
No. 11-1898

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TOM BRADY, ET AL.,

Plaintiffs-Appellees,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MINNESOTA
0:11-CV-00639-SRN-JJG

**BRIEF OF ELECTED OFFICIALS AND SMALL
BUSINESS OWNERS AS AMICI CURIAE
SUPPORTING PLAINTIFFS-APPELLEES**

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INTEREST OF AMICI CURIAE¹

This brief addresses the impact that the preliminary injunction blocking the NFL's lockout will have on the public interest. More particularly, this brief explains the devastating effects that the lockout will have on the states and localities that depend on the substantial economic effects generated by the NFL season—and that often have used hundreds of millions of dollars in tax revenues and subsidies to build and operate NFL stadiums. This brief also addresses the severe impact that shutting down the NFL season would have on the hundreds of local businesses that directly rely on NFL games to drive their revenues.

Amici curiae are state and local elected officials and small-business owners and operators. Amici include 32 elected officials who represent states and localities that host NFL teams or that otherwise depend on NFL-driven revenues. Amici are also the proprietors of local businesses for which the cancellation of even a single NFL game is no abstract concern—amici, like countless other individuals across America, depend on game day for their financial survival.

¹ No counsel for a party authored this brief, in whole or in part, and no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief. No person other than amici curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

The parties have consented to the filing of this brief. Their written letters of consent have been submitted to the Clerk.

Amici are, in practical terms, the “public” that will suffer the cascade of harmful effects of a lockout.

Long-settled law requires this Court to consider those effects in evaluating the propriety of the district court’s injunction, and amici are particularly well-positioned to explain them. As explained in detail below, amici are united in the view that the NFL’s lockout threatens to cause serious harm to working people, business owners, and state and local governments. The following are signatories to this brief:

Sherry Appleton is a Representative in the Washington House of Representatives.

Marty Block is a Member of the California State Assembly.

Kevin Boyle is a Representative in the Pennsylvania House of Representatives.

Chris Carter is a Representative in the Missouri House of Representatives.

Steve Conway is a Senator in the Washington State Senate.

Billy Davis is the Mayor of Crowley, Texas.

Thomas De Wane is the President of the City Council of Green Bay, Wisconsin.

Mike Foley is a Representative in the Ohio House of Representatives.

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Mark Grisanti is a Senator in the New York State Senate.

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Blake Montpetit is the owner of the Tiffany Sports Lounge in St. Paul, Minnesota.

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Mike Plancarte is the proprietor of the Governor's Park Tavern in Denver, Colorado.

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SUMMARY OF ARGUMENT

The district court correctly concluded that the public interest weighs overwhelmingly in favor of enjoining the NFL's lockout. Likewise, this Court's opinion granting the NFL's motion for a stay pending appeal correctly recognized that "the public interest surely favors" a result "that will permit professional football to be played in 2011." Stay Order 13. But we respectfully submit that this Court erred in preliminarily concluding that the public-interest prong of the preliminary injunction test did not point decidedly in favor of upholding the district court's injunction.

The public-interest prong does not reduce to an abstract interest in "the proper application of the federal law regarding injunctions." Stay Order 13. That approach would render the public-interest prong entirely duplicative of the court's

evaluation of the plaintiff's likelihood of success on the merits—one could always say that the public has an interest in getting the law right. Rather, the public-interest prong must encompass the concrete and specific interests of those who are not parties to the proceeding. That is particularly true where, as here, the dispute turns on whether the law permits one side of a business dispute to idle a multi-billion-dollar economic engine that touches every corner of this nation in order to gain (by that party's own admission) negotiating leverage. This injunction is about far more than the paychecks of the players or the fortunes of the owners; it is also about the livelihoods of the business owners whose livelihoods depend on NFL game day and the taxpayers and elected officials who have committed their scarce resources to the NFL enterprise.

Those broader economic implications all counsel overwhelmingly in favor of enjoining the NFL's lockout. The NFL is a multi-billion-dollar business, with a significant economic impact on the markets in which its teams are located. In addition to employing workers directly, the NFL's teams also drive business for hotels, restaurants, bars, and other service industries. As a result, the NFL's lockout threatens the livelihood of thousands of American workers.

A lockout would also deprive state and local governments of substantial tax revenues that are generated by the league's operations. Such losses could not come at a worse time, when state and local budgets are already stretched to the

breaking point. Adding insult to injury, much of the NFL financial juggernaut was assembled with hundreds of millions of dollars in taxpayer support in the form of stadium financing and ongoing operating agreements. Surely the public interest weighs strongly against allowing the NFL to padlock the stadium doors that were purchased with taxpayer dollars on the understanding that they would remain open for business.

