UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ERIN MITCHELL, DANIELLE DIGIROLAMO, JOSH SMITH, DONALD MONTANO, ALEXANDER SUAREZ, TY HAILEY, RAY NEAL, JOSHUA HELTKE, Plaintiffs,	:	cv 12-370 (MRK)	:
v.	:		
CITY OF NEW HAVEN, JOHN DESTEFANO, DEAN ESSERMAN, COMMITTEE OF THE PROPRIETORS OF THE COMMON AND UNDIVIDED LANDS IN NEW HAVEN, Defendants	:	MARCH 26, 2012	

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF INJUNCTIVE RELIEF

Eight individually named plaintiffs participating in a group protest loosely organized under the name "Occupy New Haven" and speaking out against economic inequality and corporate control of increasing areas of American life seek injunctive relief against the City of New Haven, its officials, and a mysterious entity known as the Committee of Proprietors of Common and Undivided Lands at New Haven to prohibit the City and its officials from ousting them from an encampment they have established on the New Haven Green. This Court, Hall, J., previously granted the plaintiffs' request for a temporary restraining order preventing municipal officials from ousting them from the Green on March 14, 2012. The Court now turns to the question of a more enduring form of relief.

I. History of the Present Controversy

A. New Haven's Green – An Unusual Public Place of Uncertain Title

The sixteen-acre space commonly referred to as the Green is a space unlike any other municipal area in the United States. Although regarded as a common and public space open to the use and enjoyment of all, and maintained at public expense, it is, in fact, private property. Its owners are a five-person committee enjoying their office for life-terms, and replaced by vote of the remaining members of the committee upon the death or desertion of a committee member. This entity, known as the Committee of Proprietors of Common and Undivided Lands at New Haven, traces its claim to the land all the way back to the original purchase of the land in 1638 by settlers newly arrived from the Massachusetts Bay Colony.

The first deed reflects purchase by Theophilus Eaton, John Davenport and "others, English planters att Quinopiocke" from "Momaugin ye Indian sachem of Quionopioke" and other Indians on November 24, 1638[1][0.S.] The purchase price consisted of coats, axes, knives and other sundries. Records of the Colony and Plantation of New Haven from 1638 to 1649, pp. 1-5. A second deed adds to the estate

[1] Historians must reckon with the fact that until 1752, the colonial year was regarded as having begun on what we now recognize to be March 25, not January 1. Dates recorded prior to 1752, when England and the colonies recognized the calendar presently in place, a difference of some 84 days. Colonial land records before 1725 are recorded in Old Style dates. Modern historians by convention convert Old Style dates into the New Style. Rollin Osterweis, Three Centuries of New Haven, 1639-1938: The Tercentary History (1953, p. 437) Thus a New Style date of April 24, 1638 could as easily be reflected as an Old Style date of July 27, 1638.

of the colony and reflects a purchase from Eaton, Davenport and "others, English planters att Quinopiocke" from "Mantowese sonne of an Indyan sachem living at Mattabezeck" and others, and is dated December 11, 1638 [0.S]. This deed also reflects the transfer of title to a vast tract of land in exchange for what amounted to trinkets. Id., pp. 5-7. The lands so conveyed cannot be described with particularity, as there were no standards for surveying, nor were there conventions on how to record title to deeds. Both deeds convey the land Eaton and company and "their heires & assignes for ever."

The planters first arrived in the area now known as New Haven on April 24, 1638 [N.S.], or, according to the calendar in use at the time of the settling by the planters, July 27, 1638 [O.S.] Although the names of all planters party to the deed were not on the deed itself, the records of the colony reflect the name of some seventy men as the freemen of the "Courte of New Haven." Id., 9-10.

The freemen apparently regarded the land of the colony as a joint and corporate possession they could alienate at will.

Early governance of the colony was established by means of an agreement among the freeman at Newman's barn on June 4, 1639 [0.S.] This agreement called for what amounted to a theocracy, with full citizenship opened to members of recognized churches. The freemen agreed that the Old and New Testaments were to be to the supreme law of the colony. Id., at pp. 11-17. A government was constituted according to this agreement on October 25, 1639 [0.S.]. It called for the creation of a magistrate and certain lesser offices. The first magistrate, chosen for a one-year term, was Theophilus

Eaton. (Id., pp. 20-22) This government's first order of business was to conduct the trial of a certain native American known as Nepaupuck. He was duly convicted of murdering an Englishmen, and beheaded, with his head placed on a pike in the "market place," as the Green was then known, on October 29, 1639 (0.S.) (Id., pp. 22-24)

Colonial land records at the library in the State Capitol reflect the passage of title to discrete pieces of land by the freeman. Such lands as were not transferred to individual freeman, ostensibly remained a part of the original conveyance to the planters by way of the 1638 deeds, and remained known as "common and undivided lands," a form not unique to New Haven, but reflected in the early decisions of the courts of this state when dealing with disputed land claims in other municipalities.

By the early 1800s, the descendants of the freemen were too numerous and spread too far geographically throughout the world to manage easily what remained of the common and undivided lands. In 1805, a five-person committee was created with the consent of those claiming an interest in the common and undivided lands. This committee, the Committee of Proprietors of the Common and Undivided Lands at New Haven, is the entity now claiming title, and, to a degree difficult to discern on the record available to the Court at the present time, some measure of control over what is permitted on the Green. When a vacancy arises by means of death or disinterest, the remaining members of the Proprietors' committee select a new member. There are no public meetings of this body. It conducts its work largely in secret. The current members of the committee are composed of the following: a descendant of Theophilus Eaton's, Anne Calabresi; a judge of this Court, United States District Court Janet Bond Arterton;

Drew Days, III, former solicitor general of the United States, and a professor of law at the Yale Law School; Julia McNamara, the president of the Albertus Magnus College; and, Robert J. Dannies, Jr., a retired investment banker. It is unclear whether any of the Proprietors other than Ms. Calabresi, who claims to be a lineal descendant of Theophilus Eaton, claim an original freeman as a direct forebear.

