# 11-2215-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARY JO C.

Plaintiff-Appellant,

-against-

NEW YORK STATE AND LOCAL
RETIREMENT SYSTEM,
CENTRAL ISLIP PUBLIC LIBRARY,

Defendants-Appellees.

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**BRIEF FOR PLAINTIFF-APPELLANT**

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**CORRECTED COPY**

ON APPEAL FROM A FINAL JUDGMENT BY THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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Defendants-Appellees.

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**BRIEF FOR PLAINTIFF-APPELLANT**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is a civil rights lawsuit in which jurisdiction existed in the district court pursuant to 28 U.S.C. § 1331, which authorizes jurisdiction of civil actions arising under the United States Constitution. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 as plaintiff-appellant Mary Jo C. appeals a final judgment. The district court entered a final judgment on behalf of defendant-appellees New York State and Local Retirement System and Central Islip Public Library on May 6,2011, A-5 ; A-8. Appellant Mary Jo C. filed her notice of appeal on May 31 2011. A-5; A-7.

# QUESTIONS PRESENTED

1. Has a former employee plausibly alleged that she is disabled under the Americans with Disabilities Act when she alleged that she has suffered from mental illness her entire adult life, has only worked intermittently since 1986, and was fired from her job because of her behaviors arising out of her mental illness?

2. Under Title II of the Americans with Disabilities Act, is a former employee rendered not "otherwise qualified" to seek an accommodation in the form of a waiver of the time period for filing for disability retirement benefits by virtue of her not timely filing for the benefits in the first place?

3. Is a requested accommodation under the Americans with Disabilities Act that requires a state or local government official to act in contravention of state law *per se* unreasonable?

4. If such an accommodation is not, does the request to waive a three-month period for the filing of disability retirement benefits create an undue burden on the New York State and Local Government Retirement System as to render the accommodation unreasonable?

5. May a disabled individual file an employment discrimination claim against a local governmental entity under Title II of the Americans with Disabilities Act, or must the individual file her discrimination claim under Title I?

## STATEMENT OF THE CASE

Appellant Mary Jo C. has suffered from mental illness for approximately forty years, since she was a teenager. Her illness led to her termination by appellee Central Islip Public Library ("Library"). As a result of her illness, Mary Jo C. will never work again.

State law required Mary Jo C. to file for disability retirement benefits within three months of her last date of employment. However, at that time, she lacked the ability to apply for the benefits because she was too impaired by her disability to do so. Because of this, and within the permissible statutory time frame, the brother of Mary Jo C. asked the Library to file for disability retirement benefits on behalf of Mary Jo C., as it was permitted to do. The Library refused.

When her clinical condition improved, Mary Jo C. applied for disability retirement benefits. However, the time to apply for benefits had expired. As a result, appellee New York State and Local Government Retirement System ("NYSLRS") denied the application on the ground that Mary Jo C. failed to make a timely application. Subsequently, Mary Jo C. sought an accommodation in the form of a waiver of the filing period. NYSLRS never responded to this request, but notified Mary Jo C. that she could appeal the determination, which she did. However, the hearing officer concluded that no basis in law existed for extending the filing period.

Mary Jo C. then filed this lawsuit. She asserted that the failing to waive the filing requirements violated the Americans with Disabilities Act ("ADA") because it constituted a failure to provide a reasonable accommodation. Mary Jo C. sought equitable relief for this claim.

Mary Jo C. further asserted a damages claim against the Library, a public entity under Title II of the ADA, in which she alleged that the failure to file an application for disability retirement benefits also constituted a failure to provide a reasonable accommodation. Mary Jo C. filed this claim pursuant to Title II of the ADA, as the time to exhaust her administrative remedies pursuant to Title I had expired.

NYSLRS moved to dismiss this complaint pursuant to Fed.R.Civ.P. 12(b)(6) on the ground that the Eleventh Amendment barred claims for injunctive relief. The Library moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) on the ground that the ADA required all employees, including former employees, to file all discrimination claims pursuant to Title I only. The district court (Feuerstein, J.) granted both motions in an opinion reported at 2011 U.S. Dist. LEXIS 49567 (E.D.N.Y. May 5, 2011).

The court first recognized that the determination of whether Congress validly abrogated Eleventh Amendment immunity required a determination of the following questions: what conduct of the state violated Title II of the ADA; (2) if

the court finds a violation of Title II, whether the conduct also violated the Fourteenth Amendment; and, (3) if the conduct violated Title II of the ADA but not the Fourteenth Amendment, whether Congress's purported abrogation of Eleventh Amendment immunity is nevertheless valid. A-21. Even though neither NYSLRS nor the Library asserted that Mary Jo C. was not disabled under the ADA, A-55 – A-65; A-77 – A-83, the court then concluded that state conduct did not violate the ADA because Mary Jo C. failed to plead facts that suggested that the mental illness from which she suffered substantially limited a major life activity, which meant she was not disabled under the ADA. A-22.

The court further noted that Mary Jo C. sought an accommodation that NYLRS lacked authority to grant. A-26. The court then held that Mary Jo C. did not seek a reasonable accommodation because "[r]equiring the State defendant to violate state law is not a reasonable accommodation as a matter of law." *Id.* In so holding, the court distinguished cases in which a plaintiff sought a modification to rules, policies or practices to which a government official had discretion to waive; as no such discretion existed in this case. A-25 – A-26. The court failed to provide a justification for this distinction other than citing to *Aughe v. Shalala,* 885 F. Supp. 1428, 1431-33 (W.D. Wash. 1995), a non-binding district court case from another circuit, in which the court concluded that the waiver of a statutory provision would constitute a fundamental alteration. A-26. As a result, Mary Jo

C. failed to meet the essential eligibility requirements for the receipt of disability benefits under state law and hence, was not a qualified individual with a disability under the ADA. A-27

The district court then concluded that Title I serves as the sole remedial provision within the ADA for claims related to terms, conditions and privileges of employment. A-32. The court found that the Supreme Court implied that it would find that Title II did not cover employment discrimination. The court first cited language from *Tennessee v. Lane*, 541 U.S. 509 (2004), in which the court noted that "[t]he ADA "forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I * * *, public services, programs and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.'" *Id.* (quoting *Lane*, 541 U.S at 516-17). The court noted that the Supreme Court has noted that "'Title I of the ADA expressly deals with'" claims of employment discrimination. *Id.* (quoting *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 360 n.1 (2001).

