UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

-----X Docket#

HAMEED KHALID DARWEESH, et al.,: 17-cv-00480-AMD

Plaintiffs,

: U.S. Courthouse - versus -

: Brooklyn, New York

DONALD TRUMP, et al.,

et al., : January 28, 2017
Defendants :

TRANSCRIPT OF CIVIL CAUSE FOR EMERGENCY MOTION FOR STAY OF REMOVAL

> BEFORE THE HONORABLE ANN M. DONNELLY UNITED STATES DISTRICT JUDGE

APPEARANCES:

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American Civil

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U.S. Department of Justice

Civil Division

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Litigation - District Court

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Proceedings recorded by electronic sound-recording, transcript produced by transcription service

| | Proceedings | 2 |
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| 1 | THE CLERK: All rise. | |
| 2 | THE COURT: Good evening, everybody. You can | |
| 3 | sit down. | |
| 4 | THE CLERK: In the matter of Hameed Khalid | |
| 5 | Darweesh and Haider Sameer Abdulkhaleq Alshawi v. the | |
| 6 | respondents, President Donald Trump, Department of | |
| 7 | Homeland Security, Customs and Border Protection, | |
| 8 | Secretary John Kelly, Commissioner Kevin McAleenan and | |
| 9 | Director James Madden. | |
| 10 | Counsels, state your appearance, petitioner | |
| 11 | first. | |
| 12 | MR. GELERNT: Lee Gelernt from the National | |
| 13 | Office of the ACLU. | |
| 14 | THE COURT: Hi. Who is with you? | |
| 15 | MR. GELERNT: This is Omar Jadwat, and Davis | |
| 16 | Hausman, both | |
| 17 | THE COURT: Okay. | |
| 18 | MR. GELERNT: from ACLU. | |
| 19 | THE COURT: Okay. | |
| 20 | MS. RILEY: Good evening, your Honor. | |
| 21 | Susan Riley from the U.S. Attorney's Office, | |
| 22 | Eastern District. Seated with me is Scott Dunn, Chief of | |
| 23 | our Immigration Practice and Elliot Schachner, who is | |
| 24 | also an immigration expert. | |
| 25 | THE COURT: Okay. | |

- MS. RILEY: And also seated is Colleen Piccone (ph.), a representative from Customs and Border Protection.
- THE COURT: Okay. Do we have somebody on the phone?
 - MS. RILEY: Yes, we do. We have Gisela
 Westwater from the District Court Section of the Office
 of Immigration Litigation.

THE COURT: All right.

We're here considering an emergency stay application in a removal case. I just have a couple of questions about status. The two-named plaintiffs, what is their status right now?

MR. GELERNT: Your Honor, one of them has been released. We don't know whether the government is going to take any action against him but he was released this afternoon.

We are not sure as of this moment about the second one. The government may be able to say more about the second one.

MS. RILEY: We are sure, your Honor and he has been released.

THE COURT: So both have been released. Let me just ask you, are you opposing the application for a stay?

MS. RILEY: Well, we believe it's moot, your Honor. Both of the named plaintiffs have been released and there is no need for the issuance of a stay.

THE COURT: What about all the other people in the class? Just because, I just want to be clear that I have the class members here.

The petitioners are asking for certification of a class that consists of all individuals with refugee applications, approved by U.S. Citizenship and Immigration Services, as part of the U.S. Refugee Admissions Program, holders of valid immigrant and nonimmigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Lybia, Somalia, and Yemen legally authorized to enter the United States but who have been or will be denied entry to the United States on the basis of the January 27th, 2017 executive order.

So, I am assuming that there are going to be more people that this executive order has an impact on, is that correct?

MS. RILEY: Yes, your Honor.

THE COURT: All right. So, while the two-named -- well, my second question is, is there any assurance that there won't be some effort to remove the people that are already here? Is there any assurance by that on the part of the government?

1 MS. RILEY: Do you mean the two-named 2 plaintiffs?

THE COURT: Yes.

4 MS. RILEY: I have no information in that

regard.

THE COURT: Okay.

