

CASE No. 13-15023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH, et al.

Plaintiffs–Appellees,

v.

EDMUND G. BROWN, JR., Governor of the State of California,
et al.

Defendants–Appellants.

**BRIEF *AMICUS CURIAE* OF SURVIVORS OF SEXUAL ORIENTATION
CHANGE EFFORTS, IN SUPPORT OF DEFENDANTS–APPELLANTS
URGING REVERSAL**

Appeal From The United States District Court,
Eastern District of California, Case No. CV-12-2484-WBS-KJN,
The Honorable William B. Shubb, Judge

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE STATE HAS SUCH A COMPELLING INTEREST IN PROTECTING MINORS FROM THE SERIOUS HARMS CAUSED BY SEXUAL ORIENTATION CHANGE EFFORTS THAT THERE IS NO LIKELIHOOD OF SUCCESS ON THE MERITS OF PLAINTIFFS-APPELLEES’ CLAIMS, AND THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH HEAVILY AGAINST PRELIMINARILY ENJOINING SB 1172	3
A. James Guay.....	5
B. Ryan Kendall.....	7
C. Peter Drake	10
D. John Metzidis	11
E. Maris Ehlers	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page

Cases

<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	4
<i>Pickup v. Brown</i> , No. 12-02497, 2012 U.S. Dist. LEXIS 172034 (E.D. Cal. Dec. 4, 2012)	4
<i>Sargon Enters., Inc. v. Univ. of S. Cal.</i> , 55 Cal. 4th 747 (2012)	4

Statutes

SB 1172 § 1(m), 2012 Cal. Stat. 835	9
SB 1172 § 1(n), 2012 Cal. Stat. 835	3

Rules

Fed. R. App. P. 29(a)	1
-----------------------------	---

Other Authorities

Gabriel Arana, <i>My So-Called Ex-Gay Life</i> , THE AMERICAN PROSPECT, Apr. 11, 2012	9
Jim Burroway, <i>What Are Little Boys Made Of?: An Investigation of an Experimental Program to Train Boys to be Boys</i> , BOX TURTLE BULLETIN, June 7, 2011	16
Richard Green, THE “SISSY BOY SYNDROME” AND THE DEVELOPMENT OF HOMOSEXUALITY 313-15 (Yale University Press, 1987)	16
<i>Hearing on SB 1172 Before Cal. State Assembly Comm. on Bus., Prof. & Consumer Prot.</i> , 2011-2012 Reg. Sess. (June 26, 2012) (statement of James Guay)	5
(statement of Ryan Kendall)	8
George A. Rekers & O. Ivar Lovaas, <i>Behavioral Treatment of Deviant Sex- Role Behaviors in a Male Child</i> , 7 J. APPLIED BEHAV. ANALYSIS 173- 190 (1974).....	14, 15

Robert L. Spitzer, Letter to the Editor, *Spitzer Reassesses his 2003 Study of
Reparative Therapy of Homosexuality*, 41 ARCHIVES SEXUAL BEHAV.
757 (2012).....5

INTEREST OF *AMICUS CURIAE*

Amici Curiae are four survivors of “sexual orientation change efforts” (“SOCE”) and the sister of a man who was subjected to SOCE as a child and ultimately committed suicide. *Amici* submit this brief to recount the serious harms that they, their families, and others suffered because they were subjected to these dangerous practices, illustrating the serious risk that thousands of minors will be severely and irreparably harmed if Senate Bill (“SB”) 1172 is even preliminarily enjoined.

James Guay, Ryan Kendall, and Peter Drake each testified before committees of the California Assembly and Senate in support of SB 1172. Their testimony is expanded on here. John Metzidis recounts the harms that he suffered, even though he, like James and Peter, voluntarily sought out SOCE therapy. Maris Ehlers recounts the story of her brother, Kirk Andrew Murphy, who took his own life after being subjected to SOCE as a child by the State of California.

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party or party’s counsel authored any portion of this brief. No one other than the *Amici Curiae* or their counsel contributed any money to fund this brief.

