

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

	:	Case Nos.
SAN MIGUEL HOSPITAL CORP.	:	
D/B/A ALTA VISTA REGIONAL HOSPITAL	:	28-RM-620
	:	28-RM-621
<i>And</i>	:	28-RM-622
	:	28-RM-623
DISTRICT 1199, NATIONAL UNION OF HOSPITAL	:	28-RM-624
AND HEALTHCARE EMPLOYEES	:	28-RM-625

PETITIONER’S REQUEST FOR REVIEW

As the Petitioner in the above-captioned cases, San Miguel Hospital Corporation d/b/a Alta Vista Regional Hospital (hereafter, “Alta Vista” or the “Hospital”) hereby seeks, by and through the Hospital’s Undersigned Counsel, review of the Regional Director’s dismissal of the RM Petitions filed in the above-captioned cases by the Hospital on September 27, 2010.

BACKGROUND

1.) The RC Case and the Board’s Original Certification of Representative

On April 10, 2007, District 1199NM, National Union of Hospital and Healthcare Employees (hereafter, the “Union”) filed with Region 28 of the National Labor Relations Board (hereafter, the “Board”) a Petition for Certification of Representative (hereafter, the “RC Petition”), which was assigned Case No. 28-RC-6518. In the Petition, the Union sought to represent a Bargaining Unit (hereafter, the “Unit”) which consisted of nearly the entirety of Alta Vista’s

workforce. On June 21, 22 and 23, 2007, an Election (hereafter, the “Election”) was held at Alta Vista’s facility. The outcome of the Election was in the Union’s favor, and on August 16, 2007, the Hospital filed Objections to the Election (hereafter, the “Objections”). In furtherance of an Order issued by the Regional Director for Region 28 (hereafter, the “Regional Director”), on September 19, 2007, a hearing on the Objections took place before Hearing Officer Daniel Nelson, who, by a Report issued on November 2, 2007 (hereafter, the “Report on Objections”), overruled the entirety of the Objections.

Accordingly, on November 26, 2007, Alta Vista filed with the Board a variety of Exceptions to the Report on Objections (hereafter, at times, the “Exceptions to the Report on Objections”). On March 4, 2008, the Board, acting through two Members, issued a Decision and Certification of Representative (hereafter, at times, the “2008 Certification”) in which the agency purported to overrule the Exceptions and certify the Union as the exclusive bargaining representative of the Unit.

In the wake of the Certification, Alta Vista refused to bargain with the Union. Consequently, the Union filed an Unfair Labor Practice Charge, which was assigned Case No. 28-CA-21896, alleging the Hospital’s refusal to bargain violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended (hereafter, the “Act”). On May 15, 2008, the General Counsel, *via* the

Regional Director, issued a Complaint which incorporated the Union's allegations, and shortly thereafter, filed a Motion for Summary Judgment with the Board. On June 30, 2008, the Board, once again acting through only two Members, issued a Decision and Order (hereafter, at times, the "Board's Refusal to Bargain Decision") in which the Board purported to conclude that Alta Vista's failure to bargain with the Union violated Sections 8(a)(1) and 8(a)(5) of the Act. See San Miguel Hospital Corp., 352 NLRB No. 100. By a Petition for Review filed with the United States Court of Appeals for the District of Columbia Circuit on July 14, 2008, Alta Vista requested that the Court vacate the Board's Refusal to Bargain Decision as well as the Board's 2008 Certification. See Case No. 08-1245, Consolidated With Case No. 08-1300.

2.) Additional Unfair Labor Practice Proceeding – The Abeyta Case

Meanwhile, on March 31, 2009, the General Counsel, *via* the Regional Director, issued a Complaint which incorporated most of the allegations set forth by an Unfair Labor Practice Charge, together with Amended Unfair Labor Practice Charges, in Case No. 28-CA-22280. Specifically, the Complaint alleged that Alta Vista violated Sections 8(a)(1) and 8(a)(5) of the Act because the Hospital: (1) refused to provide the Union with requested information, (2) denied the request of one of the Hospital's employees, namely Ms. Bernice Abeyta, to be represented by the Union as part of an investigatory interview, (3) threatened employees, insofar

as the Hospital allegedly stated they would be denied representation as part of investigatory interviews, (4) changed the Hospital's policy as to employees who would be required to take and pass a "Fit Test,"¹ (5) discharged Ms. Abeyta on account of the Hospital's change to the Fit Test policy, (6) changed the Hospital's practice by denying employees' requests for a co-worker to attend an investigatory interview, and (7) dealt directly with employees in order to resolve grievances arising from their discipline.

