

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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AMERICAN ASSOCIATION OF PEOPLE))
WITH DISABILITIES, FEDERATION OF))
WOMEN’S CLUBS OVERSEAS, INC., NEW))
MEXICO PUBLIC INTEREST RESEARCH))
GROUP EDUCATION FUND, and))
SOUTHWEST ORGANIZING PROJECT,))
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Plaintiffs,))
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)	No. 1:08-cv-702 JB/RHS
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v.))
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MARY HERRERA, in her capacity as))
Secretary of State,))
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Defendant))
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RESPONSE TO PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Plaintiffs contend that they are entitled to summary judgment on their free speech claims on the basis that New Mexico’s third party voter registration law, NMSA 1978, § 1-4-49 (and accompanying regulations promulgated by the Secretary of State (“the Secretary”)) unconstitutionally burden their free speech rights. The factual record developed in this case does not support their motion, and the Court should accordingly deny it.

I. PLAINTIFFS’ STATEMENT OF UNDISPUTED FACTS

Plaintiffs’ statement of facts is, on the whole, accurate and complete. There are, however, two asserted facts that require additional examination. First, in Paragraph 8(b), Plaintiffs state that blank New Mexico voter registration forms “are to be distributed in quantities

of no more than 50 per organization or individual at any one time.” (Motion, pg. 3 [Doc. 120].) While the regulations to which Plaintiffs cite do, in fact, establish a fifty-form limit, those regulations also expressly permit both the Secretary and New Mexico’s County Clerks to provide additional forms if the circumstances warrant. *See* 1.10.25.8(c) (“The secretary of state retains the discretion to increase these quantities for special events or circumstances.”); *see also* 1.10.25.10(b) (“The county clerk may retain discretion to increase these quantities for special events or circumstances.”).

Second, in Paragraph 9(d), Plaintiffs recite varying interpretations of the 48-hour requirement given by different Secretary of State and County Clerk representatives. As discussed in the briefing on Plaintiffs’ Motion to Reconsider, regardless of how some election officials have interpreted the 48-hour requirement, the language describing that requirement is perfectly clear: an agent must either return or mail a form to the appropriate election official within 48 hours of its completion.

II. ARGUMENT AND AUTHORITIES

In their Motion, Plaintiffs sometimes lose focus of the protected rights at issue in this litigation. It is important for the Court to maintain focus where Plaintiffs have not, and examine only those burdens that the law places on Plaintiffs’ free speech rights under the United States and New Mexico Constitutions. Plaintiffs also seek in their Motion to place the burden of proof on the Secretary, notwithstanding the fact that, as the movants, Plaintiffs bear the burden of demonstrating that there are no issues of material fact such that they are entitled to summary judgment in their favor.

A. Plaintiffs Have Not Demonstrated That The Law Does Not Serve Important State Interests.

Initially, although accepting the applicability of the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), Plaintiffs' Motion is replete with arguments more properly made in a strict scrutiny case. Plaintiffs, for example, argue that they are entitled to summary judgment because the Secretary cannot demonstrate that the law "is necessary to advance a legitimate State interest." (Motion, pg. 21 [Doc. 120].) *Anderson* itself does not compel such an analysis. Instead, *Anderson* requires a court to both determine the strength and legitimacy of the interests identified by the State and to "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

This is, at bottom, a balancing analysis. It is not the same thing as requiring the State to demonstrate that a particular restriction is necessary to serve a compelling State interest. Rather, if the interest is both powerful and legitimate on the one hand, and the burden imposed is slight on the other, the law need not be strictly *necessary* to serve that interest to pass constitutional muster. It is simply another factor to be considered in the balancing performed by the Court.

Moreover, Plaintiffs have attempted to dodge their own burden of proof as a summary judgment movant by arguing that the Secretary has not demonstrated that Section 1-4-49 is necessary to serve the interests in preventing voter registration fraud and protecting the elective franchise. While the Secretary disagrees with this assessment, in order to prevail on summary judgment, it is the movant – here Plaintiffs – that must meet the burdens of proof and persuasion. In other words, Plaintiffs must show that the undisputed facts support a finding that the law excessively burdens their free speech rights even in light of the State's interest supporting it.

