Nos. 17-3075, 17-3076, 17-3115, 17-3116

In the United States Court of Appeals for the Third Circuit

TRANSCONTINENTAL GAS PIPELINE CO., LLC,

Plaintiff-Appellee,

vs.

PERMANENT EASEMENTS FOR 2.14 ACRES, *et al.*,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF APPELLANTS' MOTION FOR REHEARING AND REHEARING EN BANC

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit L.A.R. 26.1.1, undersigned counsel certifies that to his knowledge, the only interested parties omitted from the certificates of interested persons which have already been submitted are:

1. Owners' Counsel of America (amicus curiae); Owners' Counsel of America has no parent corporation and issues no stock.

2. Robert H. Thomas (counsel for amicus curiae).

3. Damon Key Leong Kupchak Hastert (law firm of counsel for amicus curiae). The law firm has no parent corporation, and all stock is held by the lawyer/Directors of the firm.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

Honolulu, Hawaii, November 13, 2018.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF APPELLANTS' MOTION FOR REHEARING AND REHEARING EN BANC

Owners' Counsel of America (OCA) respectfully moves, pursuant to Fed. R. App. P. 29(b)(3) and 29(a)(3), and Third Cir. L.A.R. 27 and 29, for leave to file the attached brief amicus curiae.

1. Courts routinely permit non-parties to file amicus curiae briefs in support of the parties in appeals before this court and other courts. Motions for leave to file amicus curiae briefs are granted in recognition that they may helpful to the Court in understanding the importance of the issues involved, determining the rules of law applicable to the case, and to point out to the court material issues the parties' briefs do not address in detail.

2. OCA is an invitation-only national network of the most experienced eminent domain and property rights attorneys. Only one member lawyer is admitted from each state. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See*

James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. OCA members and their firms have been counsel for a party or amicus in many of the property cases the eminent domain and takings cases the courts nationwide have considered in the past forty years,[1] and OCA members have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights.[2]

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1. *See*, *e.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24 (1984). *See also Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), and *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

2. *See*, *e.g.*, Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory*

3. OCA's lawyer members represent property owners in eminent domain and takings cases in state and federal courts nationwide. Accordingly, they have a keen interest in the issue presented by the petition for rehearing: whether a private condemnor exercising the delegated eminent domain power under the Natural Gas Act may obtain pre-judgment possession of the property to be condemned by way of a preliminary injunction, when Congress has not delegated the ability to obtain pre-judgment possession. This is an issue of pressing national importance, on which the panel decision conflicts not only with established Supreme

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Takings, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on *Prelitigation Process* and *Flooding and Erosion*).

Court doctrine, but the ruling of at least one other federal court of appeals. The attached proposed amicus brief of OCA sets forth our arguments on this issue.

4. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus certifies that no party's counsel authored the attached proposed brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amicus, its counsel, and its members contributed money intended to fund the brief's preparation or submission.

5. This motion and proposed brief are timely because they are being filed within the time set forth in Fed. R. App. P. 29(b)(5). The proposed brief complies with Fed. R. App. P. 29(b)(4), because it contains 2,588 words.

6. All parties to this appeal have been notified of our intention to file the proposed brief. Counsel for the Appellee was asked to consent to the filing, but has declined to consent. Counsel for the Appellants consented.

7. Given amicus's substantial interest in this case and their belief that the attached proposed brief will aid the court in its analysis and

disposition of the motion for rehearing, amicus curiae respectfully moves for leave to file the attached proposed brief as amicus curiae.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

Honolulu, Hawaii, November 13, 2018.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(g), I certify that this motion complies with the length limitations set forth in Fed. R. App. P. 27(d)(2)(A) because it contains 1,051 words, as counted by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 27(a)(2)(B).

/s/ Robert H. Thomas
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on November 13, 2018, I served the foregoing motion upon all counsel of record through the CM/ECF system.