By a Decision and Order dated November 27, 2009, Administrative Law Judge John J. McCarrick concluded that the Hospital did not violate the Act by denying Ms. Abeyta's request for representation at an investigatory interview. As for the other allegations, Judge McCarrick concluded the Hospital violated the Act as alleged by the General Counsel. In response to Judge McCarrick's Decision, Alta Vista filed timely Exceptions with the Board, which, by a Decision and Order issued on June 11, 2010 (hereafter, at times, the "Board's Abeyta Decision"), reversed a number of the Judge's conclusions and dismissed the allegations that the Hospital violated the Act on account of threats to deprive employees of representation at investigatory interviews, changes to the Hospital's practices as to employees' ability to have a co-worker present for an investigatory interview, and

¹ "Fit Testing" refers to measures taken by a health care facility to ensure the efficacy of some type of personal protective equipment (most commonly, a respirator) worn by employees to protect against the transfer (whether patient to employee, or employee to patient) of airborne pathogens, such as Tuberculosis.

meeting directly with employees as to their grievances. See San Miguel Hospital Corp., 355 NLRB No. 43. In the Board's view, therefore, Alta Vista's only unlawful conduct lied in the Hospital's refusal to provide the information requested by the Union, and the change to the Hospital's Fit Test policy, which led to Ms. Abeyta's discharge.

By a Petition for Review filed with the United States Court of Appeals for the District of Columbia Circuit on July 28, 2010, Alta Vista asked the Court to set aside the Board's Abeyta Decision. See Case No. 10-1197. On September 8, 2010, the Board filed a Motion to Dismiss, whereby the Board informed the Court that, by an Order issued on September 2, 2010, the agency had set aside the Board's Abeyta Decision, insofar as the Decision was based upon the agency's 2008 Certification, which, as the product of a two-Member Board, was rendered invalid by the United States Supreme Court's Decision in New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (June 17, 2010). On November 2, 2010, the Court of Appeals granted the Board's Motion to Dismiss.

3.) Court of Appeals Invalidation of Board's Actions and Alta Vista's RM Petitions

Shortly before the Motion to Dismiss was granted, on September 20, 2010, the Court also granted Alta Vista's Petition for Review in Case No. 08-1245, on the grounds that both the Board's Refusal to Bargain Decision and the Board's

2008 Certification were the byproducts of a two-Member Board, which, under New Process Steel, could not lawfully carry out the agency's business. The Court remanded the case to the Board and the attendant mandate was issued on September 24, 2010.

On September 27, 2010, Alta Vista filed with the Regional Director six (6) RM Petitions (hereafter, collectively, the "RM Petitions) in which the Hospital sought an election in a unit comprised of Alta Vista's (1) technical employees (Case No. 28-RM-620), (2) registered nurses (Case No. 28-RM-621), (3) non-professional employees (Case No. 28-RM-622), (4) business office clerical employees (Case No. 28-RM-623), (5) skilled maintenance employees (Case No. 28-RM-624), and (6) professional employees (Case No. 28-RM-625).

4.) The Board's 2010 Certification of Representative

On September 30, 2010, the Board, now acting through three Members, issued a Decision, Certification of Representative, and Notice to Show Cause (hereafter, collectively, the "Board's 2010 Decision"). See San Miguel Hospital Corp., 355 NLRB No. 212.

In the Board's 2010 Decision, as part of Case No. 28-RC-6518, the Board purported to overrule Alta Vista's Exceptions to the Report on Objections and issue a Certification of Representative (hereafter, at times, the "2010 Certification") in which the Union was certified as the exclusive bargaining

representative of the Unit. In addition, as part of Case No. 28-CA-21896, the Board granted the General Counsel leave to amend the Complaint to conform to the current state of the evidence, and issued a Notice to Show Cause as to why the General Counsel's Motion for Summary Judgment should not be granted. The General Counsel did not file any Amended Complaint with the Board, nor did the General Counsel respond to the Board's Notice to Show Cause. However, on November 15, 2010, Alta Vista, for its part, filed a Response to the Board's Notice to Show Cause, whereby the Hospital asked the Board to deny the Motion for Summary Judgment and dismiss the Complaint with prejudice.

