IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JOSEPH THOMAS; VERNON AYERS; and MELVIN LAWSON,

Plaintiffs,

v.

PHIL BRYANT, Governor of the State of Mississippi; DELBERT HOSEMANN, Secretary of State of the State of Mississippi; and JIM HOOD, Attorney General of the State of Mississippi, in their official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners,

Defendants.

Case No. 3:18-cv-441-CWR-FKB

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE MOTION FOR STAY PENDING APPEAL FILED BY THE GOVERNOR AND THE SECRETARY OF STATE

I. INTRODUCTION

Defendants Governor Bryant and Secretary Hosemann cannot satisfy any of the four factors required to obtain a stay, *Campaign for Southern Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014), let alone the balance of factors.[1] On the first factor, which requires Defendants to make a strong showing on likelihood of success of appeal, none of their four core arguments are persuasive. Their legal claims (that a three-judge court is required and that Section 2 claims cannot be brought against single-member districts with a bare majority of minority voters) fly in

[1] Defendant Attorney General Hood has not joined this Motion.

the face of the existing case law and this Court has properly rejected those claims in its rulings. Their factual contention (that African-American turnout is higher than white turnout) has also been rejected by this Court for good reasons and that factual finding is not clearly erroneous. Their laches claim has been rejected by the Court primarily because there is no undue prejudice and that finding is neither clearly erroneous nor an abuse of discretion.

Defendants similarly fail on the other three factors: irreparable harm to the applicant absent a stay, whether issuance of the stay will substantially injure the other parties interested in the proceeding, and the public interest. Given that the violation can easily be remedied by redrawing portions of only two districts and that the March 1 qualifying deadline can go forward in the remaining 50 districts with only a short extension necessary in those two districts; there is no irreparable harm or undue prejudice stemming from the Court's holding on liability and the imposition of a remedy. The vindication of the Voting Rights Act and the public interest require that a remedy be implemented for the 2019 election. The Motion for Stay Pending Appeal should be denied.[2]

II. ARGUMENT

A. The Defendants Have Not Established a Likelihood of Success on the Merits of Their Appeal

The Defendants claim a likelihood of success based on two legal arguments plus a factual contention and a laches claim. The first legal argument, contained in Section I-A of their memorandum, is that a three-judge court is required. [Doc. 64 at 8-12]. The second legal argument, Sections I-B-1 and I-B-3, is that there should be a *per se* rule against all Section 2 claims in majority-minority single-member districts, no matter how small the majority and no

[2] The Defendants' Statement of Facts in their Motion to Stay contains a number of misstatements. To the extent they are relevant, they will be addressed in the discussion of the merits in this response.

matter the facts, and that the allowance of any such claims would violate the Constitution. [Doc. 64 at 13-17 and 22-24]. The factual contention, contained in Section I-B-2, is that African-American turnout is not depressed when compared to white turnout but actually exceeds white turnout. [Doc. 64 at 17-22]. The laches argument is contained in Section I-C. [Doc. 64 at 24-28]. This response will largely follow the structure of the Defendants' memorandum.

1. The Court Properly Found that a Three-Judge Court Cannot Be Convened

Defendants' lead argument as to why there is a strong likelihood they will succeed on appeal is an extraordinarily weak one – that the Court erred as a matter of law in denying their motion to appoint a three-judge court. The Court previously rejected Defendants' argument based on a detailed analysis of the language of the operative statute and the fact that every case which has involved a Voting Rights Act challenge, but not a constitutional challenge to a statewide apportionment plan has been before a single judge. [Doc. 51 at 1-5]. Defendants' effort to resuscitate this issue using a combination of modified and rehashed arguments falls as flat as it did the first time.