RELEVANT STATUTORY AND ADMINISTRATIVE SCHEMES

Under Title II of the ADA, a public entity includes any local government, and any department, instrumentality or agency of a local government. 42 U.S.C. § 12131(1). Under Title II, a public entity shall not exclude from participation, or

deny benefits of the services, programs or activities operated by the entity, to a qualified individual with a disability by reason of such disability. 42 U.S.C. § 12132.

A "qualified individual with a disability" includes an individual with a disability who, with reasonable modifications to rules, policies or practices, meets the essential eligibility requirements for the receipt of services, or participation in the programs provided by the public entity. 42 U.S.C. § 12131(2). A public entity must make reasonable modifications in policies, practices and procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that the modification would fundamentally alter the nature of the activity. 28 C.F.R. § 35.130(b)(7).

Title I of the ADA prohibits discrimination because of disability in regard to, *inter alia,* terms, conditions and privileges of employment. 42 U.S.C. § 12112(a). Discrimination includes not making reasonable accommodations to the known mental disabilities of an otherwise qualified individual with a disability, unless the proposed accommodation would impose an undue hardship on the operation of the business of covered entity. 42 U.S.C. § 12112(b)(5)(A).[1]

If a state or local government employee is physically or mentally incapacitated for the performance of gainful employment, and is so incapacitated

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[1] A covered entity includes an employer. 42 U.S.C. § 12111(2).

that she ought to be retired, she is entitled to disability retirement benefits. N.Y. Ret. & S.S. Law § 605(c). The employee must file a disability retirement application within three months of the employee's last day on the payroll. N.Y. Ret. & S.S. Law § 605(b)(2).

## STATEMENT OF FACTS

Mary Jo C. is a 57 year-old individual who has suffered from mental illness since adolescence. A-38, ¶ 12.[2] Notwithstanding her illness, Mary Jo C. worked intermittently as a librarian for various libraries on Long Island between 1986 and November 2006. A-38, ¶ 13. In January, 1988, Mary Jo C. became a member of the NYSLRS. *Id.*, ¶ 14.

Appellee Library served as Mary Jo C.'s last employer. *Id.*, ¶ 15. As a result of behaviors that were symptomatic of her mental illness, the Library fired Mary Jo C. in November 2006. *Id.*, ¶ 16. Also as a result of behaviors manifested by Mary Jo C. that were symptomatic of her mental illness, libraries in Suffolk County communicated among themselves and agreed that Mary Jo C. should not be hired as a librarian; in the vernacular, blacklisting Mary Jo C.. A-42, ¶ 40.

Because Mary Jo C. suffered from mental illness, she would have been eligible for disability retirement benefits if she made a timely application. A-39, ¶ 18. New York law required Mary Jo C. to file an application for retirement

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[2] A-__ refers to the joint appendix.

benefits within three months of her last day of work. *Id.*, ¶ 19. However, because of mental illness from which she suffered, Mary Jo C. failed to recognize that state law required her to file her retirement benefits application within this time period. *Id.*, ¶ 20.

During this three-month period in which an application could have been filed for disability benefits, Mary Jo's brother, Harry C., attempted to take steps to assist Mary Jo C. in obtaining benefits to which she was entitled. *Id.*, ¶ 21. Harry C. spoke to the NYSLRS Disability Retirement Director. *Id.*, ¶ 22. The Director notified Harry C. that the Library could file an application for disability retirement benefits on behalf of Mary Jo C within the permissible time period. *Id.*, ¶ 23.

As a result of his conversation with NYSLRS, Harry C. asked the Library to file for retirement benefits on behalf of Mary Jo C. A-40, ¶ 25. The Library denied the request to file disability benefits on behalf of Mary Jo C. *Id.*, ¶ 26. In response, Harry C. then requested in the alternative that the Library reclassify her termination as an unpaid leave of absence. A-40, ¶ 27. If the Library reclassified her termination as an unpaid leave of absence, Mary Jo C. would have been able to file for disability retirement benefits once her clinical condition improved and she recognized the necessity of applying for the disability benefits. *Id.*, ¶ 28. The Central Islip Public Library also denied the request by Harry C. to reclassify her termination to an unpaid leave of absence. *Id.*, ¶ 29.

In November, 2007, Mary Jo C.'s clinical condition improved and she applied for disability retirement benefits. *Id.*, ¶ 30. NYSLRS denied the application on the ground that Mary Jo C. failed to comply with the requirement under New York State Law in that she did not file her application within three months of her last day of employment. *Id.*, ¶ 31.

In July, 2008, Mary Jo C. requested an accommodation under the Americans with Disabilities Act from NYSLRS in the form of a waiver of the filing deadline. A-41, ¶ 32. Although NYSLRS never responded to this request, it stated that Mary Jo C. could appeal the denial of her disability retirement claim. *Id.*, ¶ 34. Mary Jo C. appealed the denial of her claim, and in the appeal NYSLRS argued that federal law did not authorize the waiving of the filing requirements. *Id.*, ¶ 36. The hearing officer denied the appeal on the ground that no provision existed for extending the filing deadline. *Id.*, ¶¶ 37-38.