When questions arose about whether the Committee of Proprietors could lawfully convey title to common and undivided lands, the Connecticut General Assembly passed an act in 1810 recognizing their right to do so by means of a resolution confirming their right to alienate property. (Exhibit A) In 1831, lawmakers recognized the rights of town proprietors to appoint committees to act on their behalf for the purpose of executing land deeds. (Exhibit B)

The current committee operates under authority of these acts, and maintains to this very day that it has title to the Green. The undersigned has found no case in the history of the Colony of New Haven, the Colony of Connecticut or the State of Connecticut challenging the rights of either the freemen, their descendants, or the committee acting on their behalf to hold title to land. Although title has never before been disputed in a court of law, a study commissioned by the Proprietors in the late 1970s or early 1980s could say no more than that *it appeared* that the Proprietors had title in fee simple absolute. *Governing the New Haven Green: An Examination of the Committee of the Proprietors of Common and Undivided Lands*, Craig Lewis, Manuscript, Yale Law School, February 182, fn. 60. (Exhibit C) The current committee is believed to be the only colonial vestige in the United States still maintaining title to

land in public use, with all other proprietors having transferred "their powers and privileges" to the towns in which their land was located. (Id., p. 10)

According to one student of the Proprietors:

> New Haven's Committee of the Proprietors of Common and Undivided lands is an institution unique in the country. In no other modern American city is a large plot of land upon which community life centers owned and governed, not by elected officials of that city, but by a self-perpetuating institution that traces its roots back to the seventeenth century.

Id. P. 25.

B. Current Governance of the Green

In response to the plaintiffs' application for a temporary restraining order in the instant case, counsel for the City of New Haven filed a responsive memorandum dated March 14, 2012. The first exhibit to the memorandum, Exhibit A, is a set of regulations governing use of the Green. (Attached herewith as Exhibit D) Counsel for the City conceded in remarks to the Court that this document means what it says: it consists of regulations "adopted by The Committee of the Proprietors of Common and Undivided Lands in the Town of New Haven to Govern the use of the New Haven Green." According to counsel for the City, New Haven merely administers the regulations enacted by the Committee. (Exhibit D) The regulations read that a permit must be obtained before holding a "meeting, rally, exhibit, demonstration or any other event on the New Haven Green." The "permit must be obtained from the Director of Parks, Recreation & Trees acting on behalf of The Committee of Proprietors of Common and Undivided Lands in the Town of New Haven." (Id. Section (a). It appears as if this

private entity has attempted something unique and unheralded in post-colonial American law: a transformation of its private interest and right to manage land into public law absent any adoption by the municipality of laws, regulations, ordinances or acts of any kind agreeing to behave as the servant of a colonial master.

The City of New Haven apparently regards itself as in some sense the partner of the Proprietors in management of the Green. An undated memorandum attached as Exhibit C to the City's March 14, 2012, Memorandum contains a "Proposal for Occupy New Haven." (Attached herewith as Exhibit E) The memorandum reads, in part: "Provided that the removal of structures and the cessation of current ONH activities on the Green occurs with this timeframe [removal by mid-March], the City & Proprietors would allow ONH structures to reassemble on the Green for durationally limited periods (generally not to exceed one week) at times in the future mutually agreeable to all parties." The document also reflects the Prorpietors' affirmation of the "right to assembly and the right to freedom of expression on the Green for all groups."

On or about March 12, 2012, both the City and the Proprietors informed Occupy New Haven demonstrators that they must "take down any and all tents and structures and vacate the New Haven Green" by noon of March 14, 2012. The notice ends by stating: "Both the City of New Haven and the Proprietors of the Green appreciate the dedication you have brought to the cause of economic justice, and we wish you well as you move forward elsewhere." Defendants' Memorandum of March 14, 2012, Exhibit E. (Attached herewith as Exhibit F)

It appears that the City and its officials regard themselves either as the agent of

the Proprietors or as partners with the Proprietors. The Proprietors regard themselves as owners of the Green empowered with the right to set the terms and conditions of its use.

C. The Occupiers

A tent city emerged as a result of spontaneous public protests spreading throughout the United States in October 2011 under the banner of "Occupy." In New Haven, since October 15, 2011, some 30 or so people have pitched tents and lean-tos on a portion of the Green amounting to no more than 10 percent of its total area. A community of sorts has emerged, with regular assemblies, meetings and subcommittees to manage the day-to-day activities of living together as a group. The plaintiffs are members of the group residing in the compound from time to time.

The compound is a site devoted to protesting economic inequality and corporate control of the American economy. Ironically, given the Proprietors' claim to lineal descent from the original purchasers of the land, and the profoundly anti-democratic manner in which the Green is both owned and governed, the New Haven Occupy's expressive protest takes on added poignancy: They remain on space commonly regarded as public in defiance of what amounts to the orders and commands of a secretly and self-selected committee of five claiming what amounts to an hereditary interest in land managed by the public.

The eight plaintiffs in this action are not serving as class representatives. For financial reasons, the plaintiffs did not seek class certification, although, if necessary, they will do so. They seek the right to do what they have thus far done for five months

without undue incident: remain a visible, real and present reminder to the community, and given the approach of the Yale commencements in May, to the world, of the fact that for many Americans the rhetoric of the American dream does not match the reality of their lives. We have become a nation increasingly divided along class lines, with the privileged one percent reaping full benefit of citizenship, while the vast majority, rhetorically referred to as the 99 percent, are marginalized, forgotten and kept hidden from view. The plaintiffs occupation of the Green is protest speech designed to make visible the lives, claims and aspirations of the forgotten American.