Finally, Plaintiffs contend that because they have brought an as-applied challenge, "the Secretary must show that the State has a legitimate and sufficient interest in burdening Plaintiffs,

which are volunteer-driven, resource-limited and undisputedly ‘reputable’ organizations.” (Motion, pg. 21 [Doc. 120].) This is, however, not how as-applied challenges work. While the Court must of course examine whether the law is constitutional as applied to Plaintiffs, that does not mean that the constitutional analysis turns on whether or not Plaintiffs are staffed by volunteers, have limited resources, or are likely to violate the statute. Instead, the issue is simply whether the law unconstitutionally burdens their free speech rights, regardless of their propensity to commit voter registration fraud or engage in the disenfranchisement of New Mexico citizens.¹

1. The law prevents and deters voter registration fraud.

The law requires third party agents to include their individual registration number on every completed voter registration form they submit to New Mexico election officials. This requirement allows the State to track to their source any forms submitted for the purpose of defrauding the State in the voter registration process. Plaintiffs do not dispute the fact that this does, in fact, enable the State to engage in such tracking. Instead, they contend that such tracking is simply unnecessary. To prove this contention, Plaintiffs point to record evidence that, in their view, demonstrates voter registration fraud is rare if not nonexistent.

This attack, while novel, is insufficient to carry Plaintiffs’ burden of showing that the law does not serve the legitimate State interest in deterring and preventing voter fraud. As the Court is already aware, there have, in fact, been at the very least attempts at voter registration fraud in New Mexico. Denise Lamb, the former director of the Bureau of Elections at the Secretary of

¹ Plaintiffs also cite *Village of Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 637 (1980) for the proposition that the Secretary cannot lump Plaintiffs in with groups whose conduct violates Section 1-4-49. This argument fails. First, as noted above, the constitutionality of Section 1-4-49 cannot turn on whether a group is likely to violate its mandates. Second, *Schaumburg* dealt with a regulation that flatly prohibited direct solicitation by groups that spent more than twenty-five percent of their budget on salaries and administrative costs. *Id.* at 637. Section 1-4-49 does not prohibit – flatly or by implication – voter registration activity. Finally, the *Schaumburg* Court applied strict scrutiny to the statute at issue, not the *Anderson* balancing test (unsurprising, given that *Schaumburg* predates *Anderson* by three years). This was crucial to the result in *Schaumburg*: “The Village’s legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation.” *Id.*

State's Office and current director of the Bureau of Elections for Santa Fe County, testified both through an affidavit and in her deposition that the Libertarian Party in 1999 defrauded voters into switching their party affiliation. *See, e.g.*, Affidavit of Denise Lamb, ¶¶ 4, 5.

Plaintiffs attempted in deposing Ms. Lamb to minimize this conduct, and quote her deposition testimony that it as an “egregious exception” rather than the common practice of third party voter registration agents. (Motion, pg. 25 [Doc. 120].) That does not mean, however, that the Libertarian Party's conduct was somehow not problematic. Indeed, the State's interest in preventing egregious conduct is self evident, and is hardly lessened by virtue of the fact that the conduct is egregious. Plaintiffs also argue that the alleged fraud was easily traced by “simply check[ing] the voter's present party in order to identify the likely culprit.” (Motion, pg. 25 [Doc. 120].) This ignores, however, the fact that neither NMSA 1978, § 1-20-3(B) (which makes it a crime to falsify a voter registration certificate) nor NMSA 1978, § 1-20-9(D) (which makes it a crime to intentionally suppress a voter registration certificate) provide for organizational liability. Thus, determining which political party is responsible for the fraud is useless – the State must identify the particular individuals responsible, and neither of the statutes to which Plaintiffs direct the Court provide any mechanism for such individual tracking.²

Plaintiffs also gloss over the Secretary's testimony regarding forms submitted by the Republican Party in 2004 with mismatched names and Social Security Numbers and Ms. Toulouse-Oliver's testimony regarding forms submitted in 2008 by ACORN that raised sufficient red flags to submit the forms to state and federal law enforcement agencies for

