No. 11-35864

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DAVID WILLIAM HENDERSON AND CANDICE YVETTE HENDERSON,
Debtors.

AMERICAN EXPRESS CENTURION BANK,
Creditor-Appellant

— v. —

DAVID WILLIAM HENDERSON and CANDICE YVETTE HENDERSON
Debtors-Appellees

ON DIRECT APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO No. 10-03114-JDP

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTORS AND SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

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March 5, 2012

CORPORATE DISCLOSURE STATEMENT

American Express Centurion Bank v. Henderson, No. 11-38564

Pursuant to Rule 29(c)(1) of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: March 5, 2012

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,800 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008); *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir. 2007).

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom file under Chapter 13 as "above median income debtors" with no "projected disposable income" under section 1325(b)(1)(B). The proper interpretation and application of the five year "applicable commitment period" under section 1325(b)(4) is of great significance to all such debtors because the resolution of that issue dictates the

length of time the debtor must stay in bankruptcy to obtain relief. All parties have consented to the filing of this brief pursuant to FRAP 29(a).

CONSENT

This amicus brief is being filed with the consent of the parties.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor part or party's counsel contributed money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

SUMMARY OF ARGUMENT

The plain meaning and intent of section 1325 dictate that the five year "applicable commitment period" of subdivision (b)(4) does not apply to debtors who, like the debtors in this case, have no "projected disposable income" within the meaning of subdivision (b)(1)(B), as this Court previously held in *Maney v. Kagenveama*, 541 F.3d 869 (9th Cir. 2008) (*Kagenveama*). The Supreme Court's recent decisions in *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010) (*Lanning*), and *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716 (2011) (*Ransom*) in no way undermine the holding in *Kagenveama* on this point. Rather, the Supreme Court's analysis of how bankruptcy courts should calculate "projected disposable income" in *Lanning* further supports the essential underpinnings of that holding. *Kagenveama* therefore remains good law, which controls in this circuit. Indeed, given the patently unfair and absurd results that would flow from a freestanding five year plan length requirement for all above median income debtors, this Court's plain meaning interpretation of section 1325(b) is inescapable. As such, the debtors in this case are not bound to the five-year "applicable commitment period," and the bankruptcy court correctly confirmed their 36 month plan.

ARGUMENT

I. THIS COURT'S HOLDING IN *KAGENVEAMA*, WHICH IS CONSISTENT WITH THE PLAIN LANGUAGE AND CLEAR INTENT OF SECTION 1325, AS WELL AS THE SUPREME COURT'S DECISION IN *LANNING*, DICTATES THAT THE DEBTORS IN THIS CASE ARE NOT BOUND TO THE FIVE YEAR "APPLICABLE COMMITMENT PERIOD" BECAUSE THEY HAVE NO "PROJECTED DISPOSABLE INCOME."

A. Framework and Background

When the trustee or an unsecured creditor objects to a debtor's proposed Chapter 13 repayment plan, the court cannot confirm the plan unless, as of the effective date of the plan, it provides "that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B). "Disposable income" means "currently monthly income received by the debtor . . . less amounts reasonably necessary to be expended." 11 U.S.C. §1325(b)(2). Those expenses are determined in accordance with specified standards in the Internal Revenue Code. 11 U.S.C. §§ 1325(b)(3) and 707(b). "Current monthly income," in turn, is defined as "the average monthly income" that the debtor received during the six month period before the filing of the petition. 11 U.S.C. § 101(10A)(A). For above median income debtors, the "applicable commitment period" for the plan is five years; that is, such debtors must devote all of their "projected

disposable income" to unsecured creditors for not less than five years. §1325(b)(4)(A)(ii).

