

<p>DISTRICT COURT, COUNTY OF CITY AND COUNTY OF BROOMFIELD, STATE OF COLORADO</p> <p>Court Address: 17 DesCombes Drive Broomfield, Colorado 80020</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p>THOMAS E. CAVE; BROOMFIELD BALANCED ENERGY COALITION,</p> <p>Contestors</p> <p>v.</p> <p>THE CITY AND COUNTY OF BROOMFIELD, COLORADO; MICHAEL SUSEK, in his Official Capacity as Election Manager for the City and County of Broomfield, Colorado; JIM CANDELARIE, in his Official Capacity as City and County Clerk for the City and County of Broomfield, Colorado</p> <p>Defendant</p>	<p><b>Case Number:</b></p> <p><b>13CV30313</b></p> <p><b>Division B</b></p>
<p style="text-align: center;"><b>ORDER</b></p>	

This matter coming on for hearing upon the Contestors' Verified § 1-11-213 Written Statement of Intention to Contest; the hearing having commenced February 24, 2014 and having concluded February 25, 2014. The Court having heard the testimony, having reviewed the exhibits, having heard the arguments of counsel, having reviewed the Court's file and deeming itself fully apprised in the premises, DOTH FIND AND CONCLUDE:

This case arises out of an election held on November 5, 2013 regarding a ballot proposal known as Local Question 300. As a preliminary matter, there is no dispute that

the Plaintiff, Thomas E. Cave, is a registered elector in the City and County of Broomfield and has standing to bring this action. § 1-11-202, C.R.S.

This action is brought pursuant to Section 1-11-201, C.R.S., *et seq.* Although the verified statement raised numerous issues, the trial in this case ultimately was distilled to allegations that illegal votes were received or legal votes were rejected at the polls in sufficient numbers to change the result of the election. § 1-11-201(3)(a), C.R.S.

The evidence established that there was a statewide ballot issue, local school board election, a local mayoral race, city council races, and the ballot issue whose passage is being challenged on the ballot. *See*, Defendants' Exhibit 4. The school board election involved seats that included two counties, Adams County and the City and County of Broomfield.

It is undisputed that this election was a coordinated election. A coordinated election is defined in Section 1-1-104(6.5), C.R.S. as follows:

“Coordinated election” means an election where more than one political subdivision with overlapping boundaries or the same electors holds an election on the same day and the eligible electors are all registered electors, and the county clerk and recorder is the coordinated election official for the political subdivisions.

*See also*, § 1-7-116, C.R.S. regarding the conduct of coordinated elections, mandating mail ballots, and designating the county clerk and recorder as the coordinated election official.

Once the governing bodies of each of the affected political subdivisions designates the election as a coordinated election, the affected political entities may enter into intergovernmental agreements authorize the appropriate, designated election

authority to conduct the election. The statutory scheme contained in Section 1-1-111, C.R.S. provides, in its relevant parts:

(1) In addition to any other duties prescribed by law, the governing board of a political subdivision entitled to call elections shall have the following duties:

(a) To supervise the conduct of regular and special elections which it is authorized or required to call; and

(b) Where appropriate, to consult and coordinate with the county clerk and recorder of the county in which the political subdivision is located and with the secretary of state in regard to conducting elections and rendering decisions and interpretations under this code.

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(3) Elections which are set for the same date by various political subdivisions may be held as coordinated elections if the governing bodies so choose. Political subdivisions authorized to cooperate and contract with each other to perform any function relating to an election.

Although the intergovernmental agreements were not presented into evidence, Mr. Susek and Mr. Candalerie made reference to relying upon the agreements in making their determinations in the conduct of the election during their testimony. By statute all affected governmental agencies were required to cooperate in setting out clear procedures for the conduct of the coordinated election.

A major difficulty presented to governmental entities choosing to hold a coordinated election arose out of the legislative enactment of House Bill 13-1303. This legislation constituted a major revision of Colorado election law and became immediately effective upon its signature by the governor on May 10, 2013. The parties have stipulated that, as a result of this enactment, three different residency requirements existed with respect to the casting of ballots in each of the races or ballot issues.