## SUMMARY OF ARGUMENTS

Congress validly abrogated the Eleventh Amendment immunity belonging to NYSLRS because the conduct of NYSLRS violated the ADA, and the abrogation was congruent and proportional to problems Congress attempted to remedy when it passed the ADA. Appellant Mary Jo C. is protected by the ADA because she suffers from a substantial impairment in her ability to work. She has suffered from mental illness her entire adult life, she lost her job as a result of mental illness and

prospective employers have determined that she should not be hired for other positions.

Mary Jo C. is a qualified individual with a disability because at this time she seeks the opportunity to apply for disability retirement benefits, and nothing more. By utilizing the very same procedural requirement of which Mary Jo C. seeks a waiver to determine that Mary Jo C. is not otherwise qualified, without examining the necessity of the rule, the district court turned the ADA on its head.

An accommodation under the ADA is not inherently unreasonable simply because it requires a state official to act in contravention of state law. Pursuant to the Supremacy Clause, federal law supersedes state law. This Court has required state officials to act in contravention of state law when necessary to enforce federal civil rights, and two Circuits have found that an accommodation under the ADA that requires state officials to act in contravention of state law is not inherently unreasonable.

In this case, the proposed accommodation that Mary Jo C. seeks, a waiver of the three-month period to file for disability retirement benefits, is reasonable. When determining whether an accommodation in the form of a waiver of state law constitutes a reasonable accommodation, a distinction must be made between an accommodation that requires a government entity to alter its substantive standards, which may be unreasonable, with a waiver of procedural rules. A waiver of

procedural rules does not require a government entity to alter its standards and it provides an opportunity for a disabled person to obtain benefits to which the disabled individual may be entitled.

The remedy of a reasonable accommodation in this case is congruent and proportional to problems Congress found and attempted to remedy. Congress sought to enforce provisions of the Due Process Clause, which include the right to contract. Congress further found that people with disabilities were financially disadvantaged. The accommodation in this case enables Mary Jo C. to enforce her contract rights with NYSLRS, which may help remedy economic disadvantages to which she may be subject.

Next, Title II of the ADA prohibits employment discrimination by state and local governments. A review of the legislative history of the ADA establishes that in passing Title II, Congress sought to incorporate all forms of discrimination prohibited by section 504 of the Rehabilitation Act. Section 504 prohibits employment discrimination. Furthermore, the regulations of the Department of Justice, which are at the very least, entitled to significant respect, conclude that an employee may file a claim of employment discrimination against a state or local government pursuant to Title II.

In addition, when the Eleventh Circuit found that Title II of the ADA covers employment discrimination it engaged in a mode of analysis consistent with this

Court's interpretation of Title II. On the other hand, when the Ninth Circuit concluded that Title II does not cover claims of employment discrimination, it engaged in a mode of analysis antithetical to this Court's Title II jurisprudence. Hence, the Eleventh Circuit constitutes far more persuasive authority for this Court.

## APPLLICABLE STANDARDS GOVERNING REVIEW OF DISTRICT COURT DECISION

The standard of review governing the dismissal of the cause of action against NYSLRS is *de novo,* as it involves a determination of a motion to dismiss on Eleventh Amendment grounds. *See State Emples. Bargaining Agent Coalition v. Rowland,* 494 F.3d 71, 95 (2d Cir. 2007). The standard of review governing the dismissal of the claim against the Library is also *de novo,* as it involves a review of a granting of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). *Matson v. Bd. of Educ. of the City Sch. Dist. of N.Y.,* 631 F.3d 57, 63 (2d Cir. 2011).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). On the Rule 12(b)(6) part of the defendants' motion, not only must a court assume as true all factual allegations in the complaint, it must also draw all reasonable inferences in favor of the plaintiff. *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009). When assessing the adequacy of

the plaintiff's claims, this Court can consider the allegations in the complaint, documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken. *Allen v. Westpoint Pepperello, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). On a motion to dismiss that challenges the jurisdiction of the court, while a court must assume as true all material allegations in the complaint, it will not draw inferences in favor of the party asserting jurisdiction. *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

## ARGUMENTS

### I. CONGRESS VALIDLY ABROGATED ELEVENTH AMENDMENT IMMUNITY BELONGING TO NYSLRS.

It is well settled that in passing the ADA, Congress attempted to abrogate the Eleventh Amendment immunities belonging to the states: "A state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. This statement reflects the "unequivocal expression of Congress's intent to abrogate state sovereign immunity." *United States v. Georgia*, 546 U.S. 151, 154 (2006). Whether such abrogation was valid requires the following three-part analysis:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the

> Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

*Georgia*, 546 U.S. at 159.

A. The Failure to Provide a Reasonable Accommodation in the Form of a Waiver of the Three Month Filing Requirement to Obtain Disability Retirement Benefits Violated the ADA.

1. Mary Jo C. Was Disabled Under the ADA Because Mental Illness Substantially Impaired Her Ability to Work.

The ADA defines disability as, *inter alia,* a physical or mental impairment that substantially limits a major life activity. *Capobianco v. City of New York,* 422 F.3d 47, 56 (2d Cir. 2005). Work is a major life activity. *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 870 (2d Cir. 1998). When evaluating whether or not an impairment is substantially limiting, a court must examine the nature and severity of the impairment, its duration, and the existence of any actual or expected long term impact. *Capobianco*, 422 F.3d at 57.

This Court has recognized that "`a heightened pleading requirement,' requiring the pleading of `specific facts beyond those necessary to state [a] claim and the grounds showing entitlement to relief' ... [is] ... impermissible." *Arista Records LLC v. Doe 3,* 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (other internal quotes omitted). Accordingly, a complaint "`does not need detailed factual allegations,'" but must

avoid containing "'labels or conclusions'" or "'formalistic recitation[s]'" *Id.* (quoting *Twombley*, 550 U.S. at 555).