Finally, there is an intangible—but nonetheless substantial—public interest in favor of playing the 2011 NFL season, because so many Americans are fans of the sport. Although not as weighty as the two interests discussed above, this Court’s public-interest analysis should take into account the substantial harmful effects that would flow from permitting the unilateral cancellation of what has become the national pastime. The NFL has earned substantial profits making professional football part of our social fabric, but with such rewards come equally weighty responsibilities to the American public.

ARGUMENT

To obtain preliminary injunctive relief, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008). This brief addresses solely the last of those factors. As explained below,

the NFL's lockout threatens serious, harmful, real-world consequences to millions of Americans who depend directly or indirectly on the NFL's business.

THE PUBLIC INTEREST OVERWHELMINGLY FAVORS A PRELIMINARY INJUNCTION OF THE NFL'S LOCKOUT

The public-interest requirement "should be given considerable weight" in determining whether to issue a preliminary injunction. 11A Charles Alan Wright Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.4, at 205 (2d ed. 1995). The requirement helps to make certain that the court's exercise of its equitable discretion takes due account of the effect of an injunction on the interests of those who are not parties to the lawsuit. As the Supreme Court recently emphasized, "courts of equity should pay particular regard for the public consequences" of the decision whether to grant an injunction. *Winter*, 129 S. Ct. at 376-77 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

The district court correctly concluded that the public interest decidedly favors an injunction of the NFL's lockout. "[T]he proper application of federal law regarding injunctions," Stay Order 13, we respectfully submit, is no substitute for consideration of the real-world impact that the lockout will have on millions of Americans. Those effects are easily identifiable and indisputable: Jobs will be lost, and government budgets will be left short. And worse still, all of this will occur after taxpayers have contributed hundreds of millions of dollars to subsidize the very stadiums that the NFL intends to shutter for its own financial advantage.

A. The Public-Interest Prong Of The Preliminary Injunction Standard Requires Consideration Of Concrete Harms To The General Public's Interests, Not Abstract Compliance With The Law

In its order granting the NFL's motion for a stay pending appeal, this Court acknowledged that "the public interest surely favors some resolution between the parties that will permit professional football to be played in 2011." Stay Order 13. Ultimately, however, the Court expressed its preliminary view that it could "see no reason to differentiate between the public interest and the proper application of the federal law regarding injunctions." *Ibid.* With respect, that analysis misunderstands the import of the public-interest prong of the preliminary injunction standard.

If the public interest is "expressed only in general and abstract terms" that treat compliance with the law as a public interest in itself, "it would be no more than a makeweight for the court's consideration of the moving party's probability of eventual success on the merits." *Continental Group, Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 357-58 (3d Cir. 1980). In *Continental Group*, the district court had granted a company's motion for a preliminary injunction enforcing a nondisclosure covenant with a former employee. The court concluded that the employer was likely to prevail on its claim that the former employee would disclose proprietary information, and on that basis reasoned that "[t]he public interest warrants protection against the loss of [the employer's] property and

against the threat of unfair competition.” *Id.* at 357. In vacating the preliminary injunction, the Third Circuit held that the interests identified by the district court were “not sufficiently specific” to warrant consideration under the public-interest prong. *Ibid.* Instead, the court explained, the public-interest inquiry properly focuses on “much more concrete and specific” interests of those who are not before the court. *Id.* at 358; see also *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 585 (7th Cir. 1995) (observing that the public-interest prong requires a court to consider “the effect that granting or denying the injunction will have on nonparties”) (quoting *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994)); *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 594 (7th Cir. 1985) (Posner, J.) (same).

The Supreme Court’s recent decision in *Winter* reinforces this common-sense understanding of the public-interest prong. In that case, plaintiffs complained that the Navy should have prepared an environmental impact statement before beginning a sonar training exercise, and the court of appeals upheld a preliminary injunction imposing restrictions on the Navy’s use of sonar. 129 S. Ct. at 370. In reversing the judgment of the court of appeals, the Court did not address the merits of the plaintiffs’ claim. *Id.* at 376, 381. Instead, it concluded that any injury demonstrated by the plaintiffs was “outweighed by the public interest and the Navy’s interest in effective, realistic training.” *Id.* at 376. In particular, the

Court explained that the lower courts had erred by discounting the injunction’s “adverse impact on the public interest in national defense.” *Id.* at 377. By thus invoking the “public interest in national defense”—an interest far afield from the plaintiffs’ environmental claims—the Court confirmed that the public-interest prong does not merely track the plaintiff’s likelihood of success on the merits, but rather addresses the interests of third parties who are not before the Court