SUMMARY OF ARGUMENT

SB 1172 is necessary to protect minors from the serious harms caused by the junk science techniques, collectively referred to as SOCE, that continue to be used by some practitioners more than 40 years after the mental health profession roundly rejected the idea that homosexuality is a disorder or condition that can or should be changed. The proven dangerousness of these discredited practices demonstrates that the balance of hardships here weighs heavily in favor of the public's interest in protecting the victims of SOCE, despite Plaintiffs-Appellees' dubious First Amendment claims.

Amici's personal stories as survivors of SOCE, and the stories of those that they love, show the severity of the risks of exposure to SOCE, even to those who voluntarily seek out this "treatment." *Amici's* stories of damage and pain also show that there is no likelihood of success on the merits of Plaintiffs-Appellees' largely invented constitutional claims. Given the evidence of harm, SB 1172 is well within the State of California's power to regulate professional mental health providers to protect the health and safety of their patients.

For these reasons, the District Court erred in preliminarily enjoining enforcement of SB 1172 against Plaintiffs-Appellees, and its preliminary injunction order should be vacated.

ARGUMENT

I. THE STATE HAS SUCH A COMPELLING INTEREST IN PROTECTING MINORS FROM THE SERIOUS HARMS CAUSED BY SEXUAL ORIENTATION CHANGE EFFORTS THAT THERE IS NO LIKELIHOOD OF SUCCESS ON THE MERITS OF PLAINTIFFS-APPELLEES' CLAIMS, AND THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH HEAVILY AGAINST PRELIMINARILY ENJOINING SB 1172

SB 1172 was enacted to protect minors from the serious harms caused by SOCE. Based on extensive evidence of the harmfulness and ineffectiveness of SOCE, and the broad consensus in the mental health profession condemning its practice, the Legislature found that “California has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.” SB 1172 § 1(n), 2012 Cal. Stat. 835.

The harms that *Amici* and their families have suffered because they were subjected to SOCE are just the tip of the iceberg. The legislative record is replete with evidence of the pain and suffering of the countless lesbian, gay, bisexual, and transgender (“LGBT”) adolescents and young adults who have been exposed to these damaging “therapies.” As Dr. Caitlin Ryan’s research has revealed, “a little more than half (53%) of LGBT young adults, ages 21-25, report having been pressured by their families to change their sexual orientation when they were

teenagers, while a little more than one-third (34%) report having been sent outside the home to a therapist or religious leader to ‘cure, treat, or change your sexual orientation’ during their teenage years.” (ER 74 [Ryan Decl. ¶ 14].)

For nearly 40 years, the leading professional associations of mental health researchers and practitioners have recognized that homosexuality is not a mental illness or disorder. For example, as the District Court in the related case of *Pickup v. Brown* recounted, homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) in 1973. *Pickup v. Brown*, No. 12-02497, 2012 U.S. Dist. LEXIS 172034, at * 7 n.3 (E.D. Cal. Dec. 4, 2012). There are no documented benefits of this junk science; in fact, there is so “‘great an analytical gap between the data and the opinion proffered’” by the advocates of SOCE that they would not qualify to testify as expert witnesses. *See Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 770-72 (2012) (adopting standard for admissibility of expert testimony based on approach first announced by United States Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). The one prominent academic study that purported to show that SOCE could result in changes in sexual orientation has been renounced by its author, Dr. Robert Spitzer, who explained that his methodology was deeply flawed and apologized to the gay community for “making unproven claims of the efficacy of reparative therapy.” Robert L. Spitzer, Letter to the Editor, *Spitzer Reassesses his*

2003 Study of Reparative Therapy of Homosexuality, 41 ARCHIVES SEXUAL BEHAV. 757 (2012).

The overwhelming evidence in the legislative record establishing the danger of practicing SOCE on children demonstrates that SB 1172 must be upheld as a valid exercise of the State's power to regulate mental health providers to protect the health and safety of minors, regardless of what level of scrutiny is applied by the Court. *Amici's* stories of the harms that they and their loved ones suffered provide further evidence that there is no likelihood of success on the merits of Plaintiffs-Appellees' constitutional claims, and that the balance of hardships and the public interest weigh heavily against preliminarily enjoining SB 1172.