For the statewide race, a voter had to be a resident of the state for twenty-two days to vote on the state ballot issue. § 1-2-101(1), C.R.S. The school board election required that the voter be a resident of the school district for twenty-five days. § 22-31-101(1), C.R.S. Finally, all municipal elections and Local Question 300 required a voter be a resident of the City and County of Broomfield for at least thirty days to be eligible to cast a ballot. § 31-10-201(1)(b), C.R.S.

The law regarding municipal elections also contains special provisions pertaining to computing the thirty day requirement. Section 31-10-201(1)(b), C.R.S. provides, in relevant part:

An otherwise qualified and registered elector who moves from the municipal election precinct where registered to another precinct within the same municipality within thirty days prior to any regular or special election shall be permitted to cast a ballot for such election at the polling place in the precinct where registered.

This provision gives a qualified and registered elector, who had resided for thirty days continuously within the City and County of Broomfield, albeit at more than one address, the right to vote in a City and County wide race.

The election was held under the provisions of the “Mail Ballot Election Act,” Section 1-7.5-101, C.R.S., *et seq.* The statutory scheme involving mail ballot elections establishes a series of requirements involving the preparation of ballots and materials as well as specific preelection processes.

Section 1-7.5-105, C.R.S. sets out the various election authorities duties with regard to the conduct of the election. A plan for the coordinated election must be provided to the Colorado Secretary of State no later than ninety days prior to the election. The plan may be based on a standard plan adopted by the secretary of state by rule. § 1-

7.5-105(1), C.R.S. The secretary of state must then approve or disapprove of the plan with fifteen days after receiving the plan and provide written notice to the affected political subdivision. § 1-7.5-105(2)(a), C.R.S. There is nothing in the record indicating that the plan was not approved by the secretary of state. Clearly, a standard plan was not available to the municipality since no rules had been timely promulgated by the secretary of state in sufficient time to plan the election and distribute ballots. The testimony of Ms. Suzanne Staiert, the Deputy Secretary of State, establishes that rules were not promulgated regarding the affected elections until after the ballots were required to be mailed.

The importance of the various residency requirements became problematic because the election officials were required to apply differing lengths of qualification to the various ballots. Section 1-1-104(1.5), C.R.S. provides that:

“Authorizing legislation” means the provisions of the state constitution or statutes or of a local charter authorizing the existence and powers of a political subdivision and providing for the call and conduct of the political subdivision’s election.

Section 1-2-104, C.R.S. pertaining to the qualifications and registration of electors, provides that:

**Additional qualifications.** The authorizing legislation, as defined in section 1-1-104(1.5), may provide additional or alternative qualifications for a person to become an eligible elector of a political subdivision.

Read together, these two provisions of law required that the election official overseeing the coordinated election apply the differing residency requirements in determining what votes could be cast in each separate election category. *See also*, Rule 2.2.3 of the Election Rules of the Colorado Secretary of State, adopted and effective November 14,

2013. A single ballot involving all three levels of races was developed, approved and mailed to those voters that were determined to be residents of the City and County of Broomfield.

After mailing the ballots and an initial review of the returned ballots, it became clear that there were difficulties being experienced across the state regarding multi-level, coordinated elections. The credible testimony of Mr. Candalarie disclosed that, as a consequence of the secretary of state's failure to timely fulfill the requirements of Section 1-1-107(2)(a), C.R.S. in the promulgation of rules governing the November, 2013 elections, county clerks throughout the state were conferring regarding the handling of coordinated elections with differing residency requirements for various elective offices or ballot issues.

Mr. Candalarie testified that there was no uniform practice regarding the determination of residency for multi-level, coordinated elections. He testified that many clerk and recorders were experiencing difficulties with varying residency requirements. No rules giving guidance to the clerks having been promulgated, various approaches were being with respect to voter eligibility to vote in specific elections.

His testimony, which the Court accepts, was that some of the clerks and recorders were counting all ballots in all elections based upon the information in the state's central voter database without further confirmation. After determining that a number of voters' duration of residence could not be confirmed and conferring with other clerks throughout the state who were facing similar issues, the clerk and recorder of Jefferson County and the clerk and recorder for the City and County of Broomfield decided to use a voter self-affirmation form that permitted a voter to declare their length of residency within the

jurisdiction. *See*, Plaintiffs' Exhibit 49. should be counted and agreed the affirmation would be accepted at face value. Based upon the voter's self-affirmation statement, the clerk and recorder could determine which elections the voter was qualified to vote. The ballot would then be counted accordingly. Who the self-affirmation form was served upon and how it was used will be discussed later in this Order.