² This is part of Plaintiffs' larger argument that Section 1-4-49 is unnecessary because New Mexico has already criminalized the conduct described in Sections 1-20-3(B) and 1-20-9(D). These statutes are strictly criminal statutes and do not carry the less severe civil penalties found in Section 1-4-49. As noted, they also do not provide any mechanism for tracking fraudulent voter registration forms. Thus, Plaintiffs' suggestion that “this regime is sufficient to deter and punish voter registration fraud” (Motion, pg. 24 [Doc. 120]) misses the mark.

investigation. The fact is, the State must be vigilant to attacks on its democratic process, and Section 1-4-49 provides a unique tool to the State in exercising that vigilance.

Plaintiffs' entire argument is ultimately little more than a tempest in a teacup in any event, because neither *Anderson* nor its progeny require the State to present empirical evidence of massive voter registration fraud before passing a statute, like Section 1-4-49, that is designed to prevent such fraud. Plaintiffs recognize the importance of ensuring the integrity of the electoral system; indeed, in some respects their position in this litigation depends on it. The power of that interest does not turn on how frequently it is threatened. The integrity of the democratic process is equally important whether voter registration fraud happens one or one thousand times.

2. The law protects the elective franchise.

Plaintiffs suggest that Section 1-4-49 can only protect the elective franchise if it ensures registration forms are both accurate and submitted before the deadline for registration (Motion, pg. 27 [Doc. 120]), and argue that the law meets neither goal. The record evidence indicates that Plaintiffs are wrong.

First, Plaintiffs contend that the law does not, on its face, ensure accurate completion of registration forms or hold third party agents responsible for such information. Plaintiffs ignore, however, the impact that mandatory training has on this issue. The training is designed to, among other things, ensure that third party agents know what information is required of voters so that the completed forms will be accurate. And while third party agents may not be held accountable if a voter provides inaccurate information in the completion of the form, they are

certainly held accountable if they submit intentionally fraudulent information on their own account.³

Plaintiffs next try to suggest that the 48-hour requirement actually impedes accuracy by hampering their quality control efforts. This suggestion, however, is predicated on the assumption that Plaintiffs' quality control efforts are reasonably conducted. The Court cannot indulge this assumption. It is difficult to believe that Plaintiffs, in light of their relatively small-scale voter registration efforts, cannot conduct sufficient quality control checks in two days. The forms are not particularly complicated, and assuming that Plaintiffs and their volunteers have successfully completed training, they should know exactly what to look for to determine whether a form has been completed in such a way as to ensure its acceptance by the relevant election official. While Plaintiffs' assert that two days is not enough time to complete their quality control checks, the Court is not obligated to accept that assertion at face value when there is reason to question whether it is supported by an adequate explanation.

Plaintiffs also argue that the 48-hour requirement is unnecessary because it is their "mission to expand the franchise" and they therefore "have every incentive to submit forms in a timely fashion." (Motion, pg. 28 [Doc. 120].) This begs the question: if Plaintiffs' mission is to submit forms in a timely fashion, why is the 48-hour requirement a problem? Plaintiffs' real complaint is that the 48-hour requirement is "unnecessary to ensure timely submission of registration forms." (Motion, pg. 29 [Doc. 120].) But, as demonstrated above, this is not the constitutional test. Even assuming that there is a better system, that fact does not render the system chosen by the New Mexico legislature unconstitutional. Moreover, *Anderson* does not

³ Indeed, if Section 1-4-49 did hold third party agents accountable for inaccurate information provided by the voter him or herself, such accountability would undoubtedly be a centerpiece of Plaintiffs' challenge to the law.

require a showing of necessity – it is merely another factor to be considered in conducting the balancing required by *Anderson*.

Finally, Plaintiffs suggest that the law is unnecessary because the evidence of past voter disenfranchisement is hearsay and does not “establish a pattern of disenfranchisement that would justify enactment of the challenged law.” (Motion, pg. 29 [Doc. 120].) The evidence to which Plaintiffs refer involved third party agents who utterly failed to submit completed voter registration forms to the appropriate election official. Here again, Plaintiffs are incorrect to assume that there must be a “pattern of disenfranchisement” before New Mexico would be able to pass a law like Section 1-4-49. The strength and legitimacy of New Mexico’s interest in preventing disenfranchisement does not turn on how often New Mexico voters are disenfranchised. Even one incident is sufficient to justify a law like Section 1-4-49 so long as the burdens imposed by the law are not excessive.