A. James Guay

James Guay testified before the State Assembly's Committee on Business, Professions and Consumer Protection in support of SB 1172 because he feels an obligation, as a licensed therapist and a survivor of SOCE, to do his part to protect minors from the harms that he suffered. *See Hearing on SB 1172 Before Cal. State Assembly Comm. on Bus., Prof. & Consumer Prot.*, 2011-2012 Reg. Sess. (June 26, 2012) (statement of James Guay), <http://sd28.senate.ca.gov/sites/sd28.senate.ca.gov/files/06-26-12%20SB1172%20James%20Guay%20StatementBio.pdf>.

As the son of a preacher raised in a fundamentalist Christian household in Southern California, James was plagued with guilt and shame when he realized at the age of 12 that he was gay. Like countless other children brought up in religiously conservative households, James was taught that homosexuals were inherently flawed and sinful, and was desperate to change his sexual orientation. He spent four years attempting to do so on his own—through church involvement, Bible reading, and prayer—but succeeded only in internalizing the Biblical message that he was an “abomination” and increasing his feelings of self-hatred.

At the age of 16, James disclosed his internal struggle to his parents, who helped him find a self-described “ex-gay” licensed psychologist, Dr. James Wilder, who practiced a form of SOCE referred to as “conversion therapy.” James was initially filled with a sense of relief and a newfound hope that he could change his sexual orientation through SOCE. Like many other LGBT minors, James voluntarily agreed to undergo SOCE and was fully dedicated to the weekly sessions for a year. As an impressionable teenager determined to rid himself of his “disease,” James believed for a time that undergoing SOCE was beneficial to him. Instead, his exposure to SOCE created lasting psychological damage and trauma.

As part of James’s “conversion therapy,” Dr. Wilder counseled that homosexuality can result from inadequate parenting, which wreaked havoc on James’s relationship with his parents by transforming his self-hatred into anger at

them. Dr. Wilder also required James to examine his past to search for an actual set of events that caused his same-sex desires, which put extraordinary pressure on him to create false memories and obliterated his sense of self. When he realized that, despite his discipline and devotion, he could never truly change who he was, James's worst fears were realized and he saw himself as intrinsically broken. His exposure to SOCE deepened his depression, shame, and feelings of isolation, rejection, and failure. For years, he suffered from fear of intimacy, anxiety, panic attacks, and from addictive behaviors.

Eventually, James was able to recover from the damage done to him by SOCE, and he has worked as a licensed therapist for more than a decade helping LGBT clients overcome the harmful effects of SOCE. His clients who underwent SOCE are often distrustful, scared, and in a great deal of pain, exhibiting symptoms similar to those of people who suffered early childhood traumas. Through his work, James has learned that his experience was a common one: many of his clients voluntarily underwent SOCE because they, like he, desperately needed to conform their identities to the expectations of their families and communities.

B. Ryan Kendall

Ryan Kendall testified before the State Assembly's Committee on Business, Professions and Consumer Protection in support of SB 1172, because as a survivor

of SOCE, he wants to ensure that from now on, minors raised in similar circumstances to his will be protected. *See Hearing on SB 1172 Before Cal. State Assembly Comm. on Bus., Prof. & Consumer Prot.*, 2011-2012 Reg. Sess. (June 26, 2012) (statement of Ryan Kendall), <http://sd28.senate.ca.gov/sites/sd28.senate.ca.gov/files/06-26-12%20RyanKendallTestimony.pdf>.

Ryan was raised in a fundamentalist Christian household in a religiously conservative community in Colorado Springs by parents who believed that homosexuality was sinful. When he was a young teenager, Ryan's parents discovered that he was gay and desperately sought to "fix" him by sending him to a series of SOCE practitioners. For the better part of a year, Dr. Joseph Nicolosi practiced SOCE on Ryan through weekly telephone sessions and in person at the California treatment center of the National Association for Research and Therapy of Homosexuality ("NARTH").