MS. RILEY: And part of the government's position, and I'm going to let Ms. Westwater take the lead in arguing this, is that this has unfolded with such speed, both the executive order and the actions taken pursuant to the executive order, that we haven't had an opportunity to address any of the issues, the important legal issues, the status of anyone who may be at the airport.

THE COURT: Well, that's why I really started by asking if you really oppose the stay because if you haven't had a chance to address it -- I mean, if I don't grant the stay, there are while not perhaps not these two-named plaintiffs, there are, it sounds to me, like a host of people who will be affected by this executive order and I think just based on what the petitioners have alleged today, is not something that's just -- that is something that is very real.

And I do recognize that you haven't really had a chance to review all of this but that's, I think, why

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1 | they're asking for the stay.
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Now is there something else you wanted to say?

MR. GELERNT: No, your Honor.

THE COURT: Okay.

MR. GELERNT: I just wanted to know if you

wanted to hear from me yet.

THE COURT: Not just yet. I do --

MR. GELERNT: Okay. That's fine, your Honor.

THE COURT: I do want to hear -- and I'm sorry,

who is on the phone?

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MS. RILEY: Ms. Westwater.

MS. WESTWATER: Judge, this is --

THE COURT: Ms. Westwater?

MS. WESTWATER: -- Gisela Westwater.

THE COURT: Yes.

MS. WESTWATER: Yes.

THE COURT: Did you have anything you wanted to

18 | say just on that subject?

MS. WESTWATER: I believe at this time, your

20 | Honor -- I mean, the government's position is that the

21 two-named plaintiffs have been dismissed. That the

22 government can't make any assurances as to any other

23 | individuals who are not named plaintiffs. They all have

24 very different situations. We believe that a stay at

25 this time would be inappropriate first because these are

1 arriving aliens.

THE COURT: Well, I am going to stop you right there. So, I think everybody agrees that under Supreme Court precedent that considering the application, I am going to apply the traditional four-factor test. You agree with me on that, don't you?

MS. WESTWATER: I am sorry, in which four-factor --

THE COURT: The four-factor test that you apply for the traditional four-factor test for a temporary restraining order. So, I'll just go through them for you; likelihood of success on the merits, and really one of the most significant factors which is irreparable injury to the petitioner, the likelihood of injury to the opposing party, which is you, and where the public interest lies. And when the government is the opposing party, those two final factors, the likelihood of injury to the opposing party and the public interest merge.

So, I'm just -- let's just go right to that irreparable injury to the petitioner. What is your argument that there won't be irreparable injury to either the petitioner or the members of the putative class?

MS. WESTWATER: Your Honor, we believe that's something that is difficult without having the named plaintiffs in front of us, and what exactly are

plaintiffs arguing are the various statuses of these individuals?

THE COURT: Well, let me just put it this way.

I mean, if they had comes in two days ago, we wouldn't be here, am I right?

 $\label{eq:MS.WESTWATER:} \quad \text{That would seem to be correct,} \\ \text{your Honor.}$

THE COURT: So presumably, and at least by definition of the class that the petitioners are asking to be certified, these are all people that have been through a vetting process and at least these two named petitioners have been through a very extensive -- I think one of them, and I'm sure you'll correct me if I am wrong, first applied in 2014. And our own government, presumably, approved their entry into this country.

And so, that really goes to what is the likelihood of injury to the government but the petitioners have also alleged that not just these named petitioners but members of the class, face real irreparable injury and in some cases, people whose families are already here, people who face threats if they're returned to their country of origin, the named plaintiffs have been -- according to the petition, have been specifically targeted with violence in their own countries.

So, what I would like you to do, whether it's you or whether it's one of your colleagues at the table, is just explain to me how it is that the members of this class will not suffer irreparable injury if I don't grant the stay.

MS. WESTWATER: Your Honor, the difference as we said -- there's a difference within the different categories. This is an overly broad request --

question, how can you argue that they won't suffer irreparable injury? I mean, sure you could argue about who is an appropriate member of the class but that's not my question. The identified members that the petitioners have identified are all people that there's no question about them being dangerous or anything like that, at least as far as I understand. So, I mean, I don't hear you to be arguing that there's some particular risk posed by this class of people. Am I right about that?