II. Ownership Of The Green: Do The Proprietors Have What Amounts To An Hereditary Interest In The Green In Violation Of The State Constitution?

The defendants assert the Green is private property owned by an entity claiming direct lineal descent from the colonists who purchased in from the Indians. The land, apparently acquired in fee simple absolute, was passed down through the generations as land has always passed, sometimes by means of will, sometimes by operation of law for those who die without will. These essentially private transfers of property rights are not unusual.

What is unusual in this case is the recognition by the Connecticut General Assembly in both 1810 and 1831 of what amounts to a hereditary interest in the common and undivided lands of New Haven. By means of the these legislative acts, an interest in land was conveyed to a body self-perpetuating in character, much as is a family, although, in this instance, members of the Proprietors committee have a privilege family members do not enjoy – they get to select those who share their interest

in the land. The rights are passed as hereditary interests are passed, from one generation to the next.

The Connecticut Constitution of 1818 prohibits the granting of “hereditary emoluments, privileges or honors.” Our current constitution maintains that prohibition at Article First, Section 18. It appears that in the nearly 200 years since that prohibition became the fundamental law of the state, no case or controversy asking for its meaning to be interpreted has ever found its way to the state Supreme Court. The plaintiffs in this action request the question of whether the Proprietors current claim of both title and the right to govern the Green amounts to the sort of hereditary privilege forbidden by the Constitution be certified to the Connecticut Supreme Court for resolution.

While title may have passed freely from private generation to private generation by means of private act or devise, the decisions of the Connecticut General Assembly to give the force of a public act to the essentially private conveyance of property from one generation to another has operated in such a way as to create an hereditary interest with rights and privileges more extensive than would be enjoyed by any mere private owner. In the case of the extant Proprietors, committee members, almost all of whom would otherwise have no stake or claim to the property, claim an ownership interest in land that comes with the privilege of setting terms and conditions of public use of land that is apparently maintained at public expense. While membership in this secret society may be by private invitation only, the General Assembly has given this society the cloak of legislative recognition, effectively granting the sort of hereditary privilege repugnant to a republic.

III. Is The Green A Public Forum?

Despite the lingering questions about title and control of the Green, the parties apparently do not contest that it is a public forum. For the sake of argument and by way of analogy, the Green has much the same apparent standing as does a private prison: Whoever owns it, it serves a public function and purpose. Just as a prison cannot claim that its ownership exempts it from the Eighth Amendment's prohibition against cruel and unusual punishment, so the Green's public character and use renders it a public place the regulation of which is governed by the First Amendment.

The plaintiffs contend the Green is a quintessential public forum, that is, a place "by which long tradition or government fiat ha[s] been devoted to assembly and debate," such as a "street or park." Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37, 45-46 (1983). Regulations on speech within a public forum must be content-neutral, serve a significant government interest and leave open an alternative means of communication. In other words, restrictions must be valid in terms of time, place and manner of restriction. Grayned v. Rockford, 408 U.S. 104, 121 (1972); Young v. American Mini-Theaters, Inc., 427 U.S. 50, 63 (1976); Clark v. Community for Creative Non-Violence, et al., 468 U.S. 288, 293 (1984).

The court need not linger long over an issue on which the parties appear to be in agreement. As argued in Section V of this brief, by any applicable standard, the defendants' attempt to regulate speech in this public forum must fail.

IV. Do The Regulations Purportedly Governing Use Of The Green Have Any Legal Effect? If Not, Then There Are No Reasonable Time, Place and Manner Restrictions Governing Use of the Green and the Attempt to Oust Protestors After Five Months Is Arbitrary

"In no other modern American city is a large plot of land upon which community life centers owned and governed, not by elected officials of that city, but by a self-perpetuating institution that traces its roots back to the seventeenth century." (Exhibit C, p. 25) Clearly, the entity that controls the Green blurs the line between private power and legitimate, democratic governance. The plaintiffs contend that the Green's regulations, promulgated by the Proprietors, have no legal effect because the entity behind them has no authority to pass binding law: private parties may only limit the conduct of other private parties by way of contract or the rights attendant to pure, private property. In the alternative, even if the Proprietors have the power to regulate public space, the regulations and decisions pursuant to them are void because they were not promulgated or adjudicated consistent with the demands of the due process clauses of the fifth and fourteenth amendments or state law.

A. The Proprietors Cannot Wield Power Reserved To The State

In the state of Connecticut municipalities are the product of one of two things: enacting statutes or home rule charters. In either case, the General Statutes set out the scope of municipal powers. Conn. Gen. Stat. § 7-148. These powers are comprehensive and detail most of the workings of a city government imaginable. Notably, the statute lays out powers for, inter alia, handling property, highways and sidewalks, as well as regulatory and police powers over buildings, traffic, nuisances,

loitering and trespassing,[2] and miscellany—all subject matters connected to governance of the Green. *Id*. Municipalities are not, however, free to wield their power over these subject matters arbitrarily or hastily.

> Power granted to any municipality under the general statutes or by any charter or special act…shall be exercised by ordinance when the exercise of such powers has the effect of:
>
> (1) Establishing rules or regulations of general municipal application, the violation of which may result in the imposition of a fine or other penalty including community service for not more that twenty hours; or
> (2) Creating permanent local law of general applicability.

