IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GREGORY HOLT, ADC # 129616 **APPELLANT**

v. **12-3185**

RAY HOBBS, et al. **APPELLEES**

AN APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

HONORABLE BRIAN S. MILLER
UNITED STATES DISTRICT JUDGE

BRIEF OF APPELLEES AND ADDENDUM

Respectfully Submitted,

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SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT

Appellant Gregory Holt alleges certain Arkansas Department of Correction (ADC) employees violated his constitutional rights when they enforced the ADC's Grooming Policy, which does not allow inmates to maintain a beard. Holt wants to maintain a beard for alleged religious reasons and argues the district court erred in not following the practices of a California penal institution. This case was allowed to proceed to a Pre-Jury Hearing on January 4, 2012 against Appellees Ray Hobbs, Gaylon Lay, D.W. Tate, Vernon Robertson, Michael Richardson, and Larry May. Holt alleges the district court erred when it dismissed Holt's Complaint following the Pre-Jury Hearing. The district court did not err in following well-established case law and dismissing this case. As a result, this Court should affirm the decision of the district court.

Appellees respectfully submit that this is a straightforward case, as the case law in the Eighth Circuit is well established, and assert that the Court would not be substantially aided by oral argument.

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JURISDICTIONAL STATEMENT

This is an appeal from an Order and Judgment issued in the United States District Court, Eastern District of Arkansas, Pine Bluff Division, Judge Brian S. Miller presiding. The Order followed a Prejury Hearing, which was held before Magistrate Judge Joe J. Volpe on January 4, 2012.

Appellant Gregory H. Holt, an inmate of the Arkansas Department of Correction (hereinafter, "ADC"), filed a civil rights action against six named individuals on June 28, 2011. (DE 2) Appellant sued these individuals in their official capacities under 42 U.S.C. § 1983. On that same date, Plaintiff filed a Motion for Preliminary Injunction and Temporary Restraining Order, seeking an Order prohibiting the ADC from forcing him to comply with their grooming policy. (DE 3) On October 18, 2011, the district court granted Appellant's Motion for Preliminary Injunction and Temporary Restraining Order. (DE 28) Appellees were served with the Summons, Complaint, and Amended Complaint on November 7, 2011.

On January 4, 2012, the parties attended a Pre-Jury Hearing before magistrate Judge Joe V. Volpe. (DE 73) On January 27, 2012, the Proposed Findings and Recommendations were issued, recommending the Order Granting the Motion for Preliminary Injunction and Temporary Restraining Order be vacated, and the Complaint dismissed with prejudice. (DE 82) Appellant filed his

Objections on February 8, 2012. (DE 86) The District Court entered an Order on March 23, 2012, adopting the Proposed Findings and Recommendations. (DE 93) Judgment was entered on March 23, 2012. (DE 94) Appellant filed a Motion for Re-Hearing, or in the alternative, Motion for Stay of Order Pending Appeal on March 27, 2012. (DE 96) Appellant filed his Motion for Extension of Time to file Notice of Appeal on April 17, 2012. (DE 98) The District Court granted Appellant's Motion for Stay of Order Pending Appeal as well as the Motion for Extension of Time on April 19, 2012. (DE 99) Appellant filed his Notice of Appeal on April 27, 2012, as to the following pleadings: DE 82 - Report and Recommendations; DE 93 – Order Adopting Report and Recommendations; DE 94 – Judgment; and DE 99 – Order.

STATEMENT OF THE ISSUES

I.

THE DISTRICT COURT PROPERLY HELD THAT THE ARKANSAS DEPARTMENT OF CORRECTIONS GROOMING POLICY, AS STATED IN ADMINISTRATIVE DIRECTIVE 98-04, DOES NOT VIOLATE THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSON ACT OF 2000, 42 U.S.C. §2000CC ET SEQ.

Turner v. Safely, 482 U.S. 78 (1987)

Hamilton v. Schriro, 74 F.3d 1545 (8th Cir. 1996)

Overton v. Bazzetta, 539 U.S. 126 (2003)

II.

APPELLANT'S RETALIATION CLAIM IS NOT PROPERLY BEFORE THIS COURT

In re Horton, 668 N.W.2d 208 (Minn. App. 2003).

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988).