Ryan knew that his sexual orientation was inherent and unchangeable, so he never went through a period of believing that SOCE was beneficial. This did not protect him from severe psychological harm due to the "therapy." During each session, Dr. Nicolosi emphasized that Ryan's "treatment" would help him suppress his sinful and defective same-sex desires. Ryan's exposure to SOCE validated his parents' beliefs about homosexuality, encouraging them to reject him and causing him great pain. After he began SOCE, Ryan's parents became verbally and

emotionally abusive, telling him that he was abhorrent, disgusting, and evil.

Ryan's sense of identity and place in the world were virtually destroyed, driving him to the brink of suicide.

Ryan's experience was not unique: in enacting SB 1172, the Legislature relied in part on peer-reviewed research finding that LGBT youth who experienced high levels of family rejection, as Ryan did, were 8.4 times more likely to report having attempted suicide. SB 1172 § 1(m), 2012 Cal. Stat. 835. In fact, Gabriel Arana, another minor undergoing SOCE who Dr. Nicolosi paired with Ryan as part of their "treatment," came perilously close to taking his own life after years of exposure to SOCE because he saw himself as "a leper with no hope of a cure." *See* Gabriel Arana, *My So-Called Ex-Gay Life*, THE AMERICAN PROSPECT, Apr. 11, 2012, <http://prospect.org/article/my-so-called-ex-gay-life>.

When he was 16, Ryan stopped undergoing SOCE, ran away from home, and legally separated from his parents. For the next decade, Ryan suffered severe depression, including frequent thoughts of suicide. He was filled with self-hatred that derived from SOCE, which had reinforced the message that he was defective and immoral at a time when most adolescents are first discovering their sexual identity. Like many others experiencing total family rejection, Ryan succumbed to periods of drug abuse and homelessness, and his education was derailed for more

than a decade. Ryan’s exposure to SOCE tore apart his family, leading to a fifteen-year period of estrangement from his parents.

Although Ryan has been able to rebuild his life, returning to school and reconciling with his parents, he continues to struggle with the lasting psychological damage caused by SOCE. Nor will he be able to regain his lost decade—at the critical period in the transition from adolescence to adulthood—or the fifteen years taken from him and his family, including his father, whose health is failing.

C. Peter Drake

Peter Drake testified before the State Senate’s Judiciary Committee in support of SB 1172 to ensure that minors, who are particularly susceptible to the dangers of SOCE, are protected from the harms that he suffered.

Although Peter realized that he was attracted to men when he was 13, for much of his life he could not accept his sexual orientation. Peter lived in a straight marriage for 28 years, fathering two children. Although he was faithful to his wife, his attraction to men was always present, and Peter came to realize that he was unable to change on his own by immersing himself in his church. When he was 46, Peter sought out a licensed SOCE therapist in an attempt to change his sexual orientation.

For nearly three years, Peter subjected himself to weekly SOCE “therapy” sessions that were extremely harmful to his mental health. His therapist’s change

efforts ranged from having Peter imagine himself lusting for parts of the female body, to attempting to “father” Peter to correct the supposedly inadequate parenting that the therapist believed to be a cause of his homosexuality. Like countless others who undergo SOCE, Peter perceived his inability to change his sexual orientation as a personal failure, and became increasingly discouraged, ashamed, and humiliated. Peter’s hopes that he could be “cured” were dashed, and his therapist offered no comfort, leaving him broken. Peter’s exposure to SOCE severely worsened his depression, and he came very close to attempting suicide.

Through work with a different therapist, Peter was eventually able to accept himself as a gay man, coming out to his family and friends when he was 53. With support from his wife, Peter’s marriage ended amicably.

Peter’s daughter has come out as a lesbian woman. Given what he suffered from his exposure to SOCE as a middle-aged man, Peter is grateful that his daughter was never subjected to SOCE, particularly as a minor.