5.) The Regional Director's Dismissal of the RM Petitions

As noted above, Alta Vista filed the RM Petitions on September 27, 2010. A few days later, on September 30, 2010, the Regional Director advised the Hospital that the RM Petitions were blocked due to pending unfair labor practice proceedings. In response to Alta Vista's query, by an email to the Hospital's Counsel dated October 1, 2010, the Region advised that the Regional Director's blocking determination was based upon Section 11730.3(b) of the Board's Casehandling Manual, Part Two, Representation Proceedings (hereafter, the "Board's Manual"). By a letter dated that same day, the Regional Director observed that the RM Petitions were not supported by evidence of objective considerations, and advised that, short of the immediate production of such

evidence, the RM Petitions would be dismissed. By a letter dated October 5, 2010, Alta Vista asserted that, because the Union was not an “incumbent union,” the Hospital was under no obligation to offer evidence of objective considerations, and requested the Regional Director to process the RM Petitions without further delay. Ultimately, by a letter dated November 3, 2010, the Regional Director dismissed the RM Petitions because of the pending unfair labor practice proceedings as well as the Hospital’s failure to offer evidence of objective considerations.

ARGUMENT

As shown below, the Regional Director’s dismissal of the RM Petitions was not justified by either the pendency of unfair labor practice proceedings in which the Hospital and the Union were or are now involved, or Alta Vista’s failure to offer evidence of objective considerations in support of the RM Petitions.

1.) The Pendency of Concurrent Unfair Labor Practice Proceedings

In part, the Regional Director’s decision to dismiss the RM Petitions is based upon the premise that a question concerning representation (hereafter, at times, a “QCR”) is precluded by virtue of the pendency of two unfair labor practice proceedings, specifically Case No. 28-CA-21896 and Case No. 28-CA-22280. A copy of the Regional Director’s dismissal is attached hereto, and made a part hereof, as “Exhibit A.” Under Section 102.71(b) of the Board’s Rules and Regulations (hereafter, at times, the “Board’s Rules”), where the Regional

Director's dismissal of a petition (such as, a RM petition) is based upon the pendency of concurrent unresolved charges of unfair labor practices, the Board may grant the petitioner's request for review upon a showing of (1) a substantial question of law or policy raised on account of the absence of, or the departure from, Board precedent, (2) compelling reasons for reconsideration of an important Board rule or policy, or (3) action by the Regional Director which is, on its face, arbitrary or capricious. In the case now before the Board, every basis for review is applicable, because (1) given the circumstances, there is no Board precedent which governs the processing of the RM Petitions, (2) there are compelling reasons for the Board to reconsider the Regional Director's *de facto* policy by which Section 11730.3(b) of the Board's Manual governs the processing of a RM petition filed in the wake of a Court of Appeals' invalidation of a certification of representative issued pursuant to Section 9(c)(1)(B) of the Act, and (3) the Regional Director's actions were, on their face, arbitrary and capricious.

As explained by the Region's October 1, 2010 email, the Regional Director's blocking determination was based upon Section 11730.3(b) of the Board's Manual. A copy of the Region's October 1, 2010 email is attached hereto, and made a part hereof, as "Exhibit B." Under Section 11730.3(b) of the Manual, a QCR claimed by a petition (such as, a RM Petition) may be subject to conditions or precluded altogether on account of the pendency of unfair labor practice charges

that involve recognition issues, such as a charge which alleges an employer's unlawful failure to recognize or bargain with a labor organization. Though not referenced by the Region's email, the Regional Director's letter of dismissal would suggest that the blocking determination was based upon the pendency of two unfair labor practice proceedings, to wit: Case Nos. 28-CA-21896 and 28-CA-22280. See Exhibit A, page 4.