MS. WESTWATER: Your Honor, to the two-named

plaintiffs -THE COURT: One of them worked for the

government. One of them worked for the United States government, I believe, or at least the family members did.

MS. WESTWATER: Yes, your Honor. However, the

1 proposed class is broader and would include --

THE COURT: Yeah, but --

MS. WESTWATER: -- tourists, would include people who are not making a claim, who have -- are coming here on a tourist visa which would have a very different interest and very concerns regarding harm.

THE COURT: Well, let me just ask, are tourist visas included in this, as well, in your class?

MR. GELERNT: Yes, your Honor.

THE COURT: Okay.

MR. GELERNT: There is a broad range but we would say that they've all been vetted and all been given legal permission to come here. So, I think there's no question that they've been vetted. And just with respect to the different classes, I think your Honor has basically put her finger on it, that that may end up being different arguments on the merits but as to the question that you're getting at, a factual question, are they going to face irreparable harm, absolutely. I mean, they are facing real harm because they are going back to some of the most dangerous countries.

And as to your question about do we know whether anybody could be sent back, I mean the government was very candid saying that --

THE COURT: You don't know.

MR. GELERNT: -- they can't give assurances and we also just were told that the government is threatening to put someone back on a plane at 9:20 and we don't even know what's going on around the country. There are so many people -- and so we are here, what we think is a fairly modest request to the Court, to just keep things in place until both sides can brief it.

We don't expect your Honor to figure out the merits now. I mean, some of the merits issues are eye glazing, to be truthful. We think we have the better of it but certainly on irreparable harm, I haven't heard the government say why they can't keep the people here. It's not as if these people weren't vetted. I mean, they were vetted, given legal permission and they were just caught in transit. They took off before the executive order was signed. They landed after. And so, they were in a horrible position. They were on U.S. soil and they certainly can't be sent back without, at a minimum, an asylum hearing and a Convention Against Torture -- I mean that is basic law.

THE COURT: Do you have a sense of how many people we're talking about? that was another question that I had.

MR. GELERNT: Yeah. You know, your Honor, we believe that it's upwards of a hundred to 200. The

government won't give us that information. They won't tell us who the people are, so it makes it very difficult.

- And I was just passed a note that the government is literally as we speak, putting someone back on a plane back to Syria.
- THE COURT: All right. Do you have anything else you want to say from the government?
- MS. WESTWATER: Yes, your Honor. It appears the question seems to be what is irreparable harm. As we've argued, for people coming here on a tourist visa --
- THE COURT: But that's one category but this is just an emergency stay and so I am interrupting you because I'm not going to make the decision based on some person that has not identified who might have a tourist visa.
- Apparently, there is somebody who they're putting on a plane -- what do you think about that -- back to Syria? Irreparable harm?
- MS. WESTWATER: Your Honor, the government does not have sufficient information about this person or the circumstances, your Honor, to be able to have a position. And I'm sorry, as your Honor had suggested, we all do require additional time to have more facts.
- THE COURT: Well, that's exactly why that I am

going to grant the stay. So, the stay is --1

2 UNIDENTIFIED SPEAKER: (Inaudible).

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3 THE COURT: No, no, no, not a word. Not a 4 word.

The stay is granted. I will sign it and I also find, just so the record is clear, that each of these four factors is met. Irreparable harm has been established. There's no likelihood of injury to the opposing party, nor is there any problem to the public interest and the likelihood of success on the merits, which we have not discussed, but I have reviewed the submissions and for purposes of this application, there is a likelihood of success on the merits.

I will also say that there is a likelihood with respect to the certification of the class, that the class will be certified.

So, for all of those reasons, I will sign the order which includes the putative class and I think the only thing that is left to do is to pick a date where you can present your arguments more fully. Do you have one proposed?

MR. GELERNT: We will proceed on whatever schedule the Court wants us to.