/s/ Robert H. Thomas
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
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DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
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Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
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Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS

Owners' Counsel of America (OCA) is an invitation-only national association of the most experienced eminent domain and property rights attorneys.[1] They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a 501(c)(6) organization sustained solely by its members. OCA members and their firms have been counsel for a party or amicus in many of the property, eminent domain, and takings cases the courts nationwide have considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights. OCA's

1. All parties been notified of our intention to file. Counsel for the Appellee was asked to consent to the filing, but has declined to consent. Counsel for the Appellants consented. In accordance with Fed. R. App. P. 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus curiae and its counsel and members, contributed money that was intended to fund preparing or submitting this brief.

members represent property owners in eminent domain and takings cases in state and federal courts nationwide, including takings cases under the Natural Gas Act.

OCA thus has a keen interest in the issue the petition for rehearing presents, which is of pressing national importance, on which the panel decision conflicts not only with established Supreme Court eminent domain doctrine, but with the decision of at least one other federal court of appeals.

ARGUMENT

The panel's focus on the district court's summary judgment order as the dispositive action misconstrued the nature and effect of that ruling. The panel erroneously concluded that obtaining summary judgment on the three predicates which a private pipeline company must satisfy in order to institute an eminent domain action in federal court under 15 U.S.C. § 717f(h), gave Transco a "substantive" right to the properties.[2]

2. The NGA has a three-part requirement for a private pipeline to institute an eminent domain action in federal court: (1) it first obtain a certificate of public convenience from FERC; (2) it cannot acquire the property by voluntary purchase; and (3) the amount claimed by the owner is more than $3,000. 15 U.S.C. § 717f(h). In these circumstances, a private condemnor "may acquire the [right-of-way] by the exercise of the right of

Panel op. at 19 (the dispositive fact was that Transco had "established its substantive right to the property by filing for [and obtaining] summary judgment"). Thus, the panel concluded, because Transco's condemnation was all but inevitable, it was entitled to possession before payment of compensation and title transfer.

The panel's rationale not only violates the well-worn rule of statutory interpretation of eminent domain statutes (they must be liberally read in favor of the property owner, and strictly construed against the condemnor), but also reflects a fundamental misunderstanding of the eminent domain power, and process. Federal statutory takings become inevitable only when title transfers. And only then can the condemnor get possession. Here, by contrast, the panel acknowledged that title would not transfer until the end of the case, but nonetheless allowed possession. Panel op. at 20 ("Here, unlike a 'quick take' action, Transcontinental does not yet have title but will receive it once final compensation is determined and paid.").

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eminent domain in the district court of the United States for the district in which such property may be located[.]" *Id.*

I. Because Congress Delegated Only The Straight Taking Power, Summary Judgment Only Determined Transco May Exercise The Straight Taking Power

The panel correctly concluded that in the Natural Gas Act, Congress delegated to private pipeline companies only the ordinary power of eminent domain—also known as a "straight taking." Panel op. at 23 (NGA "does not on its own create an entitlement to immediate possession"). Thus, because Congress delegated to Transco only the straight takings power, the district court's summary judgment order could determine—at most—only that Transco may exercise the straight taking power.

II. A Straight Taking Condemnor Has No Right To Possession Until After Title Transfers

In all federal takings, the right to possess the property transfers only when title transfers. The Supreme Court in *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984), described the "straight taking" power and process, noting its key feature: that title transfers only *after* the determination of compensation and tender of payment:

> Rule 71A requires the filing in federal district court of a "complaint in condemnation," identifying the property and the interest therein that the United States wishes to take, followed by a trial before a jury, judge, or specially appointed commission—of the question of how much compensation is due the owner of the land. The practical

> effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price. If the Government wishes to exercise that option, it tenders payment to the private owner, *whereupon title and right to possession vest in the United States.* If the Government decides not to exercise its option, it can move for dismissal of the condemnation action.

Id. at 2 (emphasis added) (citing *Danforth v. United States*, 308 U.S. 271, 284 (1939)). Thus, in straight takings, title transfers only after the condemnor exercises its option to buy at the adjudicated price.