In Case No. 28-CA-21896, on account of the Court of Appeals' decision to grant Alta Vista's Petition for Review, the Board's Refusal to Bargain Decision has been vacated as the invalid byproduct of a two-Member Board. A copy of the Court of Appeals' docket summary in Case No. 08-1245 is attached hereto, and made a part hereof, as "Exhibit C." Based upon the same two-Member defect, the Court of Appeals also effectively vacated the Board's 2008 Certification. To be sure, on account of the Board's 2010 Decision, the agency has revisited the question of Alta Vista's refusal to bargain with the Union. However, as explained in the Hospital's Response to the Board's Notice to Show Cause, even upon the presumption, solely for the sake of argument, that the predicate 2010 Certification is valid, the General Counsel's failure to amend the Complaint or respond to the Board's Notice to Show Cause reveals, or in any event should constitute, the General Counsel's deliberate abandonment of any allegation that the Hospital has unlawfully refused to bargain with the Union. A copy of Alta Vista's Response to

the Board's Notice to Show Cause is attached hereto, and made a part hereof, as "Exhibit D." Accordingly, as a practical matter, Case No. 28-CA-21896 is over, and could not serve as a legitimate basis for the Regional Director's blocking determination.

As for Case No. 28-CA-22280, as noted above, by an Order issued on September 2, 2010, the agency set aside the Board's Abeyta Decision, which was comprised of the findings that the Hospital unilaterally changed the Fit Test policy and refused to provide information requested by the Union.² A copy of the Board's September 2, 2010 Order and the Board's Abeyta Decision are attached hereto, and made a part hereof, as "Exhibit E" and "Exhibit F," respectively. Notably, under Section 11730.3(b) of the Board's Manual, allegations of an employer's unilateral change(s) and / or refusal(s) to provide information requested by a labor organization do not provide a basis for a blocking charge determination, since the violations are not remedied by way of an affirmative bargaining order.

Aside from the fact the Board's Abeyta Decision is a legal nullity, and the allegations of the case do not afford the basis for a blocking charge determination,

² The Regional Director's letter of dismissal includes a plainly inaccurate summary of both Judge McCarrick's and the Board's disposition of the allegations set forth in Case No. 28-CA-22280. Specifically, the Regional Director both overlooked the fact that Judge McCarrick dismissed one of the General Counsel's allegations and failed to account for all of the allegations dismissed by the Board. See Exhibit A, page 4. Accordingly, the Regional Director's blocking determination is based upon an inaccurate understanding of the outstanding unfair labor practice allegations.

the General Counsel's entire theory of the case teeters upon the presumption that the Union is the beneficiary of a valid certification of representative. As noted elsewhere, the Board's 2008 Certification has been invalidated by the Court of Appeals. See Exhibit C. As for the Board's 2010 Certification, as explained by Alta Vista's Response to the Board's Notice to Show Cause, the Certification was issued at the expense of the Hospital's due process rights and ought to be viewed by the agency as a legal nullity. See Exhibit D, pages 4-7. Moreover, should the Board disagree with Alta Vista's procedural challenges, Alta Vista would still have the right, of course, to seek a Court of Appeals' review of the Board's 2010 Certification, together with Alta Vista's Objections to the Election.

In summary, at the very most, the two unfair labor practice proceedings referenced by the dismissal letter afforded the Regional Director an arguable basis to hold the RM Petitions in abeyance, as the Hospital's challenges to the Election are litigated to a last conclusion. To be clear, however, Alta Vista's position is that neither Case No. 28-CA-21896 nor Case No. 28-CA-22280 provided the Regional Director with any legitimate basis on which to block the RM Petitions, since Case No. 28-CA-21896 has been abandoned by the General Counsel and the allegations which remain in Case No. 28-CA-22280 may not, under Section 11730.3(b) of the agency's own Manual, serve as grounds for a blocking determination.

Accordingly, the Regional Director's determination that the pendency of unfair

labor practice proceedings precluded the QCR raised by the RM Petitions is an arbitrary and capricious action, which reveals a *de facto* policy by the Regional Director which ought to be reviewed and rejected by the Board.