THE COURT: All right. Well, I think it really 25 is going to depend in part on how much time it's going to

- 1 take. I think the government hasn't really had a full
 2 chance to think about this. So, what time sounds good to
 3 you?
- 4 MS. WESTWATER: I would ask --
- 5 THE COURT: Do you want --
 - MS. WESTWATER: -- if anyone in the -- if my colleagues from the United States Attorney's Office would have a potential proposed schedule?
- 9 THE COURT: What about Friday morning for an 10 argument, next Friday morning, is that too soon?
- MS. RILEY: Yes.

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- 12 THE COURT: Okay.
- MS. RILEY: Yes, it is, your Honor.
- THE COURT: Okay. So, let me just look at my calendar because I may have a few other cases.
- MS. RILEY: So, your Honor, we would request an opportunity to submit papers.
- 18 THE COURT: Yes.
- MS. RILEY: We do not understand the Court to be certifying a class at this time.
 - THE COURT: I'm not at this time. It is for purposes of the stay, otherwise I will be signing and listening to application from 100 people and it sounds to me like the class is pretty well defined, as outlined in the petitioner's papers and so, it's what I specified at

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1 | the beginning.
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So, do you have a proposed order?

3 MR. GELERNT: Um --

THE COURT: It's okay if you don't. I have one

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MR. GELERNT: We can get it to you in 15 minutes if you need that.

THE COURT: I think I've got it. I just need to put who the class is.

MR. GELERNT: Your Honor, can I make two points?

12 THE COURT: Yes.

MR. GELERNT: The first is, we are not pushing any schedule on the Court and want to proceed as the Court feels appropriate. The only thing that we would ask because I think the government is going to ask for two weeks, it sounds as if the government is going to keep all these hundreds of people who have been given lawful status in detention. That's a long time.

And so, if the government is going to release them on supervision, that would be the best of all worlds. I think since they were, by our government, given lawful status, if you're not going to release them, then we would ask that you proceed as quickly as possible.

Proceedings The only thing I wanted --1 2 THE COURT: Well, let me just ask first of all, 3 are you in a position to say that right now? MS. RILEY: We are not. We are not, your 4 5 Honor, but what we are in a position to do is point out 6 that today, the named plaintiffs were released. 7 THE COURT: Right. 8 MS. RILEY: And to the extent that requests are made, we will act on them --9 10 THE COURT: Well, obviously the --11 MS. RILEY: -- one way or the other. 12 THE COURT: -- petitioners do have an interest. 13 If somebody is not being released, I guess I'll just hear 14 from you, if that happens. 15 MR. GELERNT: And that's how -- I mean, we 16 would ask that the government designate someone that we 17 could send that information to because I think right now, 18 we don't even have a person --19 THE COURT: I think that's probably a good 20 If you all can work out somebody with whom the 21 petitioner' can communicate with specific individuals. 22 MR. GELERNT: Right. And, you know, the other 23

problem for us as the government knows is, the government is not letting us see all the people in all the airports. If they want to provide a list on, you know, why they're

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going to release some and not the others, but right now
we're sort shooting -- I mean, what's happened is through
sort of happenstance, we found people at airports.

THE COURT: What do you want me to do?

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MR. GELERNT: If the government would provide a list of all the people and whether they're going to release them or not, I think that would be the best thing.

MS. RILEY: We don't know. Your Honor, we don't know.

11 THE COURT: But can you provide at least a list 12 of who is being detained?

MS. RILEY: Well, your Honor, that is actually more difficult than it sounds. People are coming in all the time.

THE COURT: Well, why don't you try to work it out? Get him a list of people that are detained.

MS. RILEY: We can try to work it out.

THE COURT: All right? Sorry. Go ahead.

MR. SCHACHNER: Just one question just to define the contours of the stay. So, it's clear the stay is in terms of not removing anyone.

THE COURT: Correct.