This is similar to the two other forms of statutory takings, where possession only transfers upon title transfer. In a quick take, "any time before judgment," the condemnor can file a declaration of taking and make a deposit of the estimate of just compensation which the property owner can withdraw, after which title to the land transfers, along with the right to possess the property. *See* 40 U.S.C. § 3114(b)(1) – (3) ("On filing the declaration of taking and depositing in the court, "title . . . vests in the Government; the land is condemned and taken . . . ; and the right to just compensation for the land vests in the persons entitled to the compensation."). *See also* 40 U.S.C. § 3118 (noting "the right to take possession *and title* in advance of final judgment" in quick take eminent domain

actions) (emphasis added). And in a pure statutory taking where Congress "exercises the power of eminent domain directly," a statute itself vests "all right, title, and interest" in the federal government as of the date of the adoption of the statute. *Kirby Forest*, 467 U.S. at 5, n.5. These, along with straight takings, are the only ways in which a condemnor can exercise federal eminent domain power. *Id.*

Thus, like in all straight takings cases, title in this case will transfer only after Transco exercises its option, which can happen only after the district court determines the final compensation owed. That determination has not yet occurred. Consequently, summary judgment merely established Transco's *standing* as a straight taking plaintiff which can exercise eminent domain, and that the takings are for public purposes. Nothing more. A ruling affirming the power to institute and maintain an eminent domain action is not the same as a ruling on the ultimate issue in the case, a ruling that Transco has actually acquired critical *title* to the property. That—not the "right to take" as the panel concluded—is the "substantive" right a condemnor may be awarded in an eminent domain

case.[3]

III. Summary Judgment Did Not Vest In The Property Owners An Irrevocable Right To Compensation

Equally important is the fact that summary judgment did not vest in the property owners an irrevocable right to compensation. There's no question that as a straight taking condemnor, Transco retains the ability to walk away once the district court determines the final compensation. True quick takings—unlike straight takings, and unlike the injunction process employed by the district court here—are irrevocable, because title transfers before possession, and the owner's right to the quick take deposit becomes vested. *See* 40 U.S.C. § 3115 (noting that a quick take under § 3114 results in the government's "irrevocable commitment" to pay whatever compensation is eventually determined). Lacking that critical component, the district court's summary judgment and injunction

3. Moreover, the Supreme Court has repeatedly emphasized the "right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994). Thus, not only did the summary judgment order not transfer a "substantive" right from the owners to Transco (it could only confirm Transco's standing and that the takings are for public purposes), the injunction actually deprived the owners of one of their essential substantive rights, the right to exclusive possession of their land.

process—which may look somewhat like a quick take but lacks the key feature of a constitutional quick take—falls woefully short: a quick take condemnor obtains title and in return foregoes the right to decline to pay whatever compensation the court may eventually determine. Transco, by contrast, to this day does not have title, and has retained the straight take option of walking away if the compensation eventually determined is too dear. *Cf. Kirby Forest*, 467 U.S. at 2.

But has Transco not already promised to pay? After all, it posted a bond. *See* Panel op. at 19-20 ("Transcontinental also posted a bond at three times the appraised value of the rights of way, as required by the orders of condemnation."). Does not the bond represent Transco's binding obligation to pay whatever the district court later determines is just compensation? No, two reasons why it matters not that Transco may not likely walk away, or it promises not to do.

First, the bond is merely security, not an irrevocable, vested, and enforceable obligation to pay the whatever final compensation the district court may determine in the future. *See* Order at 3 (Aug. 23, 2017) (Doc. 41) ("Transco shall post a bond . . . as security for the payment of just

compensation to the Defendants."). Footnote 60 of the panel opinion reveals why the bond is not a sufficient substitute. It details two critical ways the bond does not operate like a quick take deposit:

1. The footnote acknowledges that "it does not seem to be common practice to distribute compensation upon posting of the bonds," in stark contrast to quick take deposits, where the estimate of just compensation "should be promptly distributed." *See* U.S. Dep't of Justice, *Envt'l Resource Manual* § 13 (Procedure for Distribution of Funds Deposited in Court), *available at* https://www.justice.gov/jm/enrd-resource-manual-13-procedure-distribution-funds-deposited-court (the U.S. Attorney in a federal quick taking should "[a]dvise the defendants or their counsel by letter of the fact that funds have been deposited in court, and offer all possible assistance in obtaining the disbursement of such funds.").