First, Defendants again argue that the language of 28 U.S.C. § 2284(a) is grammatically ambiguous and could be read so that any challenge to the apportionment of a statewide legislative body would be heard by three-judges whereas only constitutional challenges to a congressional reapportionment would be heard by a three-judge panel. [Doc. 64 at 8-9]. As this Court previously found, this would rewrite the statute. [Doc. 51 at 4]. Defendants' reading is inconsistent with the plain reading of the statute, where the term "the constitutionality of" serves as a series-modifier of everything that follows, as discussed by Scalia and Garner. [Doc. 51 at 3]. Defendants argue that, because the examples provided in Scalia and Garner's text regarding the series qualifier canon of construction all "involve a modifier, not a noun," this "canon simply

does not apply to §2284(a)." [Doc. 64 at 9]. Boiled down, Defendants' argument relies solely on the fact that the examples Scalia and Garner happened to include their text do not include any examples of nouns as modifiers. Defendants ignore the basic fact that a noun – or a phrase (*e.g.*, "the constitutionality of") - can also act as a modifier. Merriam-Webster Dictionary 746 (10th ed.1993) (a modifier is a "word or phrase that makes specific the meaning of another word or phrase").

Second, Defendants turn to a cherry-picked version of the legislative history of § 2284(a) to argue that "every statutory method of challenging any apportionment" must be heard by a three-judge panel. [Doc. 64 at 10]. However, a more thorough review shows that the Senate Judiciary Committee provided for three-judge courts in only certain reapportionment cases (*i.e.*, cases with constitutional claims) because they wanted to avoid overwhelming the courts. *Chestnut v. Merrill*, No. 18-00907, 2019 WL 338909, at *3 (N.D. Ala. Jan. 28, 2019) ("[I]n 1976, when Congress amended § 2284, Congress made the amendments to limit the number of cases requiring a three-judge panel.") (italicization omitted). As this Court noted, the Supreme Court has held that "congressional enactments providing for the convening of three-judge courts must be strictly construed." *Allen v. State Bd. of Elections*, 393 U.S. 544, 561-62 (1969) (citing *Phillips v. United States*, 312 U.S. 246 (1941)). Similarly, in *Morales v. Turman*, 430 U.S. 322, 324 (1977), the Court noted that "the three-judge court procedure is not a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." (internal quotations omitted).

Third, Defendants rehash their argument that past precedent—particularly *Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001)—supports their argument that a three-judge court is necessary. [Doc. 64 at 11-12]. As this Court noted, *Page v. Bartels* actually undermines

Defendants' argument, as the court in *Page* concluded that 28 U.S.C. § 2284(a) "only requires a three-judge court for certain constitutionally-based apportionment challenges." 248 F.3d at 189. Moreover, both the Court, [Doc. 51 at 5], and Plaintiffs, [Doc. 50 at 4-5], identified numerous cases where challenges solely under the Voting Rights Act have been heard by a single judge, while Defendants have not and cannot point to even one similar case that has been heard by three judges.

Finally, Defendants argue that, because Plaintiffs' complaint includes "evidence of unconstitutional behavior in Mississippi's past," that means the Court should interpret Plaintiffs' complaint as pleading a constitutional claim. [Doc. 64 at 11-12]. However, their argument is grounded on a misguided interpretation of the Senate Factors. The Supreme Court made clear that, "in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the totality of the circumstances and . . . determine, based upon a practical evaluation of the past and present realities, whether the political process is equally open to minority voters." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (internal quotations omitted). The factors courts typically consider in evaluating the "totality of the circumstances" in a Section 2 case are known as the Senate Factors and plaintiffs do not need to prove all of them or a particular number of them to prevail. *Id.* at 45 (noting that the list of Senate Factors is "neither comprehensive nor exclusive," and "there is no requirement that any particular number of factors be proved"). The first Senate Factor is the history of discrimination touching the right to vote in the jurisdiction. *Id.* at 36-37. The fact that Plaintiffs introduced evidence of the history of voting discrimination in Mississippi, including some constitutional violations, does not turn this case or any other Section 2 results case into a constitutional challenge. As this Court previously found, plaintiffs

are the masters of their claims and in this case, Plaintiffs consciously chose to bring a Section 2 results claim, and not a constitutional claim. [Doc. 51 at 3].