STATEMENT OF THE CASE

Appellant Gregory Holt, an inmate incarcerated in the Arkansas Department of Correction (ADC), filed a *pro se* Complaint on June 28, 2011, alleging his constitutional rights had been violated by six (6) employees of the ADC. Specifically, Holt alleged that the ADC grooming policy violates his constitutional rights and the Religious Land Use and Institutionalized Persons Act (PLUIPA). Also on that same date, Holt filed a Motion for Preliminary Injunction and Temporary Restraining Order. In it, Holt sought to prevent the ADC from forcing him to comply with the grooming policy, and/or to prevent the ADC from reprimanding him for his failure to comply. On October 18, 2011, the District Court granted Holt's Motion for Preliminary Injunction and Temporary Restraining Order.

On November 7, 2011, ADC employees Ray Hobbs, Gaylon Lay, D.W. Tate, Vernon Robertson, Michael Richardson were served with copies of the Summons, Complaint, and Amended Complaint. On November 15, 2011, Holt filed a Motion for Hearing. Appellees' Answer to the Complaint was filed on November 28, 2011.

On November 30, 2011, Magistrate Judge Joe J. Volpe scheduled an Evidentiary Hearing for January 4, 2012. The case proceeded to an Evidentiary Hearing on January 4, 2012 before Magistrate Judge Volpe. On January 27, 2012,

Judge Volpe recommended the Order granting Holt's Motion for Preliminary Injunction and Temporary Restraining Order be vacated, Holt's Motion for Preliminary Injunction and Temporary Restraining Order be denied, and that Holt's Complaint be dismissed in its entirety and the dismissal count as a "strike" for purposes of the Prison Litigation Reform Act. Holt filed his Objections to the proposed findings on February 8, 2012. District Court Judge Brian S. Miller adopted Magistrate Judge Volpe's proposed findings in their entirety on March 23, 2012. The Order of Dismissal and Judgment were entered that day.

Holt filed a Motion for Re-Hearing, or in the alternative, Motion for Stay of Order Pending Appeal on March 27, 2012. On April 17, 2012, Holt filed a Motion for Extension of Time to File Notice of Appeal. On April 19, 2012, the District Court granted Holt's Motion for Hearing and Granted Holt an Extension of Time to file his Notice of Appeal. Holt filed his Notice of Appeal on April 27, 2012.

STATEMENT OF THE FACTS

ADC's Administrative Directive 98-04 ("AD 98-04") outlines the ADC's grooming policy. It states, in part, the following:

> B. Inmates' hair must be worn loose, clean and neatly combed. No extreme styles are permitted, including but not limited to corn rows, braids, dread locks, Mohawks, etc. The hair of male inmates must be cut so as to be above the ear, with sideburns no lower than the middle of the ear lobe and no longer in the back than the middle of the nape of the neck. Female inmates may wear their hair no longer than shoulder length.
>
> D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSH 207 upon demand.

The purpose of the policy is "to provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." (*Id*.) An inmate's failure to comply with the grooming policy is grounds for disciplinary action. (*Id*.)

Appellant Holt identifies himself as a Salafi Muslim who seeks to grow a beard in observance of his religion. Holt acknowledges that the ADC has a legitimate governmental interest in maintaining security for inmates and staff alike and in the prevention of the follow of contraband. Holt seeks permission to grow a

½” (one half inch) beard. AD 98-04 does not allow for a ½” beard to be worn by any inmate and objects to Holt’s request on the basis of security concerns.

SUMMARY OF THE ARGUMENT

The District Court's ruling, in which it vacated the Order granting Holt's Motion for Preliminary Injunction and Temporary Restraining Order, dismissed Holt's Complaint with prejudice and counted it as a "strike" for purposes of the Prison Litigation Reform Act, was correct under the law and should be affirmed by this Court. Appellees did not violate Holt's constitutional rights pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, et al. The District Court correctly ruled that Holt could not prove a set of facts in support of his claims with regard to the ADC's grooming policy issue.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE ARKANSAS DEPARTMENT OF CORRECTIONS GROOMING POLICY, AS STATED IN ADMINISTRATIVE DIRECTIVE 98-04, DOES NOT VIOLATE THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSON ACT OF 2000, 42 U.S.C. §2000CC ET SEQ.

A. Standard of Review

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, et seq, to provide protection for institutionalized persons' religious freedom. *Singson v. Norris*, 553 F.3d 660, 662 (8th Cir. 2009); *Murphy v. Mo. Dep't of Corrs*., 372 F.3d 979, 987 (8th Cir. 2004). RLUIPA provides, in part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution. . . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1. RLUIPA "defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs.'" *Van Wyhe v. Reisch*, 58 F.3d 639, 655-56 (8th Cir. 2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner's religion. *Gladson v. Iowa Dep't of Corrs*., 551 F.3d 825, 831-32 (8th Cir. 2009).