2. The owners must demonstrate "hardship" in order to have access to the bond. Panel op. at 19-20 n.60. Contrast quick take, where the right of the property owner to withdraw the deposit is not conditional, and no showing of hardship is needed.

Second, the bond is not irrevocable because Transco retains the "option" to decline to obtain title. *Kirby Forest*, 467 U.S. at 2 ("The practical

effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price."). Title transfer is the key feature which saves both quick takes and pure statutory takes from unconstitutionality. In those situations, even though compensation is not provided contemporaneously with physical occupation, title transfers. That act triggers the self-executing Fifth Amendment obligation to pay. Because the owner's self-executing right to compensation becomes vested as a consequence, all that is needed is a "reasonable, certain, and adequate provision for obtaining compensation." *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). Here, by contrast, no transfer of title has taken place. Nor can it take place until Transco exercises its option after determination of the just compensation, an event that not happened yet (and indeed, may never occur). *See* 40 U.S.C. § 3114(b)(1) (upon declaration of taking and deposit, title vests in government).

In short, the bond is hardly a substitute for a quick take deposit. It is not Transco's binding obligation to pay whatever just compensation the district court eventually determines. *Cf.* 40 U.S.C. § 3115 (government's "irrevocable commitment" to pay whatever compensation is eventually

determined).

IV. The Rules Of Civil Procedure Cannot Enlarge Transco's Right, Which Is Limited To Title And Possession Only After Payment Of Final Compensation

The panel also wrongly concluded that although Congress did not delegate the quick take power in NGA takings, neither did it take away district courts' equitable powers. Thus, the rationale goes, Congress must have expressly *prohibited* preliminary injunctions in NGA cases. But neither the district court's equitable powers nor the rules of civil procedure can convey to Transco more rights (or powers) than Congress has delegated. *See* 28 U.S.C. § 2072(b) (the rules of civil procedure "shall not abridge, enlarge or modify any substantive right.").

Transco's substantive right in this case has been limited by Congress in the Natural Gas Act to title only after final determination of compensation, the exercise of the option to purchase, and tender of that compensation. *Kirby Forest*, 467 U.S. at 2. Only then will possession follow. As the Seventh Circuit noted in *Northern Border Pipeline Co. v. 86.72 Acres*, 144 F.3d 469 (7th Cir. 1998), a party with only the ordinary power of eminent domain has no ability to possess the property until after just compensation is determined and the condemnor exercises its option

to buy the property at that price. That has not occurred here, nor can it occur until the district court makes a final determination of the compensation Transco must pay, and Transco decides whether to go forward at that price. *Id.* at 471 (because the gas company's right to take possession of the owner's property will not "arise [until] the conclusion of the normal eminent domain process, [the gas company] is not eligible for the [injunctive] relief it seeks"). In short, possession can occur only after determination of the compensation owed *and* payment, or the irrevocable and enforceable obligation to pay whatever compensation is finally determined, neither of which has occurred here.

CONCLUSION

Possession can be transferred only upon title transfer and the resulting irrevocable obligation to pay what the court determines is just compensation. That has not occurred. But under the panel's rationale, Transco possesses both its cake (pre-compensation possession), and the ability to eat it (the option to walk away in the future). In the meantime, the injunction has ousted the owners from possession, and taken their right to exclude others, without any compensation whatsoever. While

Congress may delegate to a private condemnor the power to take possession prior to final payment, a court cannot do so in the absence of that authorization.

Transco's solution if it desires to obtain pre-compensation possession in these cases is painfully simple: it should do it the right way and ask Congress, and not take the shortcut of asking the courts.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
Counsel for Amicus Curiae

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Pursuant to Fed. R. App. P. 29(b)(4), amicus curiae states that this brief complies with the type and volume limitations because it contains 2,588 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and this document has been prepared in a proportionally-spaced typeface in font Century Schoolbook, point sized 14.

Respectfully submitted,

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, and that participants in the case who are registered CM/ECF users will be served by the system.

Respectfully submitted,

/s/ Robert H. Thomas

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