2. Under Controlling Authority There is No Per Se Rule Barring Section 2 Cases Where the Minority Population Is a Majority of the Political Subdivision

Defendants' next argument—that no matter the facts, Section 2 claims are not cognizable as a matter of law when the African-American voting age population in the challenged jurisdiction is more than 50 percent, [Doc. 64 at 13-17]—is another one this Court appropriately rejected in its opinion finding liability. [Doc. 61 at 30-31]. Controlling authority from both the Supreme Court and the Fifth Circuit makes clear that such claims are not barred as a matter of law and the main case Defendants rely upon, *Bartlett v. Strickland*, 556 U.S. 1 (2009), involves a completely different issue that has no relevance to this case.

In *LULAC v. Perry*, a Section 2 case decided by the Supreme Court, the majority noted "it may be possible for a citizen voting-age majority to lack real electoral opportunity." 548 U.S. 399, 428 (2006). Defendants fail to address this language from *LULAC*. Defendants acknowledge that there is Fifth Circuit and Eighth Circuit authority which stands for the proposition that a minority group that comprises a majority of the eligible voter population can bring a viable Section 2 case. But Defendants claim that these decisions are distinguishable because they involve challenges to at-large methods of election. In addition to the Fifth Circuit's statement in *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989)—"[u]nimpeachable authority from our circuit has rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution"—which this Court already cited, there are cases from four other circuits (including the Eighth Circuit) that have reached the same conclusion:

- District of Columbia Circuit: *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003) ("Vote dilution claims must be assessed in light of the demographic and political context, and it is conceivable that minority voters might have less opportunity to elect representatives of their choice even where they remain an absolute majority in a contested voting district.") (cleaned up);

- Second Circuit: *Pope v. Cty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) ("[T]he law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that they do not present the 'real electoral opportunity' protected by Section 2") (quoting *LULAC v. Perry*, 548 U.S. at 428);

- Eighth Circuit: *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018) (noting "minority voters do not lose VRA protection simply because they represent a bare numerical majority within the district" and ultimately finding a § 2 violation);

- Eleventh Circuit: *Meek v. Metro. Dade Cnty.*, 908 F.2d 1540, 1546 (11th Cir. 1990) (rejecting lower court's finding that Hispanics could not bring a Section 2 challenge because they comprised a numerical voting majority and could potentially elect their candidates by increasing the percentage of registration).

Moreover, Defendants do not explain, nor could they plausibly do so, as to why district claims should be treated differently than at-large claims concerning this issue. [Doc. 64 at 16 n.8]. Indeed, the *LULAC v. Perry*, *Kingman*, and *Pope* cases involved challenges to district election systems.

The primary case Defendants cite, *Bartlett*, involves a fundamentally different issue. In *Bartlett*, the Supreme Court upheld a lower court's decision finding that plaintiffs failed to satisfy the first *Gingles* precondition. 556 U.S. at 14. The plaintiffs attempted to meet the first *Gingles* precondition with respect to a challenge to one of North Carolina's state house districts by creating an illustrative district where African-American voters made up less than 50 percent but could, along with white crossover voters, elect representatives of their choice. *Id.* at 6. The Supreme Court rejected this argument. The Court concluded that the minority population must compose a "numerical, working majority" to have recourse under Section 2 and satisfy the first

Gingles requirement of size and geographic compactness. *Id.* at 12-13. The Supreme Court's holding in *Bartlett* precluding a Section 2 violation when the minority population is too small does not suggest, let alone mandate, a *per se* rule barring a claim on the ground that the minority population is too large. Such a *per se* rule would nullify the Court's statement four years earlier in *LULAC v. Perry*. Given that Justice Kennedy wrote both the opinion in *LULAC* and the plurality opinion in *Bartlett* upon which Defendants rely, their reading of *Bartlett* does not make sense. [3]

3. This Court Correctly Held that White Turnout Is Higher than African-American Turnout in District 22 and that Finding Is Not Clearly Erroneous