Conn. Gen. Stat. § 7-148(b). Clearly, this is the type of power the Proprietors claim to wield over the Green. Indeed, the Proprietors' regulations do not apply at all times and places in New Haven. But they do apply to any person wishing to enjoy the center of the City and its community: the Green is a legally and politically significant locale. The regulations, therefore, aim to become "permanent local law of general applicability:" they affect any resident, or visitor, wishing to enjoy the public square or express a message in it. The public square is literally and figuratively the foundation of American civic life and, consequently, the laws that govern it are generally applicable.

Were the Green truly private property, the Proprietors could exercise this, or substantially similar, power under the guise of personal property rights. One of the rights incidental outright, private property ownership is the right to exclude. *See Frech v. Piontkowski*, 296 Conn. 493, 51, 994 A.2d 84 (2010)("Because such a property [non-

[2] Municipalities shall "(i) [k]eep streets, sidewalks and public places free from undue noise and nuisances, and prohibit loitering theron…."

navigable body of water] is governed not by riparian rights, but by the same principles governing title to a parcel of land, we concluded that the plaintiffs, the owners of the land beneath the pond, had the right to exclude the defendants, who had claimed riparian rights to use the pond for recreational purposes.”). But the Green is not ordinary private property; even the Chairman of the Proprietors believes the land is held in public trust. P. Bass, Last Ditch Occupiers’ Suit Seeks Proprietors’ Demise, New Haven Independent, March 13, 2012, available at http://www.newhavenindependent.org/index.php/archives/entry/the_proprietors/.

The public, at least in Connecticut, has a right of access to public trust lands. *See Leydon v. Town of Greenwich*, 257 Conn. 318, 332 n.17, 777 A.2d 552 (2001)(“Under the public trust doctrine, members of the public have the right to access the portion of any beach extending from the mean high tide line to the water….”). Accordingly, a person may not be excluded from the Green on the basis that they have run afoul of a private party’s tastes: they may only be excluded because they have run afoul of validly enacted state laws or local ordinances: violent crime, obscenity, possession of contraband, et cetera. There is no basis in law for a private party unilaterally limiting the substantive freedoms of other people: the power to circumscribe substantive liberties is exclusive to the government.

The law that a private entity may wield power such that it becomes a state actor is not limited to a single section of the Connecticut statutes. In 1946 the United States Supreme Court considered an entire town that was owned by a private corporation: a company town.

> The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which cannot be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Marsh v. Alabama, 326 U.S. 501, 502-503, 66 S.Ct. 276, 90 L.Ed.2d 265(1946). Here, the Proprietors do not claim or enjoy such a reaching measure of the town. But they hold title to the town’s center-of-gravity, its critical mass: the Green which is the most politically and legally significant sixteen acres in the county. The New Haven Green is, consequently, more like the company town set forth in *Marsh* than the private shopping center addressed in *Hudgens v. N.L.R.B.*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). In *Hudgens*, the court held that peaceful protestors at a privately owned shopping center could be held liable for criminal trespass because the center was a private forum. In this case, *Marsh* is clearly the applicable precedent: there is no commerce on the Green and it is the center of the City’s political and civic life.

The *Marsh* case traditionally stands for the proposition that a private actor may take on the color of state action given the atmospheric power it wields over people. *See K. Sullivan & G. Gunther*, Constitutional Law, at 1034 (16th Ed. 2007). Here, the defendant Proprietors advocate regulations that, were they passed by the government, may be substantively reasonable. But unilaterally limiting the substantive liberties of citizens—even when legitimate—is the exclusive province of the government. The Proprietors claim the right to exercise that power. The plaintiffs claim that when state action is present, as it is here, the action must not only be consistent with constitutional constraints but that there is *some* right to democratic participation in the formulation of the action—even when it is substantively reasonable. Put most simply, the Constitution is a set of grants of power and a set of limits on power, which typically take the form of individual civil liberties. *Marsh* and the state action doctrine stand for the proposition that when a private actor begins to resemble the state, the constitution requires that he respect the inalienable rights of individuals in the same manner required of the actual government. Given this truth, the reverse implication of the state action doctrine is that where a private actor seeks to limit the substantive liberties of another individual, he must have a legitimate grant of power to do so. There is no such delegation of power in the constitution or other bodies of law: this is what separates the police from vigilantes. This is legitimacy. As a lawmaking body, whatever rights the Proprietors may have had under the colonial theocracy to govern matters both private and public, the Proprietors lack any vestige of legitimacy now.

B. The Regulations Purportedly Governing The Green Now Are Not City Ordinances

The Connecticut statutes state that the holder of municipal governing power may only exercise it by ordinance. Implicit in this requirement is that the holder of the municipal governing power has the authority to pass an ordinance. The term ordinance "mean[s] an enactment under the provisions of section 7-157" of the Connecticut General Statutes. Conn. Gen. Stat. § 1-1(n). Connecticut General Statute § 7-157(a) states that "ordinances may be enacted by the *legislative body* of any town, city, borough, or fire district." (Emphasis added) Conn. Gen. Stat. § 7-157(a). The term legislative body "as applied to cities and consolidated towns and cities, shall mean the board of aldermen, council or other body charged with the duty of making annual appropriations." Conn. Gen. Stat. § 1-1(m). The Proprietors do not fit this definition. Accordingly, they may not pass ordinances. Without the power to pass ordinances, they may not exercise municipal power. Consequently, their regulations have no legal effect and whether the plaintiffs have violated them is immaterial.

The authority to regulate is dependent upon the power to govern. The defendants can cite only a colonial vestige as the basis for their authority. This is not a legitimate power grant. Their regulations are null.