This Court has repeatedly reaffirmed this understanding of the public-interest inquiry. In *General Motors Corp. v. Harry Brown’s, LLC*, 563 F.3d 312 (8th Cir. 2009), for instance, the Court agreed that “the public interest in maintaining nineteen jobs in the . . . community weighed against an injunction” that would have caused a car dealership to close. *Id.* at 321. And in *Calvin Klein Cosmetics Corp. v. Lenox Laboratories, Inc.*, 815 F.2d 500 (8th Cir. 1987), the Court concluded that the trial court had erred in granting a preliminary injunction under the Lanham Act without considering consumers’ interests in effective price competition. See *id.* at 505. It was error, this Court explained, to act on a motion

for a preliminary injunction without considering the “broader economic implications” of the decision. *Ibid.*²

It follows that the proper focus of the public-interest inquiry in this case—which controls the fate of a multi-billion-dollar industry—is on the “broader economic implications” of the NFL’s lockout and the plaintiffs’ request for a preliminary injunction. Although the Court will consider “the proper application of the federal law regarding injunctions,” Stay Order 13, in evaluating the plaintiffs’ likelihood of success on the merits, that factor should not swallow the public-interest prong. Such impermissible double-counting risks obscuring what the district court correctly recognized: that “this particular employment dispute is far from a purely private argument over compensation.” Add. 89.³

² Other courts have likewise recognized that the economic interests of third parties are properly taken into account as part of the public-interest inquiry. See, e.g., *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (refusing to enjoin Forest Service project based on environmental claim, in part because the project would “further the public’s interest in aiding the struggling local economy and preventing job loss”), abrogated on other grounds as recognized in *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2010); *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 623-26 (5th Cir. 1985) (granting injunction requiring gas company to stop overcharging public utility, relying in part on economic interests of non-party customers); *HRP Creative Servs. Co. v. FPI-MB Entm’t, LLC*, 616 F. Supp. 2d 481, 491 (D. Del. 2009) (public interest tilted against injunction barring operation of theme park, where “over a thousand employees would be out of work in a very weak labor market”).

³ “Add. ___” refers to the Addendum to the NFL’s brief, filed May 9, 2011.

B. The NFL's Lockout Threatens Serious Harm To The Public Interest

With the 2011 regular season scheduled to begin in less than four months, there is a serious risk that, if the NFL's lockout is not enjoined, it will continue into the regular season and result in the cancellation of some or all of the games. Such cancellations would result in serious economic harm to working people, business owners, and localities. They would also cause intangible losses for millions of professional football fans. As a result, the public interest weighs heavily in favor of an injunction of the NFL's lockout.

1. The NFL's economic footprint extends far beyond the wallets of the players and owners. Those effects are particularly significant for the local economies of the cities in which its teams are located. Most obviously, there are thousands of game-day employees who work at the 32 teams' stadiums. Each stadium requires hundreds of parking attendants, ticket takers, concession stand vendors, and the like to host a home game. All are out of work if the NFL continues the lockout.

The economic effects do not stop at the stadium gates. NFL games also drive business for hundreds of surrounding hotels, restaurants, and other entertainment outlets. See, e.g., Richard Jenkins, *Area Bars, Restaurants Expect Losses with NFL Lockout*, News-Herald (Southgate, Mich.), Apr. 23, 2011 (reporting restaurant manager's estimate that football games account for a 40%

increase in his restaurant's Sunday revenue).⁴ As the district court aptly explained, "professional football involves many layers of tangible economic impact, ranging from broadcast revenues down to concession sales." Add. 89.

A few examples illustrate the point. The Green Bay Packers estimate that the franchise's total economic impact on the Green Bay community is roughly \$281 million annually, and that the franchise accounts, directly or indirectly, for 2,560 jobs. See Green Bay Packers Press Release, *Packers, Redeveloped Lambeau Field Annual Economic Impact Estimated at \$282 Million* (Sept. 29, 2010) (citing study released by Green Bay/Brown County Professional Football Stadium District).⁵ A 2003 study reported that the Houston Texans franchise and its stadium, Reliant Stadium, account for a total annual economic impact of roughly \$577 million, and 7,800 jobs. See CSL International, *Economic and Fiscal Impacts of Community Venues and Houston Sports* 16 (2003).⁶ And a recent study prepared in connection with the construction of the New Meadowlands Stadium in East Rutherford, New Jersey, predicted that the New York Giants, the New York Jets, and the new stadium would account for roughly \$938 million in total

⁴ Available at <http://www.thenewsherald.com/articles/2011/04/23/news/doc4db1ebbc6a4af842398057.txt>.