MR. SCHACHNER: But is the stay also to prevent any sort of processing of these foreign nationals? For

- 1 example, if the processing would lead to their --
- THE COURT: I don't think anybody is asking
- 3 that. You're not asking --
- 4 MR. SCHACHNER: I want to be clear on the
- 5 | kind --
- 6 MR. GELERNT: I mean, if you're talking about
- 7 | you're going to process them and then admit them in their
- 8 same status, I mean, we obviously wouldn't object to that
- 9 but that's not what I understand you to be saying.
- MR. SCHACHNER: I just want to be clear what
- 11 | the --
- MR. GELERNT: I think we want to preserve the
- 13 status quo.
- 14 THE COURT: I think that's the whole point of
- 15 this hearing is to preserve this status quo and, you
- 16 know, if this had been two days ago, we would not be
- 17 here. So, I don't think it's unduly burdensome to
- 18 | identify the people that we're talking about here within
- 19 the specific class. And I don't think it's unduly
- 20 burdensome to designate somebody with whom the
- 21 petitioners can communicate.
- This is not a situation as I understand it,
- 23 where anybody is asking any information about anybody who
- 24 has previously been deemed to pose some kind of a threat
- 25 to national security. So, that's not the request and

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1 | that's not what I am saying.
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- So, I have an order but I do think it needs to be amended to specify the parameters of the class.
- 4 MR. GELERNT: Your Honor, I am sorry, just one 5 last thing.
- THE COURT: Going to snatch defeat from the jaws of victory there?
 - MR. GELERNT: No, I hope not but I am worried about the person and probably other people who are about to get on the plane, whether the government could then tell their offices at the --
- THE COURT: Yeah, I'm going to direct you, if
 there's somebody right now who is in danger of being
 removed, I am going to direct you to communicate that I
 have imposed a stay. Nobody is to be removed in this
 class, okay?
- MS. RILEY: Well, your Honor, one thing I do
 want to point is that there is nothing preventing anyone
 who is --
- 20 THE COURT: If somebody comes in and does 21 something they're not supposed to do --
- MS. RILEY: -- and they want --
- THE COURT: -- obviously --
- MS. RILEY: No.
- THE COURT: I think you know what I am talking

1 about.

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MS. RILEY: Your Honor, there are people who may request the opportunity to return to their country and --

THE COURT: Well, I am not going to say that you have to trap them here. So -- right? I mean, I don't --

MS. RILEY: I --

THE COURT: I'm trying to make this as -frankly, as common sense as possible. I am not directing
you to hold somebody against his or her will that wants
to go back to his or her home country. And I don't
understand you to be asking me to do that.

MR. GELERNT: No.

THE COURT: I think you understand the parameters of the order. One person is nodding, so I am going to go with yes. And I am going to draft it. But I just want to make sure there's no misunderstanding. All right.

Anything else that anybody has to say? All right. Give us just a little bit of time to draft the order. It won't take much.

23 (Court and clerk confer)

THE COURT: You know, I do have -- the order is

25 ready.

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Proceedings
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    (Pause)
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              THE COURT: All right. So, I have signed an
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           We'll give you copies of the original, as soon as
   we make them and if there's nothing else, we're done.
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   Okay. Thank you.
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              MR. GELERNT:
                            Thank you.
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              MS. RILEY:
                          Was a date set, your Honor?
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              THE COURT:
                          Oh, we didn't pick a date, did we?
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              MS. RILEY: We would ask until February 10th.
              THE COURT: February 10th for filing your
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   papers?
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              MS. RILEY:
                          Yes.
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              THE COURT: Okay. And then how much time will
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   you need to respond?
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              MR. GELERNT: That's a long time from now.
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   We'll respond within 48 hours.
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              THE COURT: All right. So, I think February
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   12th is a holiday but --
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              MS. RILEY: February 20th, I think is a
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   holiday.
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              THE COURT: All right. Do you want some time
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   to respond -- to reply, I mean?
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              MS. RILEY: We would ask for seven days, your
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   Honor.
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THE COURT: Okay. So, where does that take us?

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                             Proceedings
              THE CLERK: So, that puts the petitioners'
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   response at February 13th and the government's reply at
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   February -- the 20th is President's Day -- the 21st?
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              MS. RILEY: Yes. Thank you.
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              THE COURT: All right. I think that's it.
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              MR. GELERNT: Thank you.
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                    (Matter concluded)
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CERTIFICATE

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this ${\tt 30TH}$ day of ${\tt January}$, 2017.

Linda Ferrara

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