In *Kagenveama*, 541 F.3d 869, this Court held that above median income debtors with no "projected disposable income" are not bound to the five year "applicable commitment period" under section 1325(b)(4) and thus may propose plans of shorter duration. *Id.* at 871. This Court reasoned that, by the statute's own terms, "applicable commitment period" applies only to cases in which the debtor has "projected disposable income" available to devote toward unsecured creditors. *Id.* at 876-77. In other words, "the 'applicable commitment period' is not the minimum plan duration, but instead represents the period over which payments of projected disposable income must be devoted to unsecured creditors." *Id.* at 876. "When there is no 'projected disposable income,' there is no 'applicable commitment period.'" *Id.* Since the debtor in *Kagenveama* had no projected disposable income, this Court held that the applicable commitment period was irrelevant, and that the bankruptcy court properly confirmed her plan even though it was shorter than five years. *Id.* at 877. The *Kagenveama* court also considered the proper method of calculating a debtor's "disposable income," and adopted the "mechanical approach," which multiplies by 12 the debtor's average monthly income over the six months preceding the petition. *Id.* at 871-75.

Two years later, in *Lanning*, 130 S.Ct. 2464, the Supreme Court spoke on the proper method of calculating "projected disposable income" and rejected the mechanical approach in favor of a forward looking approach that allows a bankruptcy court to take into account "known or virtually certain" future changes in the debtor's income or expenses. *Id.* at 2478. The next year, in *Ransom*, 131 S.Ct. 716, the Supreme Court held that, in calculating "disposable income," debtors may only claim the standardized expense for vehicle ownership costs if they currently have such costs or will incur such costs during the life of the plan. *Id.* at 725-26. Neither of these decisions specifically addressed the question whether above median income debtors with zero or negative disposable income are bound to section 1325(b)(4)'s five year "applicable commitment period."

B. The Supreme Court's Decisions in *Lanning* and *Ransom* Necessarily Did Not Overrule this Court's Interpretation of section 1325(b)(4)'s "Applicable Commitment Period" in *Kagenveama*

"As every first-year law student knows, the doctrine of *stare decisis* is often the determining factor in deciding cases brought before any court." *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 550 F.3d 778, 785 (9th Cir. 2008). The doctrine is '"the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion."' *Id.* at 785 (quoting *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598

(1986)). Thus, '"any departure from the doctrine of *stare decisis* demands special justification.'" *Oregon Natural Desert Ass'n*, 550 F.3d at 785 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)). When the doctrine applies, the court's prior ruling on the issue will control, except to the extent it has been overruled by, or is "clearly irreconcilable" with, later Supreme Court authority on the same issue. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003).

This Court has already ruled on the issue here, by holding in *Kagenveama* that the five year "applicable commitment period" does not apply to above median income debtors with no "projected disposable income." *Kagenveama*, 541 F.3d at 875-76. As such, it is bound to follow that holding and apply it here, except to the extent that the holding has been abrogated by later Supreme Court authority – as pertinent here, *Lanning*, 130 S.Ct. 2464, or *Ransom*, 131 S.Ct. 716.

It is clear that neither *Lanning* nor *Ransom* overruled the holding in *Kagenveama* regarding section 1325(b)(4)'s "applicable commitment period." The Supreme Court did not address the specific question whether above median income debtors with no projected disposable income are bound to propose five year repayment plans under section 1325(b)(4). As noted, *Lanning* concerned whether a mechanical or forward looking approach should be applied in determining projected disposable income, *Lanning*, 130 S.Ct. at 2478, and *Ransom* concerned a

debtor's ability to deduct standardized vehicle ownership expenses, *Ransom*, 131 S.Ct. at 725-26. It is axiomatic that an opinion is not authority for a proposition the court did not consider. *City of Kenosha, Wis. v. Bruno*, 412 U.S. 507, 512-513, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, 73 S.Ct. 67, 97 L.Ed 54 (1952). Thus, as the bankruptcy court here recognized, while *Lanning* rejected one holding adopted in *Kagenveama (by allowing consideration of known or virtually certain changes in income or expenses)*, neither Supreme Court decision can be read to have overruled the holding in *Kagenveama* concerning the "applicable commitment period" of section 1325(b)(4). *In re Henderson*, 455 B.R. 203, 208 (Bankr. D. Idaho 2011); *accord In re Reed*, 454 B.R. 790, 801-02 (Bankr. D. Or. 2011).