A prisoner's claim under RLUIPA is, instead, evaluated under a compelling governmental interest standard. *Cutter*, 544 U.S. at 722; *Gladson*, 551 F.3d at 832; *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008). The United States Supreme Court has remarked that "context matters" in the application of this "compelling government interest" standard, and that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter*, 544 U.S. at 722; *Fegans v. Norris*, 537 F.3d 897, 902 (8th Cir. 2008). While the government must meet a higher burden than the rational relationship test applied in constitutional cases, the court still affords a significant amount of deference to the expertise of prison officials in evaluating whether they met that burden. *Gladson*, 551 F.3d at 832. "The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). In reaching the proper balance, courts apply the framework of analysis that was established in *Turner v. Safely*.

As the Supreme Court has recently reinterated, *Turner* sets forth four factors relevant in determining the reasonableness of the regulation at issue. First, is there a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forth to justify it? Second, are there "alternative means of exercising the right that remain open to prison inmates?" Third, what "impact" will "accommodation of the asserted constitutional right have on guards and other

inmates, and on the allocation of prison resources generally?" And, fourth, are "ready alternatives" for furthering the governmental interest available?

B. Discussion

"It is well settled that a prison inmate retains those constitutional rights that are not inconsistent with his status as a prisoner or the legitimate penological objectives of the corrections system," *Turner v. Safley*, 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier*, 417 U.S. 822 (1974)) (internal quotations omitted). The evaluation of penological objectives in this context is "committed to the considered judgment of prison administrators." *O'Lone v. Shabazz*, 482 U.S. 342, 349 (1987); *Fegans*, 537 F.3d at 902. To ensure that courts afford appropriate deference to those judgments, courts review prison regulations alleged to infringe on constitutional rights under a "reasonableness test" that is less restrictive than ordinarily applied to alleged infringements of fundamental rights. *O'Lone*, 482 U.S. at 349; *Fegans*, 537 F.3d at 902.

A prison regulation or action is valid, even if it restricts a prisoner's constitutional rights, if it is "reasonably related to legitimate penological interest." *Gladson*, 551 F.3d at 832 (quoting *Turner*, 482 U.S. at 89). As the Supreme Court explained, in *Turner*, running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of

government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

During the hearing in the present case, Appellees presented evidence that established the ADC's compliance with *Turner v. Safley*. It is undisputed that the first factor, whether there exists a valid and rational connection between the ADC's prison regulation (Administrative Directive 98-04) and the legitimate governmental interest, is satisfied. In his Complaint, filed on June 28, 2011, Holt acknowledged that the ADC has a "legitimate governmental interest in maintaining security for inmates and staff alike and in the staunching of the flow of contraband." (DE 2) Holt further acknowledges that AD 98-04 in the ADC's attempt to satisfy the legitimate governmental interest." (DE 2)

In addition to Holt's admission and acknowledgement, testimony was given by Appellee Gaylon Lay, Cummins Unit, regarding a valid and rational connection between prison regulation and legitimate governmental concerns he has. Appellee Lay testified that if an inmate were allowed to maintain a beard, he would have concerns regarding how the inmate could change his appearance during an escape. (DE 82) An inmate with a beard could shave it off. Appellee Lay further expressed his concerns by posing the following questions: (1) how does one consistently determine on a day-to-day basis whether an inmate's beard is one-

half-inch long; and (2) what if the inmate disagreed with the assessment of his beard, as Holt has in his prior verbal altercations with inmate barber's assigned to trim his beard? (DE 82) A security concern for the inmate barber as well as the complaining inmate would be obvious, and up to the institution to more closely supervise these individuals to prevent physical altercations.

The second factor, whether there is an alternative means of exercising the right that remains open to prison inmates, was satisfied at the hearing. Holt testified and acknowledged that he had been provided a prayer rug and a list of distributors of Islamic materials. (DE 82) He further testified that he is allowed to correspond with a religious advisor, and is allowed to maintain the required diet of his choosing, and to observe religious holidays. (DE 82)

Holt further testified regarding his ability to practice his religious beliefs that followers of his faith receive credit for attempting to follow his religious tenets; thus, even though the Arkansas Department of Correction does not allow inmates to wear beards as Holt seeks to do, he is not "punished" by his religion. (DE 82)