C. Public Regulations Must Meet The Reequirements Of Due Process

A regulatory agency that legitimately possesses the power to regulate by virtue of an organic statute may only exercise that power in a manner consistent with the law. Administrative action is broken into two categories: rulemaking and adjudication and

each carries its own process requirements. In this case the Proprietors and the City have attempted to engage in both. First, the Proprietors have promulgated regulations for the Green: these regulations are of general and particular applicability with prospective effects. They are rules. Second, the City and the Proprietors have attempted to engage in adjudication: whether or not to license a party to engage in an act, or enter a property, or revoke a license for that act or entrance is an adjudication. The party that stands to experience a deprivation of a right or entitlement as a result of this adjudication is entitled to process. The defendants may not summarily revoke the plaintiffs license to continue demonstrating on the Green.

The Proprietors' regulations have the effect of an ordinance. Accordingly, the adoption of these regulations must meet the demands of state and local law for ordinances. And, at a minimum, the rulemaking procedure must comport with basic due process requirements of the constitution independent of a charter or statute.

The Connecticut General Statutes addresses the adoption of ordinances and the Charter of the City of New Havens lays out a procedure for adopting ordinances. The plaintiffs have no reason to believe that the Proprietors' regulations conform to them.

The city charter states the ordinance process most clearly. The General Statutes simply state that the local legislative body may adopt ordinances and requires publication. Conn. Gen. Stat. § 7-157. Article IX, § 41 of the Charter of City of New Haven lays out the local legislative process:

> All ordinances shall be submitted to the board of aldermen, referred to and reported by a suitable committee after public hearing, printed in the journal for a first reading, and enacted upon second reading which shall take place at least

> one week after the first reading. The second reading of ordinances cannot be waived or dispensed with. All other measures (resolutions, votes, orders) shall follow the same procedure for legislative action as ordinances, except that, upon unanimous consent, immediate action may be taken, or upon receipt of a special message from the mayor declaring that the measure is of an emergency nature and that immediate action is necessary, the second reading may take place upon the same day as the original reading, and the printing of the same dispensed with. Every such vote, resolution or measure shall be printed for examination at the request of one-fifth of the members present, except in the instance of an emergency message from the mayor. No ordinance shall be of force or effect until one week after its enactment nor until there shall have been published at least once in a daily newspaper published in said city, either the ordinance in full or a notice of the enactment of such ordinance, which notice shall contain the title of such ordinance, a brief statement of the subject matter thereof and the date of its enactment and of its taking effect.

The plaintiffs have no reason to believe that the Proprietors satisfied this process given that none are aldermen. Consequently, even if the Proprietors have the power to regulate public conduct on the Green, their regulations are invalid because their enactment violates the legislative process laid out in the city Charter.

The plaintiffs concede that what due process requires before a rule may become law is an amorphous concept. Clearly, that which is required before something becomes federal, state, administrative, or local law is not always the same. But no one can deny that the proposition that *all* but five citizens may be shut out of the rulemaking does not comport with due process.

The Supreme Court has rarely addressed this concept. In *Londoner v. City and County of Denver*, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908) the court invalidated a municipal tax assessment because those affected by the rule had an inadequate opportunity to be heard prior to its enactment: a group of city councilman met without notice, as a tax equalization board in order to assess a proposed tax over

the written objections of the plaintiffs. The court stated that while the United State Constitution imposes few restrictions upon a state's power to tax the situation changes when the state delegates that power:

> [W]here the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom [a tax] shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing…. If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief: and, if need be, by proof, however informal.

(Internal citations omitted) *Id*. at 385-86. While the plaintiffs in this case do not object to taxation, they do object to action that affects liberty interests that are as sacred as the property interests affected by taxation. *Londoner* is applicable. The plaintiffs do not go so far as to claim the seemingly extensive process laid out in *Londoner*: an opportunity for written objections followed by some form of an evidentiary hearing. They simply contend that they, and the people of New Haven, are entitled to *some* public hearing on the rules that govern the central space for political and cultural expression in the City: the Green.

Seven years after *Londoner*, the court seemingly limited its reach. In *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 the court permitted a tax that was assessed by a *state* board with far

lesser opportunity for hearing on the grounds that the hearing laid out in *Londoner* would have been impracticable: the tax affected too many people. The court stated that "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Id*. at 445. In this case, there was *no* election, *no* political appointment, and *no* hearing: the plaintiffs and the people of New Haven had *no* input into the making of the regulations governing the Green. There is no power, immediate or remote, over the Proprietors of the Green.

It must violate due process that a private entity can pass rules that are given effect by the city and its police force without an iota of public debate. Even if the Proprietors have the power to regulate the Green, the fourteenth amendment entitles the plaintiffs and the people of New Haven to a public hearing on those rules.

The plaintiffs enjoy a liberty or property right in the Green. They contend, *infra*, that this is liberty interest is protected by the first amendment. But even if the Court rejects this theory, they still possess a lesser property interest in their occupation of the Green that entitles them to some process before being deprived of their right to occupy and enjoy a small portion of it. The Green is available to the public at large and the plaintiffs cannot be arbitrarily and summarily denied use and enjoyment of it without a hearing. Moreover, the Proprietors concede that the Green sits in public trust: if true, this gives the plaintiffs a property right. The Proprietors hold legal title to the Green and the plaintiffs partial, equitable title. Accordingly, they are entitled to process prior to deprivation of this cognizable property right. The Supreme Court has addressed the due

process rights of those who stand to be deprived of public benefits in two critical cases. In *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) the court held that high school students were entitled to pre-suspension process because those students had a property right in a free public education as a result of state law. A year later the court set out a framework for determining the amount of process required prior to a deprivation in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 393, 47 L.Ed.2d 18 (1976. The court looks to the interests of the individual in retaining his property, the risk of error in the procedures used and the probable value of further procedure, and the costs and administrative burden of further procedure. Finally, the defendants' own regulations state that an applicant denied a permit is entitled to a written explanation for the denial followed by a right to appeal.