C. *Lanning* Further Supports *Kagenveama* Here

In *Kagenveama*, this Court "relied on what is viewed as 'the plain language of the Bankruptcy Code as written.'" *In re Reed*, 454 B.R. at 802 (quoting *Kagenveama*, 541 F.3d at 877). "It is well established that when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *Lamie v. U.S. Trustree*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030, 157 L. Ed. 2d 1024 (2004) (internal quotations omitted). The plain language of the Code shows that

the "applicable commitment period" of section 1325(b)(4) is "exclusively linked" to the "projected disposable income" referenced in section 1325(b)(1)(B). *In re Reed*, 454 B.R. at 802 (citing *Kagenveama* 541 F.3d at 876). Section 1325(b)(4) expressly limits the application of that term – providing it applies only "[f]or purposes of this subsection" – and section 1325(b)(1)(B) is the sole context in which the term is actually used. Thus, the "applicable commitment period" applies only to "projected disposable income" debtors will receive during the plan; "[m]oney other than projected disposable income 'does not have to paid out over the 'applicable commitment period.'" *In re Reed*, 454 B.R. at 802 (quoting *Kagenveama* 541 F.3d at 876). Ultimately, then, the five year plan specified for above median income debtors under section 1325(b)(4)(A)(ii) has no meaningful or effective application to debtors who have no projected disposable income. *Id.* Indeed, "[w]here projected disposable income is zero or less, it is hard to see how the statute requires any payment to unsecured creditors. Zero times 60 months is still zero." *Id* at 803.

The Supreme Court's analysis in *Lanning* of the proper method to calculate "projected disposable income" reinforces this Court's plain meaning, common sense construction of section 1325(b)(4)'s applicable commitment period. In adopting the forward looking approach for determining "projected disposable income" under section 1325(b)(1), the Supreme Court observed that nothing in the

enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) changed the meaning of that term as it was understood or applied under the prior law. *Lanning*, 130 S.Ct. at 2471-73. Thus, "because we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure[,]" the pre-BAPCPA practice continues to control. *Id.* at 2473 (internal quotations omitted). Under that practice, the bankruptcy court generally "multipl[ies] a debtor's current monthly income by the number of months in the commitment period as the first step in determining projected disposable income." *Id.* at 2472. As a practical matter then, the high court explained, absent known or virtually certain future changes in the debtor's financial situation, "the court must simply multiply the debtor's known monthly income by 36 and determine whether the amount to be paid under the plan equals or exceeds that amount." *Id.* at 2473 (internal quotations omitted).

Thus, contrary to appellants' claim that the Supreme Court somehow decoupled section 1325(b)(4)'s "applicable commitment period" from "projected disposable income" under section 1325(b)(1), Appellants' Joint Principal Brief at 22, the *Lanning* decision solidified this Court's plain meaning interpretation of section 1325(b)(4) as inexorably tied to section 1325(b)(1). This was a foundational point for this Court's holding that the five year applicable commitment period does not apply to debtors with no projected disposable income.

The *Lanning* court further recognized that section 1325(b)(1)(B)'s requirement that projected disposable income "will be applied to make payments" to creditors is "rendered a hollow command" when the debtor lacks the means to make such payments. *Id.* at 2474. This same basic logic was also an essential underpinning of this Court's interpretation of section 1325(b)(1) in *Kagenveama*, as this Court recognized that no sensible purpose could be achieved in binding debtors to five year plans designed to repay unsecured creditors with projected disposable income when the debtor has no such income. *Kagenveama*, 541 F.3d at 876-77. Indeed, the absurd results that would flow from such a rule, as discussed below, leave the holding in *Kagenveama* as the only sensible interpretation of section 1325(b).