A great amount of testimony and evidence was presented regarding the third and fourth factors, whether the accommodation would have a significant "ripple effect" on guards and other inmates and on the allocation of prison resources, was received and whether there is an alternative that fully accommodates the prisoner at a *de minimis* cost to valid penological interest. Appellee Gaylon Lay, Warden of

the Cummins Unit, testified as to his concern, based upon years of experience, he had for all inmates if Holt, or any other inmate was afforded preferential treatment. (DE 82) Appellee Lay testified about his concern that by accommodating one inmate but denying other inmates their preferences, the inmate accommodated could become a target by the other inmates. (DE 82)

ADC Assistant Director Grant Harris testified regarding his concerns of harm regarding the effects of affording one or several inmates preferential treatment one inmate if he were allowed to create his own grooming style. (DE 82) Mr. Harris testified that such a move could elevate an inmate's status to that of a leader, which in turn could create hostility between the 15,000 inmate population, thus causing them to take matters into their own hands. (DE 82) It is for the safety and security of all inmates that rules be created across the board, and applicable to everyone.

With regard to the impact upon staff in accommodating inmates who requested, for religious purposes, not to curt their hair, the evidence established that an undue burden would have been placed upon staff if inmates were not required to follow the grooming policy. More time would need to be spent with each inmate for personal inspections, which would have altered their ability to focus attention on security. Also, a less restrictive grooming policy would have

caused staff to have to inspect the inmate's person more closely, thereby becoming more intrusive with the inmates body. (DE 82)

Appellee Lay further expressed concern about beards being used as a means to facilitate the introduction of contraband into the inmate population. According to Lay, a one-half inch beard can be used to conceal razor blades, drugs and homemade darts.

Grant Harris, ADC Assistant Director, explained that the mission of the ADC's grooming policy is to prevent the introduction of weapons and contraband into the prisons and that inmate facial hair poses a security risk. (DE 82) Mr. Harris testified that a needle from a syringe could be concealed in an inmate's beard, which created a safety concern for the officers charged with inspecting the inmate beards who could become injured by needles or broker razors. (DE 82) Mr. Harris further testified regarding the emerging threat to security at the ADC involved cellular phones. (DE 82) Mr. Harris explained how inmates try to circumvent the ADC's phone system by smuggling in cellular telephones piece by piece and then reassembling them inside the unit. Cellular phones can be used to facilitate the introduction of drugs and weapons in to the inmate population. (DE 82) Mr. Harris demonstrated to the Court how small the SIM card for cellular telephones can be, and brought one as a demonstration for the Court. (DE 82)

In his appeal brief, Holt offers for the first time, a variety of options and alternatives he believes to be available to the Appellees. At the hearing held in this case, the only option Holt offered was for the ADC to photograph each of the 15,000 + inmates twice – once without a beard and another with a beard. (DE 82) Appellees testified as to how overly burdensome this would be if they were required to keep up with the changing looks of every inmate. Further, to follow Holt's suggestion, every time an inmate gained a few pounds or changed their hair style, they should be re-photographed. Again, Holt's only suggestion at the hearing in this case further supported Appellee's position that to do so would be overly burdensome and would require additional manpower in order to accomplish these tasks as well as provide security within the department on a daily basis.

In support of his case, Appellant Holt urges this Court to disregard its 2008 holding in *Fegans*, as well as all other established Eighth Circuit case law, and instead follow the Ninth Circuit in a case decided four years prior to *Fegans*, *Mayweathers v. Terhune*, 328 F.Supp. 2d 1086 (E.D. Cal. 2004). *Mayweathers* is not persuasive authority.

The Eighth Circuit Court of Appeals has repeatedly rejected First Amendment challenges to prison regulations that prohibit inmates from wearing long hair. One such case on point with Holt's case, is *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). In *Hamilton*, the appellee prisoner, an American Indian,

initiated an action under 42 U.S.C.S. § 1983 alleging that appellant prison officials violated his First Amendment right to free exercise of religion by requiring him to cut his hair and by denying him access to a sweat lodge. Prison officials testified that long hair poses a threat to prison safety and security. Testimony further revealed that without the hair length regulation, prison staff would be required to perform more frequent searches of inmates, which could cause conflicts between staff and inmates. Searching an inmate's long hair would be difficult, especially if it were braided. Testimony was also presented by prison officials that they had tried to control gangs by not allowing them to identify themselves through colors, clothes, or hair carvings. Further, testimony was that if the prison officials allowed the American Indians to be exempt from the hair length regulation that it could cause resentment by the other inmates. The prison officials concluded that there was no alternative to the hair length policy because only short hair can easily be searched and remain free of contraband. The officials also believed that long hair could also cause problems with inmate identification.