D. John Metzidis

Around the age of 14, when John Metzidis realized he was attracted to men, he felt immense shame, as he had been struggling with the fear that he was gay since early childhood. Raised in a politically conservative household in Orange County, California, John was not prepared to accept his sexual orientation, which he saw as a “problem” or “defect” that needed to be “cured.” After graduating

high school, John began reading about the “ex-gay” movement, and was drawn to the more secular forms of SOCE practiced by NARTH and Dr. Nicolosi, which taught that it was possible to change his sexual orientation, and seemed to present a way forward. When he was 20, John sought out a SOCE practitioner and began undergoing weekly sessions of “reparative therapy” with Scott Sutherland, a therapist at Dr. Nicolosi’s clinic.

Like many others who voluntarily seek out SOCE, John was initially hopeful at the prospect of changing his sexual orientation, and found it beneficial to have someone to talk to in confidence about his same-sex attractions. However, it was not long before SOCE began to have negative consequences on his life. As part of his “reparative therapy,” John was counseled that homosexuality was caused by a dysfunctional family life and upbringing and was encouraged to tell his parents about his struggles, which necessarily involved confronting them with what he had come to believe were their failures in raising him. This completely upended John’s relationship with his parents and their relationship with each other, as he blamed them and they blamed each other for his homosexual “problem.”

After about nine months of subjecting himself to SOCE, John was frustrated with his inability to change his sexual orientation, and became fixated on the notion that he was broken or defective. He became withdrawn and exceedingly self-conscious, and his grades showed a sharp decline. John began suffering from

deepening depression and anxiety, and thought about killing himself more than at any other time in his life. When, after 18 months of SOCE, John finally accepted that he could not change his sexual orientation, his therapist was unable to offer any support, and instead blamed John for not working hard enough to change.

John considers himself one of the luckier survivors of SOCE, but one of the most damaging aspects for him was the deep violation of trust and the abuse of the therapeutic relationship. John opened up to his therapist more than he had to any other person to that point in his life, sharing intimate details and exploring difficult emotions. Yet that relationship was based upon a fraud: that his sexual orientation was a disorder that could be changed if he tried hard enough. During an extremely difficult time in his young adulthood, John needed help, and instead suffered further harm because of his exposure to SOCE.

E. Maris Ehlers

Maris Ehlers's older brother, Kirk Andrew Murphy, was the original poster child for the dangerous practices now known as SOCE. On December 21, 2003, at the age of 38, Kirk committed suicide. At the time, Maris did not understand why. After learning more about the SOCE "therapy" that Kirk was subjected to by the State of California, Maris wonders how Kirk was able to live as long as he did.

In 1970, when Kirk was almost five years old, his parents enrolled him in a federally-funded experimental study at the University of California, Los Angeles

(“UCLA”), which used aversion therapy to discourage feminine behaviors in young boys, based on the now-discredited theory that this would prevent them from growing up to be gay. Under the pseudonym “Kraig,” Kirk became a case study, and later a repeatedly-cited “success story,” of then-UCLA doctoral student George A. Rekers, who has since become one of the leading proponents of subjecting children to SOCE. *See* George A. Rekers & O. Ivar Lovaas, *Behavioral Treatment of Deviant Sex-Role Behaviors in a Male Child*, 7 J. APPLIED BEHAV. ANALYSIS 173-190 (1974).

At the UCLA Gender Identity Clinic, Kirk was placed in a playroom filled with stereotypical “boys’ toys” and “girls’ toys.” *Id.* at 176. Kirk’s mother was instructed to smile and compliment him when he played with the “boys’ toys,” and to shun him when he played with “girls’ toys.” *Id.* at 179. Kirk became so distraught by his mother’s refusal to acknowledge him after he picked up a “girls’ toy” that he would break down crying, and the researchers had to reassure her “empathetically that she was doing the right thing and was doing it well” *Id.* Maris does not fault her mother for following the directions of UCLA “therapists,” whom she trusted not to ask her to do anything that would harm her son. However, Maris does not doubt that requiring her mother to repeatedly reject Kirk was cruel and damaging.