In its opinion, this Court described Dr. Palmer's conclusion regarding turnout based upon his ecological inference analysis of the last four senate elections in District 22: "[T]here is a sizable turnout gap between African-American and white voters in District 22. On average, white turnout is 10.2 percentage points higher than black turnout." [Doc. 61 at 7].[4] In their motion for stay, the Defendants claim that the Court should have disregarded Dr. Palmer's analysis and instead should have relied on self-reporting statewide census surveys showing that African-American voter registration and turnout exceeds that of whites in even-numbered years when presidential and congressional elections are held. [Doc. 64 at 18]. But after hearing the testimony of the experts, this Court rejected that contention, pointing out that the census surveys

[3] In a footnote, Defendants mention another case, *Jeffers v. Beebe*, in which the court declined to find a Section 2 violation because the challenged state senate district was already a majority-minority district. 895 F. Supp. 2d 920, 931-32 (E.D. Ark. 2012). Defendants acknowledge that *Jeffers* is not controlling authority. [Doc. 64 at 17 n.10]. But they fail to acknowledge that *Jeffers* is contrary to the weight of authority, including controlling authority. *Jeffers* is distinguishable factually regarding the demographic conditions in that the plaintiffs' proposed district (58 percent BVAP) was below the population threshold plaintiffs' expert stated was required to create an effective district for minority voters (61 percent BVAP). *Jeffers*, 895 F. Supp. 2d at 932-33.

[4] The Court noted that this conclusion was statistically significant in three of the four elections. [Doc. 61 at 7]. Those were the elections in 2003, 2007, and 2015. The turnout analysis was weakly significant in 2011. P. Trial Ex. 1 at 7.

"look at the wrong jurisdiction [statewide rather than District 22], the wrong election years, and rely upon known issues with self-reported voting surveys—issues that EI [ecological inference], in contrast, seeks to overcome." [Doc. 61 at 28]. This is a perfectly sensible and supportable finding by the Court based on actual turnout at the polls and there is no showing that it was clear error.

The Defendants' only real claim of error regarding the Court's finding is that "mistakes in Bolivar County [in the 2015 election] fatally undermine the statistical estimates in that sole election." [Doc. 64 at 20]. The Defendants are referring to the fact that some voters in Bolivar County received the wrong senate ballots. Voters received the proper ballot in all of the precincts in District 22 except for the Northwest Cleveland and West Cleveland Precincts in Bolivar County. Because all of the voters in Northwest Cleveland, and some of the voters in West Cleveland, received ballots for other senate districts, it was logical for Dr. Palmer to exclude them in his analysis. Voters in two other precincts that are not in District 22 actually received District 22 ballots. Naturally those were not counted since those voters are not in District 22. P. Trial Ex. 3 at 4. The exclusion of those two precincts does not "fatally undermine" Dr. Palmer's analysis of turnout differentials throughout the district.[5]

Defendants did not present any expert testimony on this subject and no witness claimed that this somehow invalidated Dr. Palmer's turnout analysis. This contention rests solely on one of the attorneys for Defendants asserting that "this Court can take judicial notice that Cleveland is the location of Delta State University, a predominantly white institution" and "[h]ad those non-voting white students been taken into consideration in plaintiffs' turnout estimates, the level

[5] Defendants mention Dr. Palmer's statement that he was unable to estimate voter turnout as a share of registered voters by race. [Doc. 64 at 21]. That is because Mississippi does not keep records on the race of registered voters. Thus, Dr. Palmer measured turnout as a percentage of African-American and white voting age populations.

of estimated white participation throughout District 22 would necessarily have fallen." [Doc. 64 at 20-21]. But this attorney is neither a witness nor an expert, he has not conducted a statistical analysis, he has no specific estimates of how far the level of estimated white participation would have fallen, and he was not subject to cross-examination. Dr. Palmer based his conclusion on his analysis of the other approximately 50 precincts in the district where voters received the proper ballots and valid votes were counted. Trial Tr. Vol. 1 53, Feb. 6, 2019. That analysis demonstrates the turnout differentials that Dr. Palmer documented. Moreover, the analysis of the elections from the prior District 22 corroborates these turnout differentials. And even if the lawyer's argument were considered to be evidence and the lawyer actually had done an analysis, the fact that a pocket of white college students in one precinct might not vote because they are likely registered in their home counties—and therefore ineligible to vote in District 22—does not demonstrate that African-American turnout somehow equals white turnout among the people who are eligible to vote in District 22.[6]

In returning to the census figures for turnout based on self-reporting, the Defendants claim that some of them "would have been available to the Legislature" in 2012 and "[t]he Legislature would have been fully justified in believing that blacks would comprise a majority of the turnout" in District 22. [Doc. 64 at 19]. However, the Vice Chair of the 2012 Joint Redistricting Committee testified and did not mention any reliance on this data. Even if he had, this is not an intent case and the point would not be relevant.