⁵ Available at <http://www.packers.com/news-and-events/article-1/Packers-Redeveloped-Lambeau-Field-Annual-Economic-Impact-Estimated-at-282-Million/4c6f9d73-b0ba-444c-a245-236438fcd439>.

⁶ Available at <http://santaclaraca.gov/ftp/csc/pdf/49ers-20070424-EFI-Houston.pdf>.

economic output and 12,450 jobs. See CSL International, *Socioeconomic Impact Analysis of the New Meadowlands Stadium Project* 27 (2006).⁷

As these figures make abundantly clear, NFL teams play a tremendously important role in their local economies. Thousands of workers rely on the NFL, either directly or indirectly, for their livelihoods. Many of them may lose their jobs if the lockout continues, and given the current economic downturn it is likely that many would be unable to find alternative employment. Simply put, a prolonged lockout would impose harsh consequences on thousands of American workers.

Indeed, the economic losses resulting from the cancellation of even a single game can be staggering. A study prepared by experts at the University of Minnesota estimated that the economic impact of one Minnesota Vikings home playoff game was \$9.1 million. See University of Minn. Press Release, *Expert Alert: U of M Experts Estimate Economic Impact of Lost Vikings Game at More Than \$9 Million* (Dec. 13, 2010).⁸ And the economic impact of the Super Bowl is much larger. The Detroit Convention and Visitors Bureau estimated that Super Bowl XL generated a total economic impact for Detroit of \$261 million. See *Countdown to Super Bowl XLI: 62 Days*, S. Fla. Sun-Sentinel, Dec. 4, 2006, at 6C;

⁷ Available at <http://www.nj.gov/dep/special/meadowlands/docs/eisvol3appi.pdf>.

⁸ Available at http://www1.umn.edu/news/expert-alerts/2010/UR_CONTENT_287140.html.

see also Fred Mitchell, *Detroit Will Miss Bears Fans*, Chicago Trib., Jan. 17, 2006 (reporting estimated economic impact of Super Bowl XXXVI on San Diego to be \$367 million).

The economic harms associated with a lockout will also extend well beyond the large cities in which most NFL teams are located. To take one example, Spartanburg, South Carolina, is the site of the Carolina Panthers' training camp. According to a report commissioned by the Spartanburg Chamber of Commerce, hosting even a relatively brief training camp leads to an increase of roughly \$855,000 in expenditures in Spartanburg County. See Brian Van Blarcom & Lawrence Allen, *Excerpts of Economic Impact Study* 10 (2006).⁹ If the lockout continues and leads to the cancellation of training camps, Spartanburg and other towns like it will lose this important economic benefit.

2. A prolonged lockout could also further imperil municipal finances that are already stretched too thin in this difficult economy. The local economic output that NFL franchises drive yields significant tax revenue for states and localities. The Green Bay Packers, for example, estimate that the franchise's operations contribute roughly \$15 million to local tax revenue annually. See Green Bay

⁹ Available at http://www.avesta.ns.ca/assets/pdfs_ppts/Carolina.pdf.

Packers Press Release, *supra*.¹⁰ A 2004 report prepared by PricewaterhouseCoopers estimated that the Indianapolis Colts generated roughly \$7.3 million in annual tax revenues. See PricewaterhouseCoopers LLP, *Economic & Fiscal Impact of the Indianapolis Colts* 4 (2004).¹¹ And a report predicted that the operations of the New York Giants, the New York Jets, and the New Meadowlands Stadium would produce roughly \$66.5 million in annual revenue for the State of New Jersey. See CSL International, *Socioeconomic Impact Analysis of the New Meadowlands Stadium Project* 28.¹² If a significant number of games are cancelled—and it is beyond serious dispute that the purpose of the lockout is to deprive players of their game checks, not their off-season conditioning programs—states and localities will lose this important revenue source.

This potential harm to the public fisc is all the more egregious in light of the generous subsidies team owners have extracted from governments for the construction of new stadiums and the renovation of old ones. Although a handful of NFL stadiums have been financed entirely with private funds, it is far more common for municipalities to absorb the lion's share of the cost. For example, the

¹⁰ Available at <http://www.packers.com/news-and-events/article-1/Packers-Redeveloped-Lambeau-Field-Annual-Economic-Impact-Estimated-at-282-Million/4c6f9d73-b0ba-444c-a245-236438fcd439>.

¹¹ Available at <http://www.employindy.org/web/downloadFile.do?id=51>.

¹² Available at <http://www.nj.gov/dep/special/meadowlands/docs/eisvol3appi.pdf>.