The self-affirmation form was flawed, however, because the form did not adequately address those voters that had resided at an address for less than thirty days but had moved from one address to another within the City and County of Broomfield resulting in actual residence for thirty days or more within the jurisdiction. The evidence discloses that this led to at least some voters votes on Local Question 300 not being counted in violation of Section 31-10-201(1)(b), C.R.S. *See*, Defendants' Exhibit 1.

Against this backdrop of complex, recently enacted election laws, multiple jurisdictional voting qualifications, and lack of regulatory rule promulgation or guidance, the coordinated election went forward on November 5, 2014.

Complicating matters more, the initial ballot count indicated that the Local Question 300 ballot initiative had failed by 13 votes. Upon completion of a mandatory recount, the election canvassing board concluded the ballot issue passed by 20 votes.

The evidence established that 21,033 ballots were cast in the election. *See*, Plaintiffs' Exhibit 62. At issue in this litigation, in addition to the procedures followed are several categories of ballots that were either counted or rejected: (1) ballots for voters who received ballots and voted pursuant to the Uniform Military and Overseas Voters Act, § 1-8.3-101, *et seq.*; (2) voters who received ballots, returned the ballots but whose residency was not determined by the Defendants at the time of the counting of

ballots; (3) voters who received ballots, had those ballots delivered to the wrong county clerk and recorder's office where they were date stamped before November 5, 2014 but received by the City and County of Broomfield after the election had closed; and (4) ballots collected by the Adams County clerk and recorders' office at the request of the City and County of Broomfield.

Before analyzing the law and evidence as they pertain to the issues the Court must resolve to determine this case, it must be noted that the parties have stipulated that ten voters had votes that were either counted in the Local Question 300 election that should not have been counted or were not counted when they should have been counted. The parties have further agreed that in order to invalidate the election, the Court must find that at least 20 ballots were counted that should not have been counted or that were not counted that should have been counted or any combination of the two totaling twenty. Russell v. Wheeler, 439 P.2d 43 (Colo.1968).

As a preliminary matter, the Court finds that the standard the Court must apply in determining whether an election was properly conducted turns upon whether there was substantial compliance by the election officials with the Colorado Election Code. §1-103(3), C.R.S.; Erickson v. Blair, 670 P.2d 749 (Colo.1983).

Although dealing with another constitutional election provision, the Colorado Supreme Court in Bruce v. City of Colorado Springs, 129 P.3d 988 (Colo.2006), set forth several considerations for a court in applying the substantial compliance standard. The Court in Bruce, *supra*, stated:

Elections will be set aside only where clear grounds for such action exist. *See id.*; *see also* F.T. Havens v. Bd. of County Comm'rs, 924 P.2d 517, 524 (Colo.1996). In Bickel, we set forth a number of factors to consider



when determining whether a measure substantially complies with Amendment 1:

(1) the extent of the district's noncompliance with respect to the challenged ballot issue, that is, a court should distinguish between isolated examples of district oversight and what is more properly viewed as systemic disregard of Amendment 1 requirements, (2) the purpose of the provision violated and whether that purpose is substantially achieved despite the district's noncompliance, and (3) whether it can reasonably be inferred that the district made a good faith effort to comply or whether the district's noncompliance is more properly viewed as the product of an intent to mislead the electorate.

129 P.3d at 992

*See also*, Loonan v. Woodley, 882 P.2d 1380 (Colo.1994)( holding Bickel v. City of Boulder, 885 P.2d 215 (Colo.1994) (substantial compliance test is used in determining substantial compliance when interpreting ballot initiative law); Kelly v. Novey, 318 P.2d 214 (Colo.1957)(absent fraud, elections are not to be set aside even if certain provisions of the law regarding elections have not been followed).

In construing the provisions of the election code, Colorado law recognizes the tension between liberally guaranteeing the right of franchise to every eligible voter while simultaneously preventing fraud. The code expressly directs that the code is to be liberally construed “ . . . so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections.” § 1-1-103(1), C.R.S. Election officials are, therefore, charged with concomitant responsibilities in the conduct of elections. They must use reasonable, good faith efforts to insure that every eligible ballot is cast and counted while simultaneously preventing ineligible electors from voting in an election.