Even when confining an examination of the extent and impact of mental illness on Mary Jo C.'s ability to work to the face of the complaint, Mary Jo C. satisfies this standard. Indeed, this may be why neither NYSLRS nor the Library argued below that Mary Jo C. was not disabled under the ADA. *See* A-55 – A-64; A-77 – A-83.

Mary Jo C. has suffered from mental illness since adolescence. A-38, ¶ 12. With mental illness, she has only worked intermittently since 1986. A-38, ¶ 13. As a result of behaviors symptomatic of her mental illness, the Library fired her in November, 2006. A-38; ¶ 16. Furthermore, as a result of behaviors manifested by Mary Jo C. that were symptomatic of her mental illness, libraries in Suffolk County concluded that Mary Jo C. was not a person who should be hired as a librarian, virtually ensuring that she will never work again. A-42, ¶¶ 40-41. In this way, there can be little doubt that Mary Jo C. is restricted in performing as a librarian, which renders her substantially impaired. *See Toyota Motor Mfg. Ky. v. Williams,* 534 U.S. 184, 202 (2002) (in context of working, degree of limitation of impairment requires comparison to average person having comparable training, skills and abilities).

Furthermore, on a Rule 12(b)(1) motion challenging jurisdiction, when jurisdictional facts are placed in dispute, a court has the "power and obligation to decide issues of fact by reference to evidence outside the pleadings." *Leblanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999). As neither appellee challenged the assertion of Mary Jo C. that she was disabled under the ADA, which resulted in the court, *sua sponte,* examining only the pleadings, the appellant did not have an opportunity to make a record as she was entitled to do on a Rule 12(b)(1) motion. *See id.*[3] If the appellees themselves raised the issue of disability or if the court provided Mary Jo C. with an opportunity to address the issue of disability under the ADA, she would have set forth evidence detailing that her mental health has deteriorated significantly over the last five years, which resulted in *inter alia*, her being hospitalized three times within a three month period and rendering it a certainty that she will never work again.

Mary Jo asserts that the failure to provide her with an opportunity to present evidence of disability can be cured by the usual practice of this Court to grant a party leave to amend the complaint on a Rule 12(b)(6) motion. *See, e.g., Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 118 (2d Cir. 2007); *Ronzani v. Sanofi* S.A., 899 F.2d 195, 198 (2d Cir. 1990). In this case, Mary Jo C. did not initially seek

[3] The remaining issues relating to the issue of jurisdiction, whether the plaintiff was "otherwise qualified" under the ADA and whether she sought a reasonable accommodation, were questions that did, and do, not involve any disputed issues of fact. *See infra* at 18-28.

leave from the district court to re-plead on the issue of disability because the appellees never raised this issue.[4]

2. If the "Otherwise Qualified" Requirement of the ADA Even Applies in this Case, Mary Jo C. Was an Otherwise Qualified Individual Because She Contracted With NYSLRS to be a Member and Worked at the Time She Was an NYSLRS Member.

Under Title II of the ADA, an otherwise qualified individual with a disability is someone who, with or without reasonable modifications to rules, policies or practices, meets the essential eligibility requirements for receipt of services or participation in programs or activities provided by a public entity. 42 U.S.C. § 12132(2). An individual is otherwise qualified when he meets the necessary requirements of the government program. *Sandison v. Michigan High Sch. Athletic Ass'n,* 64 F.3d 1026, 1034 (6th Cir. 1995); *Pottgen v. Missouri State High Sch. Activities Association,* 40 F.3d 926, 929 (8th Cir. 1994). Eligibility criteria are necessary when they further the objectives of the program of the public entity. *Cf.* 35 C.F.R. § 130(b)(4)(ii); *see also infra* at 25-27 (recognizing difference between alterations to substantive and procedural criteria that result from sought-after accommodations).

[4] May Jo C. did not request leave to re-plead after the district court's ruling on the issues of accommodation and the applicability of Title II rendered any amendment futile as it would have related to the issue of disability.

In the context of post-employment benefits, a person satisfies the essential eligibility requirements if she performed the essential functions of the job at the time of employment. *Castellano v. City of New York,* 142 F.3d 58, 68 (2d Cir. 1998). In this case, it is unnecessary to determine whether or not Mary Jo C. meets all the substantive criteria for the receipt of disability retirement benefits as she seeks only the *opportunity* to apply for such benefits. More specifically, she merely seeks the opportunity to establish that she paid money into the retirement system while she was employed to fund benefits in the event she became disabled and that she is now disabled. It is preposterous for the district court to find that Mary Jo C. was not otherwise qualified by invoking the very ministerial requirement that Mary Jo asserts can be reasonably accommodated without unduly burdening NYSLRS. *See infra* at 25-27.

The district court, relying on *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004); concluded that a program's "'formal legal eligibility requirements'" define who is otherwise qualified. A-23 (quoting *Henrietta D.*, 331 F.3d at 277). However, in *Henrietta D.* this Court further recognized that "the Rehabilitation Act requires affirmative accommodations to ensure that facially neutral rules do not in practice discriminate against individuals

with disabilities." *Henrietta D.*, 331 F.3d at 275.[5] When an individual like Mary Jo C. seeks a modification of a neutral rule that can, in fact, adversely impact people with disabilities, defining whether an individual is otherwise qualified solely by the criteria established by the facially neutral state itself, as did the district court, turns the ADA on its head. The district court effectively eliminated the ability of Mary Jo C. to seek modification of the eligibility criteria in question.[6]

3. A Waiver of The Three Month Period For Filing For Disability Retirement Benefits Constitutes a Reasonable Accommodation Under the ADA.

i. Because The Requirements of Federal Law Supersede State Law, an Accommodation That Requires State Officials to Act in Contravention of State Law is Not Inherently Unreasonable.