Arizona Cardinals' home field, University of Phoenix Stadium, was constructed in 2006 using \$346 million of taxpayer money—over 75% of the total cost of the facility. See National Sports Law Inst., Marquette Univ. Sch. Of Law, 11 *Sports Facility Reports* app. 3a (2010).¹³ Paul Brown Stadium, the home of the Cincinnati Bengals, was constructed in 2000 with taxpayers picking up 89% of the \$453 million in construction costs. See *ibid.* And the Indianapolis Colts' new stadium was built in 2008, with local municipalities shouldering 50% of the \$750 million construction cost. See *ibid.*

Local governments will be required to service the debt they took on to finance stadium construction even if not a single game is played. Worse still, because the absence of football will decrease tax revenues, those debt obligations will be that much more difficult to meet. And the recent economic downturn has already stretched state and local budgets to the breaking point.

Even if a local government is fortunate enough to be able to make its payments without serious difficulty, the public interest still counsels against permitting the NFL to render so many local government investments ineffective. Local governments face difficult tradeoffs in making capital investments; a stadium renovation project may well mean that a new library, hospital, or road

¹³ Available at <http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=4374>

cannot be built. When a local government does invest in a new stadium, that investment is premised on the expectation that the stadium will fuel further economic activity and growth. That simply cannot happen if there is a prolonged lockout that prevents the stadiums from being used for football games. Because most NFL cities have made large public investments to provide stadiums for their teams, there is a strong public interest in playing a full season so that the cities have the opportunity to recoup their investments.

In some cases, the unfairness is even more patent, because local governments, in addition to meeting their debt-service obligations, will also be required to *make payments* to NFL teams, even if no football is played. The Buffalo Bills' lease with Erie County, for example, requires the County to pay the Bills roughly \$2.5 million annually for operating and maintenance expenses. See Matt Spina, *Lockout or No Lockout, County Pays the Bills*, Buffalo News, Apr. 12, 2011.¹⁴ The Bills have insisted that the County continue to make these payments even if, as a result of the NFL's lockout, no football is played. See *ibid.* The County will thus be forced to find funding for the payments, even as it "has cut support to libraries and cultural agencies to make ends meet." *Ibid.*

¹⁴ Available at <http://www.buffalonews.com/city/article391290.ece>.

3. The NFL lockout threatens the public interest in an additional way: As the district court correctly reasoned, “the public interest represented by the fans of professional football—who have a strong investment in the 2011 season—is an intangible interest that weighs against the lockout.” Add. 89.

To be sure, the intangible losses experienced by football fans are different in kind from—and less serious than—the losses experienced by working families and cash-strapped governments. But they should not be ignored. For starters, the loss of the 2011 NFL season would be felt by a staggeringly large share of the American population. CBS has estimated that 164.2 million *unique* viewers watched NFL games on CBS during the 2010 regular season. See CBS Sports Press Release, *More People Watched “The NFL On CBS” than Any Other Network for the Entire Regular Season* (Jan. 10, 2011).¹⁵ It is difficult to imagine the closure of any other business having this kind of sweeping impact.

Moreover, although the losses experienced by football fans may not be devastating, they are not trivial either. Professional sports teams can often serve as a focal point for civic pride and unity. In many situations, a sports team may be a common interest that brings together local residents, cutting across racial, economic, and ideological lines in the process. As anyone who has attended an

¹⁵ Available at http://www.cbsspressexpress.com/div.php/cbs_sports/release?id=27229.

NFL game in recent years will attest, professional football exemplifies this dynamic—Americans are passionate about their NFL teams. Indeed, the NFL has cultivated its place in the American social fabric, earning massive revenues in the process. It cannot now ignore the responsibilities that come with being the true national pastime. For all these reasons, the intangible losses football fans would experience if the 2011 seasons were to be cancelled should be taken into account as part of this Court’s public-interest analysis. Cf. *HRP Creative Servs. Co. v. FPI-MB Entm’t, LLC*, 616 F. Supp. 2d 481, 491 (D. Del. 2009) (refusing to enjoin opening of amusement park, in part because of the interests of those who planned to attend the opening).

CONCLUSION

The district court’s order preliminarily enjoining the lockout should be affirmed.

Respectfully submitted,

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May 24, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(5), 32(a)(7)(B), and 29(d): it is written in Times New Roman, a proportionally spaced font, has a typeface of 14 points, and contains 4,510 words (as counted by Microsoft Word 2003 word processing software), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Pursuant to Circuit Rule 28(a)(h)(2), I further certify that the electronic version of this brief has been scanned for viruses and is virus-free.

Date: May 24, 2011

/s/ Mark T. Stancil
Mark T. Stancil

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system

Date: May 24, 2011

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