While the plaintiffs did receive some communication from the defendants regarding their status, they did not receive process that comports with the fourteenth amendment and the defendants' regulations. The plaintiffs were summarily adjudicated in violation of the regulations. This violated the fourteenth amendment.

If the plaintiffs are correct, and the purported regulations governing the Green have no more legal weight or authority than do the dining preferences at another secret society, let's say Skull and Bones, then there this Court must squarely face the uncomfortable fact that the city has no promulgated regulations regarding use of the Green. In that case, the facts force the conclusion that the proposed eviction from the Green of the plaintiffs is arbitrary and is not a content-neutral regulation of speech.

Consider the following: The Green has been occupied now for since October 15, 2011, with tents, lean-tos, and protestors present on the Green throughout the entire period. During this period, the city has provided such municipal services as waste removal and sanitary stations. No group has been deprived use of the Green for purposes of their own. No event open the public at large has either been cancelled or rescheduled as a result of the presence of the protestors. They have been permitted to remain throughout this period without arrest, threat of eviction or, until recently, notice to quit.

What has changed?

In terms of day-to-day life in New Haven, nothing. Yes, the appearance of the tents on the Green nettles some residents. But it is perhaps most nettlesome to its near neighbor, Yale University, which customarily uses a portion of the Green for its commencement ceremonies in the early summer. Is it any coincidence that a peaceful and uneventful long-term protest now faces eviction from a public forum when the the protestors occupy a piece of the Green right next door to the city's most privileged institution? At a minimum, the timing of the city's notice to quit the premises raises the specter that management of this public forum is not being conducted in a manner at all congruent with the requirements of content-neutrality required to limit speech in a public forum. The court need not turn a blind eye to the influence Yale hold over the Proprietors: one member, Drew Days, is a professor of the Yale Law School; another, Ms. Calabresi, is the spouse of a former Dean of the Law School. Did the Proprietors send word that it was time to shut the plaintiff's compound down in time for the lawn to

be reseeded for Yale's commencement?

The city opposed the temporary restraining order on the grounds that it would be harmed were the status quo to be kept in effect. When pressed by the judge to explain why the harm occurs now, counsel for the city had no reply that could be uttered on the record. That is because there is no such reply that can be made that does not reveal the privileged hand pulling the secret levers in New Haven.

The absence of regulations does not transform the Green into Thomas Hobbes's state of nature, where all are free to stake claim to vacant space in a war of all against all. The Green remains a public forum, although, in this case, one without regulation, and, therefore, one in which any action to remove a party using the space for purposes of protected speech or assembly has justifiable claim to cry foul when settled practices are suddenly disturbed.

If the city wants to enact regulations to govern the Green, it should do so in the same manner and means by which it passes other regulations. Receiving marching orders from a secret society is the equivalent of turning management of school menus over to a dining club: If the Sacred Order of the Goose orders that students eat Chinese food on Wednesday, will the city require students to carry chopsticks?

V. Does The First Amendment Still Exist On The Green?

The First Amendment precludes enacting laws "abridging the freedom of speech." U.S. Constitution, amend. I. The First Amendment was designed to secure

"the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945), and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957). Furthermore, the First Amendment embraces and protects not only "speech" *per se*, but also expressive conduct, as the word "speech" has not been "construed literally, or even limited to the use of words." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 (3d Cir. 2002). Accordingly, expressive conduct, like "speech" *per se*, enjoys First Amendment protection when it is "sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409-10, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (*per curiam*).

The specific speech and related expressive conduct that is the target of the Defendants' restrictions here—the erection of shanties, tents, lean-tos, and similar symbolic expressions as part of the current Occupy New Haven protest activities against the socio-political conditions that threatens to subjugate a large portion of society to silent, permanent near-servitude— creates an illustrative, educative, and persuasive visual eyesore that the viewer must confront and consider, squarely implicating First Amendment concerns.

Following a precise three step analytical process is essential to properly determining whether government restrictions are valid under the First Amendment: "[F]irst, determining whether the First Amendment protects the speech at issue,

[second,] identifying the nature of the forum, and [third,] assessing whether the ... justifications for restricting [ ] speech 'satisfy the requisite standard.' " *Mahoney v. Doe*, 642 F.3d 1112, 1116 (D.C.Cir.2011), quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). In this case, application of this First Amendment framework leads inexorably to the conclusion that the Plaintiffs' expressive conduct is sufficiently imbued with elements of communication to be protected by the First Amendment, and that the Defendants' restrictions upon their speech fails to pass constitutional muster under any degree of judicial review.

A. The Plaintiffs' Speech Warrants First Amendment Protection

As a threshold matter, this Court must determine whether the First Amendment protects the conduct at issue in the challenged restrictions, namely the "removal of structures and the cessation of current [Occupy New Haven] activities on the Green." *Proposal for Occupy New Haven,* at 1, Exhibit C to Defendants' Response to Plaintiffs' Motion for Temporary Restraining Order and Injunction. Plaintiffs bear the burden of establishing that the First Amendment applies to their conduct. *Clark v. Community for Creative Non–Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

In this case, the Plaintiffs easily carry their burden. As the Supreme Court recently stated:

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder v. Phelps, ––– U.S. ––––, 131 S.Ct. 1207, 1215, 179 L.Ed.2d 172 (2011) (internal citations and punctuation omitted). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder*, 131 S.Ct. at 1215 (citations and internal punctuation omitted).