The Court finds that many of the issues raised in the Verified Written Statement have been abandoned during the course of the hearing, narrowing the matters in dispute

to the votes cast as noted above, the Court will refer to some of the claims made by various participants in this Order because assessing those claims assists in the Court's evaluation regarding the reasonableness and good faith of the election officials.

First, the evidence disclosed that a centralized master list of voters maintained by the secretary of state known as SCORE was used to confirm the identity and residency of voters. That system was apparently developed pursuant to Section 1-2-301, C.R.S., *et seq.* That statutory scheme requires the secretary of state to maintain a master list of electors that contains the registration information regarding prospective voters. § 1-2-301(1), C.R.S. Section 1-2-301(2)(a), C.R.S. required the county clerk and recorder to provide voter registration information contained in the system and permits the county clerk and recorder to use the system in lieu of information on a local computer. Section 1-2-301(4)(a)(II), C.R.S. provides, in its relevant part, that:

(4) (a) (II) The centralized statewide registration system shall enable county clerk and recorders to maintain voter registration information and shall include such additional capabilities as may be necessary or desirable to enable county clerk and recorders and the secretary of state to carry out their responsibilities related to the conduct of elections. Such additional capabilities may include but need not be limited to the preparation of ballots, the identification of voting districts for each address, access by county clerk and recorders to the master list of registered electors and, on or after January 1, 2006, the computerized statewide voter registration list maintained pursuant to this section and section 1-2-302, the management of mail-in and mail ballots, the preparation of official abstracts of votes cast, the transmission of voting data from county clerk and recorders to the secretary of state, and reporting of voting results on election night. County clerk and recorders shall have access to the digitized signatures of electors in the centralized statewide registration system for the purpose of comparing an elector's signature in the system with the signature on the return envelope of a mail-in ballot or mail ballot, including by using a signature verification device in accordance with sections 1-7.5-107.3 (5) and 1-8-114.5 (5).

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(b) As soon as practicable, the department of state shall make the master list of registered electors available at no charge on the internet to the county clerk and recorders. This paragraph (b) shall not be construed to require the department to provide or pay for internet connection services for any county.

Section 1-2-302, C.R.S. requires the secretary of state to maintain the master list of voters and includes the information to be maintained. As relevant here, this information includes the name, current address and date of registration for any registered voter. § 1-2-302(1.5)(2), C.R.S. The secretary of state is obligated to conduct a national search of all voters on the master list and to provide the local clerk and recorders with a report of the search results. § 1-2-302.5(1), C.R.S. If that search discloses that a voter has moved, the clerk and recorder has the responsibility of confirming the information with the voter and then updating the information in the statewide system if confirmed. § 1-2-302.5(2)(a), C.R.S.

The testimony of Mr. Susek, Mr. Candalerie and Ms. Staiert disclosed that the City and County of Broomfield elected to use the SCORE database as permitted by statute. The evidence disclosed that the local election officials relied upon the statewide database and the online voting information in attempting to ascertain the residency and length of residency at a specific address for purposes of counting ballots. Ms. Staiert testified that the database known as SCORE and the online registration system were inadequate to determine all residency dates or length of residence.

Irrespective of these difficulties, the testimony of Mr. Susek and the stipulation of the parties disclosed that of the thirty-five thousand ballots that were mailed, ultimately only three hundred and eighty registered voters' length of residency could not be determined by the local election officials. *See*, Joint Stipulation, General Narrative.

In order to fulfill their obligation under Section 1-1-103(1), C.R.S. to insure that voters who were entitled to vote in an election were fully enfranchised and that voters that whose votes were not entitled to be counted for a specific ballot issue or race were not casting their ballot illegally through no fault of the voter, the self-affirmation form was sent to this pool of three hundred eighty voters.

Of these three hundred eighty voters, two hundred eleven actually voted in the election. Most voters returned their self-affirmation form without problem. Thirty four voters did not return the form as of election night. The latter category of voters was mailed another self-affirmation form the day after the election asking that they return the form within eight days, the statutory time for finalizing the election vote count. Twenty-four of those voters returned their self-affirmation form. Where investigation prior to counting could determine length of residency from the self-affirmation form or other information, the ballots were counted accordingly. If the length of residency could not be established from the resources available, the ballots were counted for the statewide race only.