D. The Absurd Results that Would Flow from a Freestanding Five Year Plan Length Requirement Erase Any Remaining Doubt that this Court's Interpretation of Section 1325(b) is the One Congress Intended

Despite the inescapable import of the plain language in section 1325(b), appellants insist that this Court abandon its holding in *Kagenveama*, citing decisions of other circuits – *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011) and *Whaley v. Tennyson*, 611 F.3d 873 (11th Cir. 2010) – which held that *Kagenveama* did not survive *Lanning* or *Ransom* and that section 1325(b)(4) establishes a freestanding plan length requirement applicable to all above median income

debtors regardless of their projected disposable income. Appellant's Joint Principal Brief at 18-23.

At the outset, these other circuit decisions simply read *Lanning* and *Ransom* too broadly. They purport to extrapolate determinative "guideposts" on this issue from the Supreme Court's discussion of Congress's purpose in adding the means test to the Code under the BAPCPA amendments – i.e., to maximize the amount debtors repay their creditors. *Baud*, 634 F.3d at 352-53; *Tennyson*, 611 F.3d at 879. But, as noted, the Supreme Court did not directly address whether section 1325(b)(4) requires five year plans for above median income debtors with no projected disposable income under section 1325(b)(1), and the analysis of "projected disposable income" in *Lanning* -- reaffirming the inextricably intertwined relationship between these provisions – does nothing but refute the notion that section 1325(b)(4) establishes a freestanding plan length requirement.

Moreover, Congress's stated purpose in adopting the means test -- "to ensure that debtors repay the maximum *they can afford*" – H.R. Rep. No. 109-31, pt. 1, at 2 (italics added) – shows it simply intended to ensure debtors repay *within* their means, not that they be forced to make payments *beyond* their means. In fact, the global purpose behind adopting BAPCPA was "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensur[ing] that the system is fair for *both* debtors and creditors." *Id.* (italics

added). A rule that section 1325(b)(4) establishes a freestanding plan length requirement applicable to all debtors regardless of their projected disposable income, as the courts in *Baud* and *Tennyson* found, runs afoul of both these purposes. This would lead to absurd results, which not only would be patently unfair to debtors but could also effectively *reduce* the amount creditors recover.

Consider, for example, the effect of such a rule on the triggering clause of section 1325(b)(1), which expressly limits the requirement of payments to unsecured creditors from projected disposable income to those cases in which "the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan." Holding that section 1325(b)(4) establishes a freestanding plan length requirement in all cases would render this triggering clause a nullity. It is axiomatic that "we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). The broad sweep of appellants' freestanding plan length requirement rationale would actually capture not only debtors with no projected disposable income, but also debtors who have no unsecured creditors at all. Reaching such absurd results must be avoided so long as the statutory provisions "can be given a reasonable application consistent with their words and with the legislative purpose." *Haggar Co. v.*

Helvering, 308 U.S. 389, 394, 60 S. Ct. 337, 339, 84 L. Ed. 340 (1940). They clearly can be: the plain language and obvious intent of section 1325(b)(1)(B) and 1325(b)(4) establish that, consistent with the Code's purpose of ensuring a fair system in which debtors pay what they can afford, debtors are bound to make the required payments under section 1325(b)(1)(B) only to unsecured creditors and only when they have projected disposable income available to do so.

Artificially extending the length of the plan to five years in every case involving an above median income debtor would also undermine BAPCPA's core purpose of achieving fairness for both debtors and creditors. For example, the monthly payments would necessarily be reduced by the extended plan period. As a result, secured creditors would have to wait longer to get paid on their claims and bear a greater risk that the debtor will suffer some sort of hardship jeopardizing the creditors' ability to ultimately obtain full recovery. The risk of an ultimate plan failure is exacerbated by the additional interest the debtor would be forced to incur under the present value calculation in section 1325(a)(5)(B)(ii). Consider also debtors like Cesar and Ana Maria Flores in the companion case (No. 11-55452). The Flores's were in fact eligible to file under Chapter 7, and even though they technically have no "projected disposable income," they chose to file under Chapter 13 and voluntary make payments toward their unsecured creditors with funds otherwise protected from the reach of creditors. *See* Appellee's Opening