Here, there can be no disputing that much of the controversial conduct by Occupy New Haven and its participants falls within the protection of the First Amendment. Though the defendants contend that the law does not permit the construction of "structures" on public land, regarding the paupers' tents and lean-tos as the equivalent of a billionaire's skyscraper, this facile analogy does not hold. As our courts have recognized, not all structures are alike, and in particular temporary structures may themselves be forms of symbolic speech. "Shanties are flimsy, shack-like wooden structures…Although large enough to hold several people, shanties are not built to serve as dwellings but as symbolic and life-size representations for illustrative, educative, and persuasive purposes, of the dwellings of black South Africans in the ghettoes of apartheid." *Students Against Apartheid v. O'Neill*, 660 F.Supp. 333, 336 (W.D.Va. 1987).

Unfortunately, Apartheid-era South Africa has no monopoly on ghettoes, and the Plaintiffs' tents also serve as symbolic speech, calling to mind the tent cities of what used to be called the "Great Depression." The tents remind those with two feet in the economy that others are less fortunate. While the stock market hits 13,000 for the one

percent, many Americans are without a job, without shelter, without a home, and without hope. The mere presence on the Green of these temporary structures is a symbolic reminder of the other and forgotten America. What's more, the tents and structures in place on the Green are themselves festooned with protected speech, announcing to all who look at them the political beliefs about economic justice of the plaintiffs and others similarly situated. No one has been deprived of use of the green, and only a small portion of the Green is currently "occupied" by the plaintiffs. That portion typically devoted to concerts and other public events is physically distinct from the compound, separated by a public street that bisects the Green.

The claim that use by the plaintiffs precludes use by others is simple nonsense. The logic that the mere presence by the occupiers precludes fair use by others can be extended to preclude use by anyone as, by definition, it would be difficult for two parties to occupy any space simultaneously. Clearly, then, the plaintiffs' conduct is symbolic expression, and "the First Amendment protects symbolic conduct as well as pure speech." *Virginia v. Black*, 538 U.S. 343, 360 n. 2, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). Symbolic expression delivers a message by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. *Clark*, 468 U.S. at 294, 104 S.Ct. 3065. In this case, the City practically concedes this issue when it ends its notice of intent to evict the "occupiers" by stating that they "appreciate the dedication you have brought to the cause of economic justice…". Even the Plaintiffs' "occupation" of that particular part of the Green that is closest to Yale is purposeful, as it gives the Plaintiffs access to an audience that might

otherwise insulate itself from their message such that the Plaintiffs would have no other means of conveying their message to them.

Thus, the Court should find that in the context of this case the "structures and…current [Occupy New Haven] activities" that are the target of the Defendants' restrictions constitute symbolic conduct that is protected by the First Amendment.

B. The Defendants' Restrictions At Issue Are Content-Based And Cannot Survive The Requisite Heightened Judicial Scrutin

Finally, having determined that the defendants' restrictions target speech in a traditional public forum, the Court must ultimately assess whether the restrictions survive the requisite standard of judicial review. As is demonstrated below, they do not.

The first step in determining if a restriction on speech is valid requires answering the question whether it is content-based, or content-neutral. Content-based restrictions on conduct protected by the First Amendment, like the restrictions at issue here, require heightened judicial scrutiny such that the government must show: (1) that the regulation is necessary to serve a compelling state interest; and (2) that regulation is narrowly drawn to achieve that end. *Boos v. Barry*, 485 U.S. 312, 321–22, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). Content-based restrictions are found where the statute's prohibition is "directed only at works with a specified content." *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd*., 502 U.S. 622, 643 (1994). Put another way, a regulation is content-based when "the message conveyed determines whether the speech is subject to restriction." *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011). In any event, a content-based regulation is presumptively invalid, and the

government has the burden to rebut that presumption. *United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010).

In this case, the Defendants cannot carry their burden. The restrictions at issue here are clearly content-based, as they are directed squarely and solely at the removal of structures and the cessation of activities by the Occupy New Haven protestors, and no one else. By their very own words the defendants have singled out a particular type of speech by a particular type of speaker – the Plaintiffs and their structures and Occupy New Haven activities -- such that the restriction is directed only at speech with a specified content made by specified speakers. As such, the restrictions are presumptively invalid, and the defendants cannot possibly rebut that presumption as they can no more demonstrate a compelling state interest than they can show that the regulation is narrowly drawn to achieve that end.

Though at oral argument counsel for the defendants did an admirable impression of the Lorax when he spoke on behalf of the grass, certainly the First Amendment stands above even the tallest blade of grass when the freedom of speech is threatened. Moreover, the defendants' argument rings particularly hollow when its concern for the grass was non-existent until the approach of commencement ceremonies could be heard closing the distance.

C. Even If This Court Deems The Defendants' Restrictions Upon The Plaintiffs' Speech To Be Content-Neutral, The Restrictions Nonetheless Fail To Pass Constitutional Muster Even Under Intermediate Scrutiny

Though the Plaintiffs maintain that the restrictions at issue here are plainly

content-based, should the Court determine the restrictions at issue in this case to be content-neutral, they must be invalidated nonetheless, as there is no articulable government interest in preventing the symbolic conduct the Defendants seek to restrict, let alone a substantial government interest.

Content neutral restrictions on conduct protected by the First Amendment in a public forum must be “narrowly tailored to serve a significant governmental interest, and…leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) quoting *Clark*, 468 U.S. at 293, 104 S.Ct. 3065 (internal citations omitted). See also *Snyder*, 131 S.Ct. at 1218. Consequently, symbolic expression “may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.” *Clark*, 468 U.S. at 294, 104 S.Ct. 3065.