The Eighth Circuit concluded that it is more than merely "eminently reasonable" for a maximum security prison to prohibit inmates from having long hair in which they could conceal contraband and weapons. It had a compelling reason for doing so. Further, it is important for prison administrators to prevent inmates from identifying with particular gangs through their hair style. The safety

and security concerns expressed by prison officials were based in their collective experience of administering correctional facilities. These are valid and weighty concerns. Moreover, there is no viable less restrictive means of addressing these concerns.

Hamilton clearly established that a grooming policy, on all fours with the ADC's policy, passes the strict-scrutiny test. Moreover, the Eighth Circuit has repeatedly rejected First Amendment challenges to prison regulations that prohibit inmates from wearing long hair. *See Campbell v. Purkett*, 957 F.2d 535, 536-37 (8th Cir. 1992) (upholding dismissal of inmate's claim that a prison grooming policy prohibiting long hair violated his right to freely exercise his Nazarite religion); *Dunavant v. Moore*, 907 F.2d 77, 79 (8th Cir. 1990) (holding that prison grooming policy prohibiting beards longer than two inches was based on legitimate and neutral penological security objectives and, therefore, did not violate the First Amendment); *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990) (holding that preventing prisoners from concealing contraband and alleviating confusion in prisoner identification are valid penological interests justifying prison hair-length policy, although contraband had never been found in any inmate's hair, and identification fears were hard to credit in light of prison's lax approach to photographing inmates); *Bettis v. Delo*, 14 F.3d (8th Cir. 1994) (regulation requiring Native American to cut his hair did not infringe upon First Amendment);

and *Sours v. Long*, 978 F.2d 1086 (8th Cir. 1992) (requiring inmate to cut his hair did not violate First Amendment although it prevented him from observing Vows of the Nazarite); and *Newingham v. Magness*, 292 Fed.Appx. 523, 2008 WL 3863607.

Appellant Holt has not brought anything new to the table. He has challenged the constitutionality of the policy, but he has not provided the Court with any evidence that distinguishes this lawsuit from *Hamilton* and a long line of Eighth Circuit precedents that is completely contrary to his position. Because Appellant has the burden of proving the policy to be unconstitutional, and has failed to do so, his claim was properly dismissed.

II. APPELLANT'S RETALIATION CLAIM IS NOT PROPERLY BEFORE THIS COURT

A. Standard of Review

This Court has held that, as a threshold matter, we generally will not consider matters not timely argued to and considered by the district court. *Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn. 1988). An exception to this rule exists for challenges to standing, which are not subject to waiver and must be reviewed by this court even if unaddressed by the district court. *In re Horton*, 668 N.W.2d 208, 2012 (Minn. App. 2003).

B. Discussion

Holt, for the first time on appeal, raises a claim of retaliation. Judgment was entered in this case on March 23, 2012. (DE 94) In his brief, Holt alleges that, beginning in April 2012, Appellees began retaliating against him. According to Holt's calculations, the alleged retaliatory behavior began occurring one month after the entry of judgment; therefore, the matter is not properly before this Court.

Additionally, Holt has filed a separate 42 U.S.C. §1983 lawsuit regarding the alleged retaliation in the Eastern District of Arkansas, Eastern Division, 5:12CV00394 DPM/BD. Holt's alleged retaliation claim is in its infancy and is properly before the district court for consideration. Holt's retaliation claim cannot be considered in this Court in this matter, and should be dismissed.

CONCLUSION

The district court properly dismissed Holts' complaint and granted judgment in favor of ADC Appellees Ray Hobbs, Gaylon Lay, D.W. Tate, Vernon Robertson, Michael Richardson, and Larry May; therefore, Appellees respectfully request that this Court affirm the decision of the lower court.

Respectfully submitted,

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BY: /s/Christine A. Cryer

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), the undersigned hereby states that the applicable portions of this brief contain 4,414 words in proportionally sized 14-point Times New Roman font. The brief was prepared in Microsoft Office Word 2007. I, Christine A. Cryer, hereby certify that the brief has been scanned for viruses and is virus free.

/s/ Christine A. Cryer
CHRISTINE A. CRYER

CERTIFICATE OF SERVICE

I, Christine A. Cryer, Assistant Attorney General, do hereby certify that on this 10th day of December, 2012, I have electronically submitted the foregoing brief for review and approval using the CM/ECF system.

/s/ Christine A. Cryer
CHRISTINE A. CRYER

ADDENDUM