3. The law’s civil and criminal penalties advance the State’s interests in deterring voter registration fraud and protecting the elective franchise.

Plaintiffs advance in their Motion a theory that the Court has already rejected, namely that the civil and criminal penalties for violations of Section 1-4-49 are unconstitutionally burdensome. Plaintiffs present a short survey of laws in other states governing third party voter registration conduct, but those laws are irrelevant to the question the Court must answer, namely whether the penalties in New Mexico’s law burden Plaintiffs’ free speech rights to such an extent as to render the law unconstitutional.

Enforcement is, of course, essential to any regulatory scheme. As such, New Mexico’s penalties undoubtedly serve the State’s interest in protecting the elective franchise. Plaintiffs again complain that the State could serve this interest with a longer deadline, but the existence of less restrictive alternatives is hardly dispositive of the issue. Finally, Plaintiffs’ survey of other

state laws regulating third party voter registration agents is irrelevant to a consideration of New Mexico's statute. Plaintiffs suggest that if civil and criminal penalties were necessary to enforce a short deadline like New Mexico's, "one would expect other States . . . to have adopted similar regimes with myriad requirements and penalties." (Motion, pg. 32 [Doc. 120].) What other states have chosen to do – or not do – has no bearing whatsoever on the law New Mexico has elected to pass to protect its voters.

4. The fifty-form limit protects the public fisc.

Plaintiffs fail to recognize the importance of the fifty-form limit, citing a string of cases that stand for the general proposition that a State cannot burden fundamental rights in an attempt to save money. But the fifty-form limit is a simple matter of financial reality. While the Secretary hopes and intends to produce a less costly form (which would render the fifty-form limit unnecessary and likely lead to its elimination from the Secretary's regulation), at present such a form does not exist. Second, as discussed in greater detail below, the fifty-form limit does not burden Plaintiffs in their voter registration activities because they may use the federal voter registration form, which is freely available on the internet, in their voter registration activities. Balancing the State's interest in controlling costs against the non-existent burden the fifty-form limit places on Plaintiffs' rights leads to the inescapable conclusion that the limit is constitutional.

B. Plaintiffs' Cannot Meet Their Summary Judgment Burden Of Establishing That The Law Unconstitutionally Burdens Their Protected Free Speech Rights.

Plaintiffs may have some legitimate complaints about the manner in which Section 1-4-49 operates. It is possible, if not likely, that there are more efficient ways in which the State could prevent voter registration fraud and protect the elective franchise. Even assuming the truth of that assertion, however, Plaintiffs must still demonstrate that the law's operation is so

burdensome on their protected speech as to render it unconstitutional. On this point, Plaintiffs' Motion fails. Plaintiffs contend that the Secretary must "justify forcing Plaintiffs to stop or severely restrict their protected activities," (Motion, pg. 35 [Doc. 120]), but, to prevail at the summary judgment stage, Plaintiffs must prove that *voluntarily* restricting their own conduct (because Section 1-4-49 does not prohibit third party voter registration activity) is a reasonable response to the law's provisions. They cannot do so.

1. The alleged vagueness of the law does not unconstitutionally burden Plaintiffs' rights.

Plaintiffs begin by essentially reasserting their claim that the law is unconstitutionally vague in three ways: (1) the term "assist" is unclear; (2) the scope and application of the 48-hour deadline is unclear; and (3) the precise conduct to which the criminal penalties apply is unclear. The Secretary has addressed all of these contentions in her briefing on Plaintiffs' Motion to Reconsider the Court's Order granting, in part, the Secretary's Motion to Dismiss. In short: (1) the Court has already ruled that the term "assist" is frequently used in legislation and carries with it a generally accepted meaning; (2) the alleged vagueness regarding the 48-hour rule flies in the face of the plain language of the statute; and (3) the penalties are likewise clear on their face (specifically, civil penalties apply to negligent conduct and criminal penalties apply to intentional conduct, *i.e.* conduct undertaken with the intention of violating the statute).