2.) **The Hospital's Failure to Offer Evidence of Objective Considerations**

Aside from the assertion that unfair labor practice proceedings now pending before the Board preclude the QCR raised by the RM Petitions, the Regional Director's dismissal of the RM Petitions is based upon the premise that, notwithstanding the absence of a valid certification at the time the RM Petitions were filed, the Union is an "incumbent union," and therefore, under Section 11042.1 of the Board's Manual, the Hospital had the duty to offer evidence of objective considerations in support of the RM Petitions. See Exhibit A, page 4. Under Section 102.71(a) of the Board's Rules, the Board may grant review of the Regional Director's position as to Alta Vista's duty to offer evidence of objective considerations, and the related dismissal of the RM Petitions, upon a showing of, *inter alia*, (1) a substantial question of law or policy raised on account of the absence of, or the departure from, Board precedent, (2) compelling reasons for reconsideration of an important Board rule or policy, or (3) action by the Regional Director which is, on its face, arbitrary or capricious. In the case now before the Board, the aforementioned grounds for review are applicable, because (1) given the circumstances, there is no Board precedent which governs the processing of the

RM Petitions, (2) there are compelling reasons for the Board to reconsider the Regional Director's *de facto* policy by which Section 11042.1 of the Board's Manual governs the processing of a RM petition filed in the wake of a Court of Appeals' invalidation of a certification of representative issued pursuant to Section 9(c)(1)(B) of the Act, and (3) the Regional Director's actions were, on their face, arbitrary and capricious.

In the letter of dismissal, the Regional Director asserted that, the second the Union prevailed in the Election, the Union was an "incumbent union," so that the Hospital was obligated to offer evidence of objective considerations in support of the RM Petitions. See Exhibit A, page 4. The Regional Director's assertion is based upon several cases, every one of which was decided by the Board in a context wholly inapposite to the case now before the Board.³

The Regional Director relies heavily upon the Board's ruling in Ramada Plaza Hotel, 341 NLRB 310 (2004), for many of the contentions made in the letter of dismissal. See Exhibit A, page 4. However, the Board's holding in Ramada Plaza Hotel is distinguishable from the case at bar. In Ramada Plaza Hotel, the union had won an election on July 25, 2002, and on August 7, 2002 was certified as the bargaining representative for a specified unit of employees. The employer

³ In addition, at least one case cited by the Regional Director, Bloomfield Health Care Center, 352 NLRB 252 (2008) (see Exhibit A, page 4), was decided by a two-Member Board, and for that reason, may not serve as a proper basis for the dismissal of the RM Petitions.

was alleged to have committed both pre-election and post-election unfair labor practices. In relevant part, Administrative Law Judge Raymond P. Green found that the employer had violated Section 8(a)(5) of the Act by unilaterally implementing new work practices beginning in late July of 2002 without first bargaining with the union.

In Ramada Plaza Hotel, unlike the case at bar, the union was properly certified at the time that Judge Green ruled in September 2003, as well as when the Board affirmed the case in February of 2004. There could be no doubt as to the validity of the union's position as bargaining representative in Ramada Plaza Hotel at the time the case was reviewed by Judge Green and the Board, as the union had both won the election and was validly certified as the bargaining representative for unit employees. In essence, this makes the Board's language regarding the sufficiency of an election to create an obligation on the part of the employer dicta, as it was not a holding necessary to the case in Ramada Plaza Hotel. Though the Board asserted that a union's winning of an election alone is sufficient to create the employer's duty to bargain, the Board was never truly required to reach this question in Ramada Plaza Hotel, because at the time of review, the union had both won the election and been validly certified as the bargaining representative. Both Judge Green and the Board had additional assurances of the validity of the union's position as bargaining representative - no open question as to validity remained.

In the case now before the Board, by contrast, the Union won the Election in June of 2007, but a lawful certification of the Union did not properly issue until September 30, 2010. Therefore, at the time the RM Petitions were filed on September 27, 2010, there still remained an open question of whether a valid certification would indeed be issued by the Board. A certification had already once been improperly issued (to wit, the 2008 Certification), and there existed at the time the RM Petitions were filed no clear indication as to whether certification would be forthcoming. This key procedural variation not only distinguishes this case from Ramada Plaza Hotel, but also illustrates that the Hospital could in no way anticipate that the Union should be treated as an “incumbent union” under Section 11042 of the Board’s Manual. Moreover, the Regional Director’s inability to cite to any legal authority which addresses the procedural posture and context of the present case demonstrates the absence of Board precedent, and therefore, a standalone basis for the Board to grant Alta Vista’s Request for Review.