The Court finds as a matter of fact, based upon the testimony of the witnesses and the exhibits presented, that the election was remarkably transparent. The vote counting was characterized by Ms. Penny Norman as chaotic. Ms. Norman has participated in overseeing balloting in various capacities since 2002 and it was clear from her manner and demeanor that this election was unusual in the level of citizen scrutiny.

The evidence disclosed that at the time of the counting of the ballots, both initially and in the recount, there were poll watchers present as well as election judges, media, attorneys for interested parties, and other election officials. *See*, Defendants' Exhibit 16.

It is clear from the testimony that the information required to be give poll watchers pursuant to Section 1-7-108(3), C.R.S. was made available to them. Mr. Harvey Branscomb, one of the designated poll watchers testified at trial. He had several criticisms regarding the information made available to him, however, he provided this Court with no testimony or evidence that indicated that he was not provided the information required by the statute. To the extent that he requested additional information, in light of the multiple parties involved in the recount, there is no showing that the information exceeding the statutorily mandated matters was practicably available.

There was also testimony provided the Court regarding the so-called late and problem box. This was a sealed transfer box where spoiled ballots or other problematic ballots were contained. The only real issue related to ballots in this box was the failure to count ballots that were in sealed envelopes but delivered to the Eagle County and Boulder County clerk and recorders offices. These ballots were date stamped by the other counties prior to the election of November 5, 2014 but received by the City and County of Broomfield after that date.

There was also testimony provided by Ms. Norman, Mr. Susek and Mr. Candelarie regarding an unsealed box that was maintained in Mr. Susek's office that contained ballots and that was not located or disclosed until after the election. There has been much discussion regarding the security of this box, the fact that it was unsealed and the fact that what were referred to as the nursing home ballots envelope being placed in the box, at the end of the day, there was no evidence of any valid ballot being placed in the box.

In fact, the reasonable inferences to be drawn from Plaintiffs' Exhibit 35, Plaintiffs' Exhibit 36, and Plaintiffs' Exhibit 37 lend credence to Mr. Susek's testimony. He testified that some of the handwriting on these ballots was placed there by him. The word "Spoiled" that appears on the ballots was not his. The handwriting for this word is different on each of the ballots and inconsistent with the handwriting of "1 of 2" that appears on each ballot. The handwriting "1 of 2" that appears on each ballot appears to be by the same person using the same writing instrument. His testimony was that ballots that had been mismarked or otherwise spoiled were declared by the voter to be spoiled and that the voter wrote the word on the ballot. This is consistent with the documents themselves. This corroborates the testimony that no valid ballots were placed in the unsealed box. The practice was sloppy and not the best practice, as Mr. Susek testified, however, no legal violation occurred nor can the Court find any irregularity rising to the level of fraud in the handling of the box and its contents.

Finally there is the issue of the Secretary of State's report. The Court finds and concludes that the secretary of state had the unequivocal statutory authority to conduct an investigation and prepare the report. § 1-1-107(1)(a)(b)(2)(b), C.R.S.

The Court finds that the report, however, is of little value to the Court and not a credible or reliable resource in the resolution of this case as a matter of fact. First, the report's factual assertions are inconsistent with the actual facts of the case presented by trial testimony. The Court finds that the evidence disclosed that the report was never vetted by permitting the local election officials to comment upon its content. The Court finds that the much of the information contained in the report was acquired in the midst of an intensive, contentious counting of ballots where conflicting interests were

demanding the attention of the local election officials. The report may have been more credible after review by local election officials so that errors or incorrect information provided during the midst of the vote counting where the local officials were not distracted by dealing with multiple demands upon their attention.

The Court notes that the haste and lack of attention to detail with respect to how the report was prepared is reflected on the cover page of the document where the date of the report is reflected as November 27, 2012. *See*, Plaintiffs' Exhibit 33. The Court notes the report was issued prior to the final recount and canvass of votes where many issues were resolved. Moreover, the Court notes some findings were quite contrary to law as the Court will later address in this Order. The Court elects to give the report little, if any, weight.