[6] Defendants claim that "it is impossible to determine from this record who should have actually won the only election ever held in [the current] District 22." [Doc. 64 at 20]. But as Dr. Palmer testified, it is reasonable to conclude that the white voters in those two majority white District 22 precincts would have voted predominantly for the white candidate if they had received the proper ballots—just as white voters did throughout District 22. Trial Tr. Vol. 1 85-86, Feb. 6, 2019. The Defendants also claim there was a "four-precinct error." [Doc. 64 at 21]. But only two of the precincts that received the wrong ballots were actually in District 22.

In summary, the evidence clearly demonstrates socioeconomic disparities and lower African-American participation. As this Court noted, Plaintiffs are "not required to prove a causal connection" between the two because "political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." [Doc. 61 at 28, *quoting Teague v. Attala County*, 92 F. 3d 283, 294 (5th Cir. 1996) and *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986)].[7]

4. Defendants' Constitutional Avoidance Arguments Are Unavailing

Defendants assert that construing Section 2 to allow for a claim challenging an existing majority-minority district is unconstitutional. [Doc. 64 at 22-24]. Neither the Supreme Court in *LULAC v. Perry* nor the Fifth Circuit or any other circuit with similar holdings on this issue have indicated that the Constitution requires a *per se* rule precluding plaintiffs from bringing a case challenging an electoral area with a majority-minority voter population. This is because plaintiffs still have to satisfy the *Gingles* preconditions and the totality of circumstances test, which impose significant and appropriate limits on when vote dilution violations will be found.

[7] Citing to *NAACP v. Fordice*, 252 F.3d 361 (5th Cir. 2001), Defendants claim that Plaintiffs in a Section 2 case must demonstrate depressed political participation in order to prevail. [Doc. 64 at 18]. This contention is legally incorrect. Even if African-American turnout was equivalent to or exceeded white turnout, that would not necessarily defeat a plaintiff's Section 2 case. In *NAACP v. Fordice*, the Fifth Circuit upheld a district court finding adverse to the plaintiffs regarding the impact of the Senate Report factors of history of discrimination and socioeconomic disparities on present-day participation. The Fifth Circuit simply said that "to support a favorable finding *on these factors*, [the plaintiff] bore the burden to demonstrate that the African-American citizens of Mississippi 'do not in fact participate to the same extent as other citizens.'" 252 F.3d at 368 (emphasis added) (citation omitted). But the absence of proof on certain Senate Report factors does not necessarily override proof of the *Gingles* factors. *Gingles*, 478 U.S. at 45.

5. Relief is not Barred by the Statute of Limitations or Laches.

For the reasons previously expressed by this Court, this claim is neither barred by limitations nor laches. Most importantly, there is no undue prejudice here. While the Defendants claim this case was filed on "the eve of the next election cycle," [Doc. 64 at 26], this Court correctly noted that Plaintiffs filed this case "16 months before the 2019 general election, 13 months before the primaries, and eight months before the qualification deadline." [Doc. 61 at 23]. As the Court stated, "[t]he evidence in our case weighs against a finding of undue prejudice." [Doc. 61 at 23]. The violation can be easily remedied by moving all of Issaquena County from District 23 to District 22, all of the Madison County precincts in District 22 to 23, eight Warren County precincts from 23 to 22 and eight Yazoo County precincts from 22 to 23. That is not a significant administrative burden. While it does mean some voters will vote in a district different from the district that existed in 2015, over two-thirds of the voters in those two districts will remain where they are. P. Trial Ex. 4 at 5, ¶ 9. The changes are a small price to pay for enforcing the Voting Rights Act.