As part of the dismissal of the RM Petitions, the Regional Director asserted that “[a]ny certification that arises from the Board from the election result only serves to provide the Union with a protective cover for a year without fear of having their representational status being subject to challenge.” See Exhibit A, page 4. Though a certification issued by the Board does serve the protective purpose described by the dismissal letter, the Regional Director’s position that

such protection is the **only** purpose of a certification departs from the Board's precedent, not to mention the Act's statutory commands.

Under Section 9(c)(1)(B) of the Act, the Board “. . . shall **certify the results [of an election]**.” See 29 U.S.C. § 159(c)(1)(B) (emphasis added). Thus, the agency's issuance of a valid certification is a statutory necessity, which serves as the basis for any Court of Appeals' enforcement of the Board's conclusion that an employer has unlawfully refused to bargain with a labor organization. To accept the Regional Director's position, and evaluate the question of whether a QCR has been raised by the RM Petitions based solely on the fact the Union won the Election, Alta Vista's Petition for Review would be rendered meaningless, as would any “testing of certification” proceeding brought by any employer in the same set of circumstances.

The fact the Union was not the beneficiary of a valid certification issued by the Board at the time the RM Petitions were filed precludes any assertion that the Union was an “incumbent union” at the time the RM Petitions were filed. Accordingly, the Regional Director's insistence that Alta Vista come forward with evidence of objective considerations is clearly misplaced. Had the Regional Director proceeded free of arbitrary predilection, the Regional Director would have merely taken administrative notice of the QCR found in the RC Petition, not to mention the Regional Director's own Decision and Direction of Election issued in

Case No. 28-RC-6518, both of which amply demonstrate the fact that Alta Vista has been confronted by the Union's claim for recognition. See Charlotte Ampitheater Corp., 314 NLRB 129 (1994). A copy of the RC Petition and the Regional Director's Decision and Direction of Election are attached hereto, and made a part hereof, as "Exhibit G" and "Exhibit H," respectively.

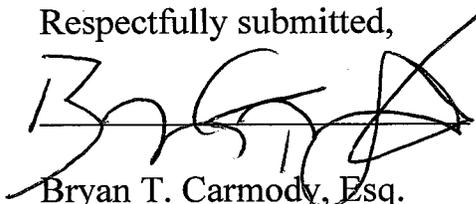
The RM Petitions were filed at a time when there was no "certification bar," no "recognition bar," and no "contract bar" to the processing of the RM Petitions, and the "certification year" and "election year" bars to the conduct of another election do not pertain. Therefore, the Regional Director should have concluded that there was a sufficient showing that a QCR was raised by the filing of the RM Petitions and should have scheduled the elections sought by the Petitions.

CONCLUSION

For all the reasons set forth above, Alta Vista respectfully requests that the Board grant the Hospital's Request for Review, and remand the above-captioned cases to the Regional Director in order for the elections sought by the RM Petitions to be scheduled and take place without further delay. Alternatively, Alta Vista respectfully requests that the Board grant the Hospital's Request for Review, set aside the Regional Director's dismissal of the RM Petitions, and hold the RM Petitions in abeyance while the unfair labor practice proceedings in Case Nos. 28-CA-21896 and 28-CA-22280 continue to be litigated.

Dated: November 22, 2010
Glastonbury, Connecticut

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bryan T. Carmody', written over a horizontal line.

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**CERTIFICATE OF SERVICE OF PETITIONER’S REQUEST FOR
REVIEW**

The Undersigned, Bryan T. Carmody, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the original of the Petitioner’s Request for Review (hereafter, the “Request for Review”) is being filed this date by San Miguel Hospital Corporation in the above-captioned matter *via* e-filing at www.nlr.gov, being the website maintained by the National Labor Relations Board.

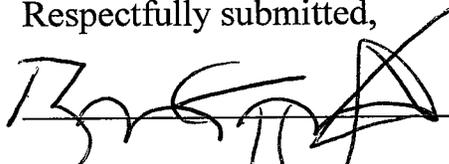
The Undersigned further does hereby certify that a copy of the Request for Review is being provided this date to the following *via* e-mail:

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Dated: November 22, 2010
Glastonbury, Connecticut

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan T. Carmody", written over a horizontal line.

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