Having generally addressed many of the factual issues before it as part of the predicated determination regarding good faith, the Court finds that under the totality of the circumstances, considering the specific issues before it, the Defendants' acted in good faith in the discharge of their duties. The analysis must now turn to whether there were specific legal violations that may lead to an invalidation of the election.

The Court will first consider the Uniform Military and Overseas Voter's Act found at Section 1-8.3-101, C.R.S. *et seq.* First, the Court cannot find by a preponderance of the evidence that the Contestors' have established any voter voted contrary to the Act's requirements. The secretary of state is the state administrator of the Act. That office determines whether a voter qualifies to participate under the Act. Local authorities have no discretion to disqualify a voter that has complied with the Act and ballots that qualify to be issued under the act must be accepted. Ms. Staiert testified that,

once a voter has executed the declaration required by Section 1-8.3-114, C.R.S., the Act applies, and the ballots must be counted. This is completely consistent with the acts requirements. The Contestors' reliance upon internet provider addresses contained in Plaintiffs' Exhibit 46 in their argument provides no guidance to the Court because there was no credible testimony as to how this evidence in fact established an Act violation. The Court finds that this category of ballots were legally cast and counted.

The Court also finds that the Contestees acted reasonably with regard to the second category of ballots. The Court finds that the steps taken by the City and County of Broomfield election officials to insure that all ballots that could be legally counted were counted were reasonable. This is particularly true in light of the lack of pre-election guidance by way of rule or regulation as well as the difficulty caused by a late and complex legislative enactment. The steps taken were a reasonable, if imperfect attempt to insure full extension of the franchise and prevention of voter fraud. The Court concludes as a matter of law that the counting of ballots contained in Defendants' Exhibit 2 substantially complied with the election laws and was not illegal. Even if the Court were to conclude that the four voters whose votes were not counted but who had subsequent to the time of the election been determined by registration or self-affirmation to be entitled to vote in the Local Question 300 ballot election, their inclusion with the ten other voters could not change the results of the election.

With regard to the ballots cast delivered to other counties, date stamped before the election but received after the election, the Court finds no error in the manner of their handling. The votes were not received by the City and County of Broomfield until after the election.



The voters did not deliver the ballots to a designated voting location or the United States Postal Service. The voters acted in a manner inconsistent with the requirements of law and, as a result, the appropriate election authority did not receive their ballots until after voting had closed. Section 1-7.5-107(4)(b), C.R.S. permits a voter to either return a ballot by mail or to any election official designated by the county clerk and recorder. If a ballot is not delivered to such person before the close of elections, the ballot is to be retained, remain unsealed and uncounted. § 1-7.5-107(4)(b)(II), C.R.S. There is no question, as a matter of fact and law, that this category of ballots was handled properly and legally.

The ballots that were mailed to the City and County of Broomfield but couriered by the Adams County Clerk and Recorder's office by mutual agreement due to staffing shortages as testified by Mr. Susek are very different than the foregoing category of ballots. These ballots were delivered to the United States Postal Service, were at a central collection point where the local election officials were collecting the ballots before the close of the election for counting but exercised discretion to let another agency collect the ballots for the local election agency because of manpower constraints. In this instance, the voter had fully complied with the requirements related to delivery of their ballot. But for the exercise of discretion and administrative convenience, there is no question these ballots would be entitled to be counted. The voter did not deliver the ballots to the Adams County Clerk and Recorder, rather, the election officials simply authorized the other agency to perform a ministerial act. The Adams County Clerk and Recorder's office was not designated as a voting place and not used as a repository for

ballots. This is a significant and important distinction. The Court finds these ballots were correctly counted.


As a result of the foregoing the Court finds and concludes that the Contestees substantially complied with the election laws of the State of Colorado and that the election should not be set aside.

BASED UPON THE FOREGOING FINDINGS AND CONCLUSIONS, THE COURT DOTH ORDER:

The Court DENIES the requested relief in the Written Verified Statement of Election Contest and DISMISSES this action.

DONE AND SIGNED IN OPEN COURT this 27<sup>th</sup> day of February, 2014.

BY THE COURT:



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Chris Melonakis  
District Court Judge

#### CERTIFICATE OF SERVICE

I certify that a true and correct copy of this order was served on all parties electronically by ICCES on this 27<sup>th</sup> day of February, 2014.



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District Court Judge