2. The 48-hour requirement does not, by making it more difficult for Plaintiffs to conduct volunteer-run voter registration activities, violate the Constitution.

Plaintiffs again complain that the 48-hour requirement prevents them from undertaking the quality control efforts they would like to undertake regarding the completed voter registration forms they collect. As discussed above, Plaintiffs' bare assertions that the process takes "several days" is insufficient to support their Motion. Simply put, a quality control process that takes

several days to determine whether a voter has provided all of the information necessary to process an application is poorly designed. Assuming that an agent has received training, he or she should be able to determine in a matter of minutes (or perhaps less) whether the voter has provided sufficient information, such as affirmation that the voter is eighteen or older.

Plaintiffs also contend that quality control is essential to the realization of the message they convey through the voter registration process, and that if a voter they assist is unable to vote, “the force of Plaintiffs’ message is greatly diminished and their expressive efforts largely wasted.” (Motion, pg. 39 [Doc. 120].) Although intriguing, this argument is not enough to undo the 48-hour requirement. First, the argument is still predicated on the validity of the assumption that a multiple day quality control process is reasonable. Second, the link between the burden and the constitutionally protected conduct is entirely too attenuated. One must engage in speculation on several levels to assume that a voter will associate being turned away from the polls with technical deficiencies in his or her voter registration application.

Ultimately, Plaintiffs overstate the matter when they assert that “the nature of Plaintiffs’ protected activities makes the quality review process a necessity.” (Motion, pg. 39 [Doc. 120].) No quality control process is strictly necessary, and the kind of quality control necessary to ensure an application is correctly completed simply does not take several days.⁴

3. The fifty-form limit does not burden Plaintiffs’ free speech rights at all, much less so excessively as to be unconstitutional.

Plaintiffs next assault the fifty-form limit on the ground that it makes it difficult to conduct “significant voter registration drives.” (Motion, pg. 39 [Doc. 120].) This argument fails for four reasons.

⁴ It is worth noting that Plaintiffs have abandoned one of their previous arguments as to why the 48-hour requirement is too restrictive, namely that it impeded their ability to add to their databases the names, addresses, and phone numbers of the voters they registered. To the extent “quality control” measures have now replaced that data mining, Plaintiffs are not engaged in constitutionally protected conduct.

First, the existence of the federal voter registration form (which Plaintiffs, tellingly, do not recognize in their Motion) removes any and all burden the fifty-form limit may place on a third party voter registration agent. If a group has difficulty running a large registration effort using the New Mexico form, that group can simply switch to using the federal form. There are, of course, no limitations on the number of federal forms a group may have at any given time, and the State of New Mexico is required by federal law to accept such forms. As discussed in the Secretary's Motion for Summary Judgment, the record evidence indicates that County Clerks abide by this federal requirement.

Second, Plaintiffs downplay the significance of the discretion allowed both the Secretary and County Clerks in providing more than fifty forms at a time to an agent or group, saying that waivers to the limit "are sometimes granted" but "made at a clerk's discretion." (Motion, pg. 39 [Doc. 120].) The record evidence is, in fact, much stronger. As detailed in the Secretary's Motion for Summary Judgment, requests for additional forms are routinely granted, and NMPIRG in particular (the one Plaintiff identified in Plaintiffs' Motion as still conducting voter registration drives) ran a successful voter registration drive in 2006 in spite of the fifty-form limit.

Third, Plaintiffs complain that the fifty-form limit is unduly restrictive because "large-scale voter registration drives require planning, and Plaintiffs are unable to organize such drives on the assumption that a waiver will be granted." (Motion, pg. 39 [Doc. 120].) Plaintiffs do not, however, have to plan such drives on any such assumption. Indeed, part of the planning process for a large-scale registration drive should be securing – before the drive begins – permission to obtain more than fifty forms at a time. Indeed, in the 2008 election cycle, ACORN reached a standing agreement with the Bernalillo County Clerk to provide its agents with one hundred

forms at a time. *See* Toulouse Aff. ¶ 7. By this simple expedient, Plaintiffs’ problems are solved.