The UCLA researchers exported Kirk's SOCE "treatment" to the Murphy home, training Kirk's mother to award blue poker chips for masculine behavior and red poker chips for feminine behavior. *Id.* at 180-81. Blue chips were to be exchanged for rewards, like candy, and red chips for punishments, including "physical punishment by spanking." *Id.* at 180. At the end of each week, when the chips were tallied, Kirk's father would administer the spankings by whipping Kirk's bare bottom with a belt. While Maris was too young to remember the poker chip system imposed on the family as part of Kirk's SOCE "treatment," she does remember sneaking into Kirk's room to comfort him after the whippings.

After ten months, the UCLA researchers ended their experimental SOCE treatment on Kirk and declared victory, concluding that they had succeeded in their attempt "to extinguish feminine behavior and to develop masculine behavior." *Id.* at 179, 186. Contrary to the researchers' self-congratulation, their "therapy" had caused extraordinary damage to Kirk. After undergoing SOCE, Kirk became withdrawn, isolated, and incredibly self-conscious. He obsessed over what others thought of him, revealing through questions to Maris that he was constantly over-analyzing the words and actions of others. Maris could never understand the visible pain that Kirk carried with him, and his belief that no one could ever love him as he was. She believes that SOCE left Kirk stricken with the feeling that he was broken.

At the age of 17, Kirk attempted suicide for the first time. The following year, Kirk explained to Dr. Richard Green, one of the leading advocates for removing homosexuality from the DSM in 1973, that he had a sexual encounter with a man weeks before his suicide attempt. Jim Burroway, *What Are Little Boys Made Of?: An Investigation of an Experimental Program to Train Boys to be Boys*, BOX TURTLE BULLETIN, June 7, 2011, <http://www.boxturtlebulletin.com/what-are-little-boys-made-of5> (quoting Richard Green, THE “SISSY BOY SYNDROME” AND THE DEVELOPMENT OF HOMOSEXUALITY 313-15 (Yale University Press, 1987)).¹ Kirk told Dr. Green that he felt guilty that the SOCE “treatment” he underwent at UCLA had failed to “fix” him, and admitted that he had tried to kill himself because he did not want to be gay. *Id.*

Unlike the other *Amici*, Kirk was not able to recover from the severe harm that he suffered as the result of being exposed to SOCE at a young age, and ultimately took his own life at the age of 38. Through the painful process of losing her brother and then learning what was done to him under the auspices of government-sanctioned SOCE “treatment,” Maris became committed to protecting other minors from being exposed to the dangerous junk science that cost Kirk his life.

¹ Dr. Richard Green used Kirk as a prominent case study in his book, under the pseudonym “Kyle.” He confirmed that “Kyle” is Kirk to Maris in 2010.

CONCLUSION

The serious harms that *Amici* and their families suffered because they were subjected to SOCE, recounted above, demonstrate the dangerousness of these discredited practices. The overwhelming evidence in the legislative record is more than sufficient to uphold SB 1172 on the merits, despite Plaintiffs-Appellees' questionable First Amendment challenges, and regardless of what level of scrutiny is applied by the Court. The personal stories of *Amici*, as survivors of SOCE, demonstrate the seriousness of the risk that thousands of minors will be severely and irreparably harmed if SB 1172 is preliminarily enjoined.

For these reasons, and for the reasons stated in the Brief of the State of California Defendant-Appellants, *Amici Curiae* urge the Court to vacate the District Court's order preliminarily enjoining enforcement of SB 1172 against Plaintiffs-Appellees.

DATED: February 4, 2013

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

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DECLARATION OF SIGNING ATTORNEY

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit rule 32-1, I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 3,819 words as counted by the Microsoft Word 2010 word processing program used to generate the brief.

DATED: February 4, 2013

/s/ Sanford Jay Rosen

Sanford Jay Rosen

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 4, 2013

/s/ Sanford Jay Rosen

Sanford Jay Rosen