The Supremacy Clause of the Constitution provides that laws of the United States made pursuant to the Constitution shall be the supreme law of the land and states shall be bound by these laws notwithstanding any state law to the contrary. U.S. Const.art.VI, Cl. 2. Accordingly, this Court has recognized that state officials

[5] There can be little doubt that the ADA also contains this requirement. *See, e.g., Henrietta D.*, 331 F.3d at 272 (recognizing that except for subtle differences, Title II adopts standards required by Rehabilitation Act).

[6] Moreover, it is worth noting that *Henrietta D.* involved a situation in which the plaintiffs invoked the ADA to enforce their right to benefits to which they were entitled under state law. *Henrietta D.*, 331 F.3d at 264. In such a situation, defining "otherwise qualified" by the standards promulgated by the government defendants furthers the purpose of the ADA in providing a "comprehensive national mandate" for the protection of people with disabilities. *Id.* at 272.

may be required to act in contravention of state law in when enforcement of federal rights require such action. *See United States v. City of Yonkers,* 856 F.2d 444, 459 (2d Cir. 1988) (recognizing authority of federal court to order state officials to order tax abatements not permitted by state law in order enforce Title VIII rights).

This Court has also consistently recognized that when state statues conflict with individual rights under federal civil rights statutes, the federal provisions enforcing federal rights supersede state law. *See, e.g., Hargrave v. State of Vermont,* 340 F.3d 27, 38 (2d Cir. 2003) (ADA prohibits enforcement of durable power of attorney provision of state law because it discriminates against people with mental illness); *Tsombanidis v. West Haven Fire Dept.,* 352 F.2d 565, 580 (2d Cir. 2003) (affirming imposition of waiver of zoning ordinance under Fair Housing Amendments Act as reasonable accommodation) *Huntington Branch NAACP v. Town of Huntington,* 844 F.2d 926, 941-42 (2d Cir. 1988) (Title VIII of Civil Rights Act requires town to amend zoning laws that violate federal statute). Accordingly, this Court has expressly recognized that the reasonable accommodation requirement of the ADA, Rehabilitation Act and Fair Housing Amendments Act requires municipalities to waive its zoning laws:

> Returning to the example of the zoning ordinance prohibiting elevators, a proper reasonable accommodation claim might assert that the zoning authority should have waived or modified its rule against elevators in residential dwellings.

*Reg'l Econ. Comty. Action Program v. City of Middletown ("RECAP"),* 294 F.3d 35, 53 (2d Cir. 2002).

Case law from this Circuit is perfectly consistent with other circuit authority. Two circuits have concluded that an accommodation that requires state officials to violate state law on its face does not, by itself, render the accommodation unreasonable. *See Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009) (rejecting conclusion of lower court that accommodation that would have required state defendants to willfully ignore or violate the law is *per se* not reasonable); *McGary v. City of Portland,* 386 F.3d 1259, 1269 (9th Cir. 2004). *McGary* is particularly instructive in that the plaintiff sought an accommodation almost identical to that of Mary Jo C.: an extension of time required by state law to file a response to a nuisance proceeding. 386 F.3d at 1261. Such a request constituted a reasonable accommodation under the ADA. *Id.,* at 1269.

Likewise, in *Quinones v. City of Evanston, Illinois*, 58 F.3d 275 (7th Cir. 1995), the Court framed the issue and holding under the Age Discrimination in Employment Act as follows:

> Evanston has been told by the State of Illinois that it may not provide pensions to firefighters hired after age 34; it has been told by the United States of America to treat these employees no worse than those hired when younger. Evanston believes that it is compelled to follow the directive from the state, but the Supremacy Clause of the Constitution requires a different order of priority. A discriminatory state law is not a defense to liability under federal law; it is a source of liability under federal law.

*Id.* at 277; *see also Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (concluding that ADA may require local officials to waive application of Hawaii's quarantine law in the case of guide dogs); *Galusha v. New York State Dep't of Evtl Conservation,* 27 F. Supp.2d 117, 125 (N.D.N.Y. 1998) (relying on *Crowder* to conclude that neutral state law discriminated against people with disabilities by denying them access to state parks; ADA required exemption to state law as reasonable accommodation). In sum, state law, does not serve as impediment to enforcing federal rights. *See, e.g., Yonkers*, 856 F.2d at 459.

This is so because the Supremacy Clause provides that state law cannot stand as an "obstacle to the accomplishment and execution of the full purposes of objectives of Congress." *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 373 (2000). Hence, when a proposed accommodation under the ADA conflicts with state law, because abrogation of Eleventh Amendment immunity evinces Congressional intent "`to exercise its constitutional authority to supersede the laws of a state, the Supremacy Clause requires courts to follow federal law.'" *Galusha*, 27 F. Supp.2d at 124 (quoting *Levitin v. PaineWebber,* 159 F.3d 698 (2d Cir. 1998)).

In passing the ADA, Congress sought to remedy the disadvantaged economic status of disabled individuals. *See* 42 U.S.C. § 12101(a)(6). It sought to do so in part by providing to people with disabilities a preference in the form of an

accommodation. *See U.S. Airways v. Barnett*, 535 U.S. 391, 398 (2002); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 143 (2d Cir. 1995). Hence, if the accommodation that Mary Jo C. seeks, a waiver of the filing period to apply for disability retirement benefits, will enable Mary Jo C. to recoup the benefits to which she is entitled, and for which she lacked the ability to apply simply because of her mental illness, then state law cannot frustrate Congressional intent to provide the accommodation.

