highest
8 importance. Preservation of the individual citizen's confidence in government is
9 equally important.” *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789
(1978) (internal quotes omitted).

9 Likewise, in *FEC v. National Right to Work Committee*, the Supreme
10 Court recognized the dual governmental interests in “preventing both actual
11 corruption and the appearance of corruption,” 459 U.S. 197, 210 (1982). In the
12 2005 report issued by the Commission on Federal Election Reform detailing
13 election reform efforts, the Commission identified a confident electorate as one
14 of the keystones of a functional democracy.⁵ “Building confidence in U.S.
15 elections is central to our nation's democracy.” *Id.* at iv. The report included 87
16 recommendations to improve public confidence, including recommendations on
17 maintaining an accurate voter registration database, identifying individuals who
18 declare they are non-citizens when summoned for jury duty, and voter
19 identification at the polls. These steps fall in line with the precautions Arizona is
20 taking to improve public confidence.

18 **B. Voter fraud lowers public confidence in the election process.**

19 Voter fraud - whether real or perceived, widespread or isolated - has a
20 debilitating effect on lawful participation. Recognizing that voter fraud cancels
21

22 ⁵ Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, September 19, 2005, available
at [http:// www.american.edu/ia/cfer](http://www.american.edu/ia/cfer).

1 out legitimate votes, the Court remarked that “the right of suffrage can be denied
2 by debasement or dilution of the weight of a citizen's vote just as effectively as
3 by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377
4 U.S. 533 (1964). Even the appearance of corruption erodes public confidence
5 and deters legitimate voters from voting. “Confidence in the integrity of our
6 electoral processes is essential to the functioning of our participatory
7 democracy. Voter fraud drives honest citizens out of the democratic process and
8 breeds distrust of our government. Voters who fear their legitimate votes will be
9 outweighed by fraudulent ones will feel disenfranchised.” *Purcell*, 127 S.Ct. at 7.
10 The Carter-Baker Commission on election reform acknowledged the reality of
11 voter fraud, stating: “*there is no doubt that it occurs.*” Carter-Baker Report at 18
12 (emphasis added).

13 Citizen participation is crucial to our form of representative democracy.
14 The Carter-Baker Commission acknowledged the devastation that could occur if
15 honest voters doubt the legitimacy of elections and decline to participate.
16 “Democracy is endangered when people believe that their votes do not matter or
17 are not counted correctly.” Carter-Baker Report at 1. “Little can undermine
18 democracy more than a widespread belief among the people that elections are
19 neither fair nor legitimate.” *Id.* States prudently adopt security measures before
20 voter fraud scandals erupt rather than waiting until the fraud is perpetrated when
21 the damage is not easily repaired.

22 Arizona's proof of citizenship for voter registration and voter identification
laws are reasonable methods for verifying legitimate voters. It is essential for
secure elections that each voter cast only one ballot, and that only legitimate
voters vote. States inevitably must adopt regulations to secure the ballot and
ensure that ballots are cast only by legitimate voters. Proof of citizenship and
voter identification requirements are reasonable, non-discriminatory means to
accomplish election security leading to enhanced public confidence in ballot
integrity.

1 **IV. CONCLUSION**

2 States are given wide latitude to regulate the order and security of the
3 election process. Arizona's proof of citizenship requirement for voter registration
4 and voter identification laws are essential in protecting the integrity and reliability
5 of the electoral process. The State unquestionably has an interest in preventing
6 fraudulent voter registration and vote fraud at the polls to increase public
7 confidence in the election process. As such, Maricopa County respectfully
8 requests that the Court grant its Motion for Summary Judgment and that of the
9 State Defendants.

10 RESPECTFULLY SUBMITTED this 6th day of June 2008.

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23 ORIGINAL of the foregoing E-FILED
24 and copies MAILED this 6th day of
25 June 2008, to:

26 Honorable Roslyn O. Silver
27 UNITED STATES DISTRICT COURT
28 Sandra Day O'Connor U.S. Courthouse
29 401 West Washington Street, Suite 624, SPC 59
30 Phoenix, Arizona 85003

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June 2008, I caused the foregoing document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

/s/ Colleen Connor _____
GN 06-263

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