Finally, Plaintiffs fail to describe with any particularity what they mean by the phrase “large-scale voter registration drive.” The affidavits previously submitted by Plaintiffs indicate that none of the Plaintiffs have ever conducted a drive in New Mexico that resulted in the registration of more than 1,000 voters. *See* Fraher Aff. ¶ 15(c); Rodriguez Aff. ¶ 9. It is difficult to understand how the fifty-form limit, even if rigidly applied, would significantly impede a voter registration drive of this size.

4. The training requirement does not violate any cognizable free speech right.

Plaintiffs contend that the training requirement “made it difficult or impossible for Plaintiffs to field volunteers.” (Motion, pg. 41 [Doc. 120].) Plaintiffs specifically assert that the registration and training requirements “have made it impossible for NMPIRG to recruit the casual volunteers on which it relied in the past.” *Id.* But, as demonstrated in the Secretary’s Motion for Summary Judgment, NMPIRG conducted – by its own description – a successful voter registration drive in 2006, the first election year during which Section 1-4-49 was in operation.

Additionally, NMPIRG has no constitutional *right* to use casual volunteers. To the extent the training requirement would also require groups like NMPIRG to amend their practices, the question is whether such an amendment is an unconstitutional burden on NMPIRG’s free speech rights. In light of NMPIRG’s success in the 2006 election cycle, the undisputed record evidence suggests that it is not.

Finally, Plaintiffs again complain that training is often held at inconvenient times and locations and that it often does more “to intimidate than to inform.” (Motion, pg. 41 [Doc. 120].)

The record evidence is not undisputed on this issue. Contrary to Plaintiffs' assertions, the training sessions are informative and accommodation is regularly made for groups that cannot attend a regularly-scheduled session. Even taking Plaintiffs' version of the facts as true, Plaintiffs have not established a violation of their free speech rights. It is not unconstitutional to require groups like Plaintiffs to do a little work (the longest training session described in the record was approximately two-and-a-half hours) before sallying forth to assist New Mexico citizens in the process of participatory democracy.

5. The civil and criminal penalties applied to violations of the law do not represent an unconstitutional burden on Plaintiffs' free speech rights.

Finally, Plaintiffs argue that the law's civil and criminal penalties unconstitutionally burden their free speech rights. The penalties assessed for violations of Section 1-4-49 are minimal. No individual fine may exceed \$250, and no individual or organization can be fined more than \$5,000 in the aggregate. Moreover, the only criminal penalty available is prosecution for a petty misdemeanor, the lowest level of criminal culpability, and such prosecution requires proof of an intent to violate the law. *See* NMSA 1978, § 1-4-49(D).

Regarding the law's civil penalties, Plaintiffs suggest that it is entirely likely they will violate the 48-hour requirement and therefore "will be exposed to ruinous liability." (Motion, pg. 42 [Doc. 120].) First, the liability imposed by Section 1-4-49 cannot be reasonably described as "ruinous." As discussed in the Secretary's Motion for Summary Judgment, the civil penalties assessed for violations of Section 1-4-49 are less severe than those struck down by the court in *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006), which provided no cap on civil liability and imposed a \$5,000 fine for each application collected by a third party registration agent but never submitted to the appropriate election official. *See* Fla. Stat. Ann. § 97.0575(3)(a)-(c).

Second, Plaintiffs' argument is based on the faulty premise that compliance with the 48-hour requirement is fundamentally impossible. It is not. In order to avoid liability under the law, Plaintiffs must simply perform their voter registration activities competently and quickly with an eye toward ensuring the ultimate enfranchisement of the voters they seek to help.

IV. CONCLUSION

For the foregoing reasons, the Secretary of State respectfully requests that this Court: (1) deny Plaintiffs' Motion for Summary Judgment; (2) order all parties to pay their own costs; and (3) provide Defendant any additional relief to which she may be entitled.

DATED: July 16, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing motion on Plaintiffs' counsel of record via electronic filing with the CM/ECF filing system on July 16, 2010.

/s/ Scott Fuqua
Scott Fuqua