Furthermore, there can be no doubt that if the plaintiff filed a disparate impact claim that the district court found meritorious, principles of federalism would not bar the court from enjoining application of the three month filing requirement, even if NYSLRS did not possess any invidious intent. *See RECAP,* 294 F.3d at 52; *Huntington Branch NAACP,* 844 F.2d at 936,942. Hence, if federalism concerns would not preclude enjoining enforcement of the three month filing requirement under a disparate impact theory, then it cannot serve as a basis to find an accommodation that would compel the same result in the absence of an undue burden to NYSLRS. *See* 28 C.F.R. § 35.130(b)(7).

ii. A Waiver of the Three-Month Period For Filing For Disability Retirement Benefits Constitutes a Reasonable Accommodation Because it Does Not Require NYSLRS to Alter Its Substantive Eligibility Criteria.

An accommodation is reasonable unless it will create an undue hardship or fundamentally alter the nature of the governmental program. *Borkowski,* 63 F.3d

at 138; 35 C.F.R. § 35.130(b)(7).[7] On one hand, this Court has recognized that the reasonable accommodation provision serves to remedy neutral rules that discriminate against people with disabilities, *Henrietta D.*, 331 F.3d at 275 and requires accommodations to procedures to ensure meaningful access to programs operated by public entities. *Rothchild v. Grottenthaler,* 907 F.2d 286, 292-93 (2d Cir. 1990) (requiring the provision of sign language interpreter at school initiated conferences). On the other hand, this Court has held that "[t]itle II of the ADA requires no . . . dimishment of otherwise applicable standards." *Harris,* 57 F.3d at 74 (rejecting of accommodation claim that would have required state to weaken its licensing standards for physicians); *see also Pottgen*, 40 F.3d at 930 (waiving of age limit for participation in school sports not reasonable); *Aughe,*885 F. Supp. at 1432-33 (waiving age limitation for receipt of benefits not reasonable).

[7] One theoretical difference between the plaintiff's Title II claim and either a Title I claim, or a claim under Rehabilitation Act, is that Title I requires a defendant to establish that an accommodation creates an undue hardship, *Borkowski*, 63 F.3d at 148, while a Title II claim requires a defendant to establish that an otherwise reasonable accommodation will fundamentally alter the program impacted by the accommodation. *See Olmstead v. L.C. by Zimring*, 527 U.S. 581, 603 (1999) (citing 28 C.F.R. § 35.130(b)(7)). It remains unclear the degree to which the undue hardship and fundamental alteration defenses differ, if at all. *See McGary*, 386 F.3d at 1269, n.7 (no significant difference between analysis of fundamental alteration defense and defenses under Rehabilitation Act); *Disability Advocates Inc., v. Paterson*, 653 F. Supp. 2d 184, 301, n.890 (E.D.N.Y. 2009) (rejecting notion that reasonable accommodation defense is distinct from fundamental alteration defense).

Indeed, this Court's analysis in *Wright v. Giuliani*, 230 F.3d 543 (2d Cir. 2000), supports this substantive/procedural distinction. In *Wright*, this Court recognized that the ADA generally does not require substantive modifications to program standards and benefits. 230 F.3d at 547-48. Rather, the ADA requires "meaningful access" to existing benefits. *Id.*

The distinction between providing a procedural accommodation that would facilitate access to rights to which a disabled individual is otherwise entitled, and the altering of substantive criteria governing the administration of public programs, can be evinced by the Department of Justice illustration of what constitutes a reasonable accommodation:

> ILLUSTRATION 2: A county general relief program provides emergency food, shelter, and cash grants to individuals who can demonstrate their eligibility. The application process, however, is extremely lengthy and complex. When many individuals with mental disabilities apply for benefits, they are unable to complete the application process successfully. As a result, they are effectively denied benefits to which they are otherwise entitled. In this case, the county has an obligation to make reasonable modifications to its application process to ensure that otherwise eligible individuals are not denied needed benefits. Modifications to the relief program might include simplifying the application process or providing applicants who have mental disabilities with individualized assistance to complete the process.

Americans with Disabilities Act: Title II Technical Assistance Manual § II - 3.6100, General Illustration 2 (1993).

Finally, to the extent that the waiver of a filing requirement might unduly burden, or even fundamentally alter the state disability retirement system, such a

question typically cannot be addressed in a Rule 12 motion that generally does not contain a factual record. *See Lyons v. Legal Aid Soc.*, 68 F.3d 1512, 1517 (2d Cir. 1995). The district court concluded that the three-month rule serves to alleviate hardships when members mistakenly terminate their service prior to filing for benefits. A-25 (citing *Matter of Grossman v. McCall*, 262 A.D. 2d 923, 924 (3d Dep't 1999)). It does, but it serves to eliminate hardship to an employee, not the State.

When the New York Legislature passed the three-month requirement, it altered then-existing law that required employees to be employed at the time of the application. *See* Letter of Deputy Comptroller, Bill Jacket L. 1981, ch. 756. At the time of this change, employees had to be "in service," *i.e.*, employed at the time of the application. The change sought to alleviate hardship to employees who mistakenly terminated the jobs prior to applying for benefits. *Id.* Indeed, one can argue that the proposed accommodation not only furthers the aims of the ADA, but also the underlying purpose behind the State legislation that imposed the three-month requirement as it protects against "the inequitable forfeiture of benefits." Letter of Superintendent of Insurance, Bill Jacket L. 1981, ch. 756.

B. Congress Validly Abrogated Eleventh Amendment Immunity Because Providing the Requested Accommodation to Mary Jo C. is a Proportional Remedy to the Problems That Congress Found.