Moreover, the new plan can be adopted and the candidate qualifying deadline can be extended for a short period well within the time period required to prepare the ballots and download them into the state's election system. And ballots can be made available and the primary elections can be held in a timely manner. [*See* Doc. 19 at 8-9 (Declaration of Madalan Lennep of the Secretary of State's Office stating that counties need to make any changes stemming from a redistricting plan in time for the new information to be downloaded to the SEMS system 55 days in advance of the election); Doc. 63-1 at 2 (Affidavit of Kimberly Turner of the Secretary of State's Office stating that the official ballot must be published in the SEMS

system no later than June 17, 2019 in order to send absentee ballots to military and overseas voters)].

Thus, there is no undue prejudice that requires that the Section 2 claim in this case be dismissed and that the Court's finding of a violation be nullified.

B. The Balance of Harms Weighs Against a Stay

As indicated by the analysis of polarized voting in this case, African-American voters in District 22 have been unable to elect candidates of choice since at least 2003. This is against the backdrop of a history where no African-American candidate was elected to the Mississippi Senate until 1979 (as set forth in the Banks Report) and African-Americans remain underrepresented in the Senate even today. This Court has found a violation of the Section 2 of the Voting Rights Act and there is significant harm in delaying a remedy for the racial vote dilution that exists.

By contrast, as demonstrated in the previous discussion of laches, there is no undue prejudice or harm in moving forward with a remedial plan that encompasses only two senate districts. The qualifying deadline in those two districts need only be delayed for a short period of time.

The Defendants claim that "[t]he Court's order will require that the Legislature spend a substantial amount of time drawing new districts for District 22 and the surrounding affected districts." [Doc. 64 at 30]. Only two districts need to be redrawn and that can be done quickly. But, it appears the Legislature has chosen not to take advantage of the opportunity to correct this violation of the Voting Rights Act and a court-ordered remedy can be adopted fairly quickly.

The Defendants contend that if a stay is not granted and this Court's decision is ultimately reversed on appeal, a special election will likely be required. *Id.* But the opposite

would be true if a stay is granted and this Court's decision is affirmed. As discussed previously, this Court's ruling on the merits suggests that affirmance is more likely and therefore the stay should be denied.

As stated by the three-judge court in *Johnson v. Miller*, 929 F. Supp. 1529 (S.D. Ga. 1996):

> We find irreparable harm in its purest sense will be occasioned by denying this preliminary injunction and by permitting use of a plan violating Plaintiffs' equal protection rights. Plaintiffs, indeed all citizens of Georgia, should not be denied their right to a constitutional districting plan. . . . No department of the government or citizen has a legitimate interest in continuing in effect a violation of another citizen's constitutional rights. Thus, the harm Plaintiffs would suffer if we permitted the continued constitutional violation clearly outweighs any harm the injunction may cause other parties.

Id. at 1560. The same is true with respect to the violation of the Voting Rights Act that exists with respect to District 22.

C. The Public Interest Is Served by Prompt Enforcement of the Voting Rights Act

The Defendants' primary argument is that a new qualifying period will significantly shorten the time candidates have to campaign and "because District 22 borders on eight other Senate districts," potential candidates "all over a multi-county stretch of northwest Mississippi cannot make plans." [Doc. 64 at 31]. But this is not a problem given that the remedy likely will affect only two districts and there will be only a short extension of the qualifying deadline.

According to the Defendants, "[t]he public is best served by allowing it to elect its own representatives on its own terms . . . ." [Doc. 64 at 32]. But the public includes African-American voters and this Court has already held that their vote is diluted by the configuration of District 22. Moreover, the public has an interest in the enforcement of the Voting Rights Act and in conducting elections from districts that are fair.

III. CONCLUSION

For the foregoing reasons, the motion for stay pending appeal should be denied.

February 22, 2019 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, I electronically filed a copy of the foregoing Plaintiffs' Supplemental Memorandum in Opposition to the Defendant's Motion for Summary Judgment using the ECF system which sent notification of such filing to all counsel of record.

s/Robert B. McDuff