To determine whether an ordinance is content-neutral, a court generally looks to the terms of the ordinance to see if the ordinance “distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed.” *Solantic*, 410 F.3d at 1259 and n. 8, *quoting Turner Broad. Sys. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). To establish an ordinance is narrowly tailored, the Court must determine whether there is a “reasonable fit” between the governmental interests and the ordinance. *Cincinnati v. Discovery Network*, 507 U.S. 410, 416, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). Finally, a content-neutral restriction must allow ample alternative channels of communication.

In the instant case, no substantial governmental interest has been articulated in support of the defendants' restrictions, thus there can be no reasonable fit between governmental interests and the restrictions. Moreover, the defendants' restrictions are substantially broader than necessary, and to rob the Plaintiffs of the Green in the fashion contemplated by the defendants' restrictions simultaneously robs them of ample alternative channels of communication. To tell the plaintiffs that they can pack up their tents and tarps and take to the airwaves or television is tantamount to saying "Let them eat cake!" as those of means as limited as the Plaintiffs simply cannot afford to express their ideas in any other manner[3]. Moreover, as argued above, the location chosen is part of the message, and one which would be lost via alternative channels.

The defendants are quick to seek support in the maxim that "the Constitution

[3] Furthermore, a content-neutral regulation does not necessarily fall with random or equal force upon different groups or different points of view. A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse. See, e.g., *City Council of Los Angeles v. Taxpayers for Vincent*, supra, 466 U.S., at 812–813, n. 30, 104 S.Ct., at 2133, n. 30. This sort of latent inequality is very much in evidence in this case for respondents lack the financial means necessary to buy access to more conventional modes of persuasion. A disquieting feature about the disposition of this case is that it lends credence to the charge that judicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against efforts by the relatively disadvantaged to convey their political ideas. In the past, this Court has taken such considerations into account in adjudicating the First Amendment rights of those among us who are financially deprived. See, e.g., *Martin v. Struthers*, 319 U.S. 141, 146, 63 S.Ct. 862, 865, 87 L.Ed. 1313 (1943) (striking down ban on door-to-door distribution of circulars in part because this mode of distribution is "essential to the poorly financed causes of little people"); *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (State cannot impose criminal sanction on person for distributing literature on sidewalk of town owned by private corporation). *Clark v. Community for Creative Non–Violence*, supra, n. 14.

neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will" in public parks. *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341, 347 (7th Cir. 1990). However, neither *Clark* nor *Lubavitch* are controlling in this case.

In the first instance, both *Clark* and *Lubavitch* present regulations that banned the erection of structures and sleeping in public parks. The bans were held to be reasonable time, place and manner restrictions. New Haven has no such blanket prohibition: its current regulations do not contain such a prohibition; indeed, the defendants have already proposed that the plaintiffs be permitted to sleep on the Green and to erect tents for intervals generally not to exceed one week. (Exhibit E) Apparently, the power to approve or disapprove of a request to remain on the Green is vested in the city's Director of Parks & Recreation. No standards govern whether and when permission shall be granted or withheld. Given the symbiotic relationship between the City of New Haven, the Proprietors and Yale, there is every reason to believe that access to the Green will be regulated under this regime in a non-content neutral manner.

In addition, in both the *Clark* and *Lubavitch* case there were regulations enacted by the governing authority in place at the time litigation was commenced over the right to erect tents and/or sleep in a public park. There are no publicly enacted regulations in this case. Even in the *Hennepin County* case, where there were no written regulations in place at the time protestors first began to sleep in the county party, county officials nonetheless maintained an unwritten policy and notified the protestors of the policy. *Hennepin County*, * 7. County officials did not wait long to begin enforcement of these

policies by removing tents and other structures and issuing trespass notices. New Haven has done nothing but permit the protestors to remain, only recently having begun a series of negotiations intended to persuade the protestors to leave. When these negotiations failed to persuade the protestors to leave, New Haven issued a notice to quit, thus forcing the protestors into this Court to seek a restraining order. To this day, the City of New Haven has not announced any coherent unwritten policy on overnight use of the Green. It is apparently permitted when the Director of Parks, Recreation & Trees decides it's all right, but only then. It is a standardless policy, if it can be called a policy at all.

Finally, the City of New Haven has to this very day failed, refused and neglected to promulgate written regulations or rules of any kind regarding overnight use of the Green. The City relies on no municipal regulation or ordinance, but merely vests the ability to read a prohibition into the Proprietors' written policy in the discretion of an administrative official. In *Hennepin County*, by contrast, county officials were swift to correct the absence of a written policy, acting within weeks to pass a resolution restricting the subject properties to certain uses. (Id.) To this very day, New Haven claims to have a policy regulating use of the Green that is silent on the very issues under contention in this case. That is perhaps because the City believes it can delegate its rule-making function to private proprietors.

VI. Conclusion

The issues in this case require for resolution development of a better factual record than that presently available to the plaintiffs. The plaintiffs request that a temporary injunction issue that will permit limited discovery on issues relating to the City of New Haven's relationship with the Proprietors, the manner in which regulations, if any, have been adopted by the City to govern use of the Green, and whether the Proprietors have any proper role to play in the enactment of regulations for a public forum. Because the harm to the plaintiffs would be irreparable were they to be evicted immediately, the plaintiffs request that the temporary restraining order be extended by an additional 30 days, or some other period that would permit the parties to conduct the discovery necessary to make a more complete record.

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CERTIFICATION

This is to certify that on March 26, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent, via e-mail, to all parties by operation of the Court's electronic filing system, and the undersigned did cause to be sent, via First Class U.S. mail, postage prepaid, a copy of the foregoing to all counsel and pro se parties that do not have access to the Court's electronic filing system and to whom the court directs the undersigned to send a hard copy via mail. Parties may access this filing through the Court's system.

By: /s/ NORMAN A. PATTIS /s/