When determining whether Congress has validly abrogated Eleventh Amendment immunity, this Court must assess whether Title II exhibits "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 541 U.S. 356, 365 (2001) (internal quotes omitted). In passing Title II, Congress sought to enforce the provisions of the Fourteenth Amendment, *Tennessee v. Lane*, 504 U.S. 509, 523 (2004), including the substantive component of the Due Process Clause. *Bolmer v. Oliveira*, 595 F.3d 134, 147 (2d Cir. 2010). The Due Process Clause protects both the right to contract and engage in the orderly pursuit of happiness, which are part of the fundamental right to liberty that the Due Process Clause protects. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

When passing the ADA, Congress sought to remedy "pervasive unequal treatment in the administration of state services and programs." *Lane*, 541 U.S. at 524. By becoming a member of NYSLRS, Mary Jo C. entered into a contractual relationship that the State Constitution protects. NY Const art. V, § 7. In the present case, the arbitrary imposition of a three-month period for filing for disability retirement benefits has, as this case illustrates, the potential to significantly impact disproportionally on people with mental illness.

Congress has mandated that states provide a preference to people with disabilities when the preference will not unduly burden the states. *See supra* at 24. This preference serves to help create opportunities that would not otherwise exist for people with disabilities. Senate Report No. 101-116 at 32 (1989); H.R. Rep. 101-485 (II) at 65 (1990).[8] Clearly, removing barriers that impair contract rights of people with mental illness is congruent to the problems that Congress found. Indeed, Congress relied on Harris polls to find that that people with disabilities are uniquely disadvantaged as they are, *inter alia*, much poorer than other Americans. Senate Report No. 101-116 at 7 (1989). Many will argue that the pursuit of happiness that the Due Process Clause protects often requires money. As stated previously, the accommodation in this case is a remedy that is proportional to the problem that Congress found. Providing an opportunity to Mary Jo C. to obtain benefits to which she is entitled, would cure the earlier imposition of state law that arbitrarily denied her such opportunity.[9]

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[8] Although these citations to the legislative history related to the provision of reasonable accommodation in the employment context, Congress intended that Title II incorporate the requirement of reasonable accommodations. H.R. Rep.101-485 (II) at 84.

[9] The Eleventh Amendment does not bar claims for injunctive relief against a state official in his official capacity. *See Henrietta D.*, 331 F.3d at 289. Hence, Mary Jo C. requests leave to file an amended complaint naming the Comptroller as the head of NYSLRS as a defendant in his official capacity if this Court finds that Congress did not validly waive the State's Eleventh Amendment immunity but that she has otherwise set forth a valid ADA claim.

## II. THE LEGISLATIVE HISTORY OF THE ADA AND DEFERENCE TO THE ATTORNEY GENERAL COMPEL THE CONCLUSION THAT TITLE II COVERS EMPLOYMENT DISCRIMINATION BY PUBLIC ENTITIES.

This Court has recognized that the prohibition against discrimination in Title II of the ADA "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context." *Innovative Health Sys.v. City of White Plains,* 117 F.3d 37, 45 (2d Cir. 1997). In reaching this conclusion, this Court cited the legislative history of the ADA:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination", as was done in title I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to *all actions of state and local governments.*
>
> Title II of the bill makes *all activities of State and local governments* subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504 (nondiscrimination).

*Id.* (quoting H.R. Rep. No.101-485 (II) at 84, 151 (1990) (emphasis by this Court). At the time of passage of the ADA, it was well-settled that section 504 of the Rehabilitation Act prohibited employment discrimination. *See Consolidated Rail v. Darrone*, 465 U.S. 624, 632 (1984).[10]

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[10] While Congress intended to incorporate the provisions of the Rehabilitation Act to Title II, it wanted to eliminate the requirement within the Rehabilitation Act that the discriminatory conduct arise solely by reason of disability. Senate Report No. 101-116 at 42. In explaining how elimination the reasons for eliminating the

In addition, Congress made clear in the legislative history that it did not intend for Title III to cover claims of employment discrimination against places of public accommodations and specifically stated that Title I covered these claims. Senate Report No. 101-116 at 56; H.R. Rep. 101-485 (II) at 382. "'[I]t is well-settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Smaldone v. Senkowski*, 273 F.3d 133, 137 (2d Cir. 2001), *cert. denied,* 535 U.S. 1017 (2002) (quoting *Duncan v. Walker*, 533 U.S. 167, 173 (2001)) (other internal quotes omitted). This Court should apply this rule of statutory construction to a review of legislative history because both a review of legislative history and this rule are tools to decipher Congressional intent.

Furthermore, the regulations promulgated by the Department of Justice provide that Title II of the ADA govern claims of discrimination arising out of employment. 28 C.F.R. § 35.140. While it remains unclear whether the views of the Department Justice are entitled to the degree of deference warranted pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,

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solely by reason of disability requirement, Congress chose a hypothetical case of discrimination to illustrate the difference under the ADA. Out of a virtually limitless set of hypothetical factual scenarios Congress could choose from, it chose a case of employment discrimination. H.R. Rep. 101-485(II) at 85. This is a pretty good indication that Congress intended that Title II cover employment.