Brief, Case No. 11-55452 at 37-38. As the Flores's point out, a freestanding five year plan length requirement for all above median income debtors in Chapter 13 would obviously encourage such debtors to stay out of Chapter 13 and to file under Chapter 7, necessarily resulting in even smaller recoveries for creditors. *Id.*

Had Congress intended to create a five year plan length for all above median income debtors, it could have easily done so. Congress included a specific provision establishing a *maximum* length of five years for such debtors. § 1322(d). This shows it acted purposefully in not establishing a *minimum* length of five years for all above median income debtors regardless of their projected disposable income, and instead meant what the plain meaning of section 1325(b) says: that the applicable commitment period of section 1325(b)(4) applies only to debtors who have projected disposable income available to pay their unsecured creditors.

In summing up why it felt bound to follow *Kagenveama* in this case, the bankruptcy court stated: "[W]hile *Kagenveama* was overruled in part by *Lanning*, neither *Lanning* nor *Ransom* alter *Kagenveama's* applicable commitment period holding. Indeed, fairly analyzed, *Kagenveama* is consonant with the particular purpose of section 1325(b)(1), and the general goals of BAPCPA as a whole." *In re Henderson*, 455 B.R. at 214. Coupled with the further illustration in *Lanning* of the integral link between "projected disposable income" and "applicable commitment period" under section 1325(b), and the patently absurd results that

would flow from a freestanding five year plan length requirement, this recognition leads inexorably to the conclusion that a five year plan is only required for debtors with projected disposable income – just as this Court held in *Kagenveama*.

E. Because the Debtors in this Case Have No "Projected Disposable Income," the Bankruptcy Court Properly Confirmed Their Plan

At the end of their brief, appellants raise a cursory argument that *Kagenveama* is in any event inapposite and of no assistance to the debtors here because they have "positive" projected disposable income based upon their *actual* income and expenses. Appellant's Joint Principal Brief at 23-24. The sole support appellants offer for this argument is language from *In re Beckerle*, 367 B.R. 718, 721 (Bankr. D. Kan. 2007), in which the court suggested that a negative projected disposable income figure under means test calculations can never support a "feasible" plan and thus the debtor must show "there is, in fact, disposable income" to have the plan confirmed. *Beckerle*, 367 B.R. at 721. This reasoning is problematic on multiple levels, as the debtors explain in their brief. Appellees' Brief at 3-4. Whatever value this suspect reasoning had back then, it clearly did not survive *Lanning* and *Ransom*, which held that the means test calculations control the determination of "projected disposable income" except in the unusual case that involves "known or virtually certain" future changes affecting the

debtor's financial situation. *Lanning*, 130 S.Ct. at 2477; *Ransom*, 131 S.Ct. at 724-25; *see also In re Theil*, 446 B.R. 434, 438-39 (Bankr. D. Idaho 2011).

There is no evidence of any future changes in the debtors' financial situation that warrant deviation from the standard means test calculations for determining their "projected disposable income." Thus, those calculations control, and they result in negative projected disposable income. *See In re Henderson*, 455 B.R. at 203. It follows then, that under this Court's holding in *Kagenveama*, the debtors are not bound to section 1325(b)(4)'s five year applicable commitment period, and the bankruptcy court correctly confirmed their 36 month plan.

CONCLUSION

Based on the foregoing, the judgment of the Bankruptcy Court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, Debtors hereby state that three cases have been consolidated for purposes of oral argument: *American Express Centurion Bank v. Henderson*, No. 11-35864, *McCallister v. Henderson*, No. 11-35865, and Danielson v. Flores, No. 11-55452. Debtors are aware of no other cases in this Court that may be deemed related.

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 3595 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

_/s/Tara Twomey _____
TARA TWOMEY, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, I electronically filed the foregoing document with the Clerk of the Court for Ninth Circuit Court of Appeals by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following parties: NONE

_/s/Tara Twomey_____
TARA TWOMEY, ESQ.