844 (1984), "'it is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Olmstead v.L.C. ex rel. Zimring,* 527 U.S. at 598-99 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)) (other internal quotes omitted).[11]

Presently a circuit split exists as to the question of whether Title II authorizes claims of employment discrimination against state or local governments. *Compare Bledsoe v. Palm Beach County Soil & Water Conservation Dist.,* 133 F.3d 816, 820-23 (11th Cir. 1998) (Title II governs employment by state and local governments) *with Zimmerman v. Oregon Dept. of Justice,* 170 F.3d 1169, 1173-1178 (9th Cir. 1999), *cert. denied,* 531 U.S. 1189 (2001) (Title II does not govern employment by government).[12] A review of both Circuit decisions reveals that the decision in *Zimmerman* is antithetical to this Court's mode of interpreting Title II, while the decision in *Bledsoe* is consistent with this Court's Title II analysis in *Innovative Health.*

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[11] Under *Chevron*, when Congress has left a statutory gap for an administrative agency to fill, courts must give controlling weight to the regulations promulgated by the agency "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

[12] Presently, a split also exists among the district courts within this Circuit. *Compare Transport Workers Union v. New York City Transit Authority*, 342 F. Supp.2d 160, 171-75 (S.D.N.Y. 2004)(authorizing Title II lawsuit) *with Fleming v. State University of New York*, 502 F. Supp.2d 324, 332-34 (E.D.N.Y. 2007) (limiting employment discrimination claims to Title I).

First, the court in *Zimmerman* refused to even examine the legislative history of the ADA, concluding that the text of the ADA unambiguously establish that Congress did not intend for Title II to govern employment discrimination claims against public entities. 170 F.3d at 1178. Perhaps even more significantly, as detailed below, the Ninth Circuit in *Zimmerman* expressly rejected the rationale underlying this Court's decision in *Innovative Health.* 170 F.3d at 1175.

Both this Court and the Ninth Circuit examined in detail the prohibition against discrimination set forth in Title II:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. This Court concluded that this language "does not limit the ADA's coverage to conduct that occurs in the `programs, services, or activities'" of the public entity. *Innovative Health*, 117 F.3d at 44-45. On the other hand, the Ninth Circuit reached the opposite conclusion: that the phrase "or be subjected to discrimination" relates only to services, programs or activities of the public entity. *Zimmerman,* 170 F.3d at 1174-76. Indeed, the Ninth Circuit acknowledged that if a Court interpreted § 12132 in the manner that this Court has, such interpretation "would be broad enough to include employment discrimination by a public entity." *Id.* 170 F.3d at 1175.

On the other hand, the Eleventh Circuit opinion in *Bledsoe* is very consistent with this Court's opinion in *Innovative Health.* The court relied on *Innovative Health* to conclude that the final clause in 42 U.S.C. § 12132 does not limit discrimination to only "services, programs or activities" but all discrimination, regardless of the context. *Bledsoe,* 133 F.3d at 821-22. Similarly, the court in *Bledsoe* relied on legislative history to recognize that Congress sought to incorporate the forms of discrimination prohibited under section 504 of the Rehabilitation Act to Title II. *Id.* at 821.

Against this weight of authority, the district court concluded that district court decisions within this Circuit and Supreme Court language in *Bd of Trs. of University of Alabama v. Garrett,* 531 U.S. at 356 and *Tennessee v. Lane*, 541 U.S. at 509, in which the Supreme Court noted in passing that Congress Title I deals with employment, warranted the conclusion that Title I served as the exclusive remedy for employment discrimination by public entities. A-32. Relying on dicta that barely relates to the issues at hand, in cases in which the issue at hand was not before the Court, hardly serves as persuasive reasoning.

## CONCLUSION

For the reasons given in the brief, this Court should vacate the judgment of the district court and remand this case to this district court. If this Court believes that Mary Jo C. has not set forth enough facts to establish that she is disabled under

the ADA, but has otherwise raised meritorious claims, this Court should grant her leave to re-plead. If this Court believes that Congress has not validly abrogated Eleventh Amendment immunity but that Mary Jo C. has otherwise set forth a valid ADA claim, this Court should grant leave to re-plead as to enable Mary Jo C. to name the Comptroller in his official capacity in place of NYSLRS.

Dated: Central Islip, New York
September 28, 2011

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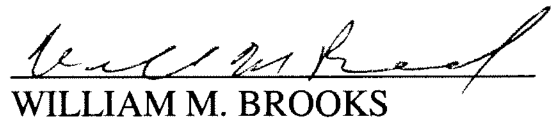
CERTIFICATE OF COMPLIANCE

William M. Brooks, the attorney for the appellant, certifies pursuant to 28 U.S.C. § 1746 and Fed.R.App.P. 32(a)(7)(C):

I used the tool format of Microsoft word, the computer program to type this brief, to obtain a word count. The program stated that this brief was 8491 words and 766 lines.

Dated: Central Islip, New York
September 28, 2011



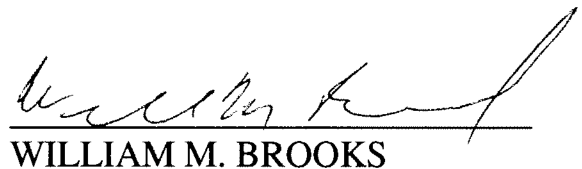
WILLIAM M. BROOKS

## CERTIFICATE OF SERVICE

I, William Brooks. Certify the truth of the following pursuant to 28 U.S.C> § 1746:

On September 28, 2011, I served two copies of appellant's brief on the New York State Department of Law, attorney for NYSLRS, by first class mail, by affixing proper postage and mailing to 120 Broadway, New York, NY 10271, Attn Laura Johnson. I also served two copies of the brief on Rivkin Radler,LLP, attoerny for the Central Islip Public Library by the same method and mailing to 926 RXR Plaza, Uniondale, NY 11566-0926, Attn Harris Zakarin. I also sereved two copies of the brief on both *amicus curiae* by mailing to Jo Anne Simon, attorney for Disability Advocates *et al,* at 356 Fulton Street, Brooklyn, New York 11021 and Sasha Samberg-Champion, attorney for the United States at Ben Franklin Station, P.O. Box 14403, Washington. D.C. 20044-4403 by the same method of service as set forth above.

Dated: Central Islip, New York
September 28, 2011



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