

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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775 Shenandoah CT)
Bourbonnais, IL 60914,)
)
Karen A. Zarifis)
775 Shenandoah CT)
Bourbonnais, IL 60914,)
)
Michael Zeman)
12346 W. Ramblin Rose Drive)
Boise, ID 83713,)
)
Timothy K. Zimmermann)
14163 Seagate Drive)
San Leandro, CA 94577-6410,)
)
Plaintiffs, Not)
Class Representatives,)
)

v.)
)
 NORMAN Y. MINETA)
 SECRETARY)
 U.S. Department of)
 Transportation)
 400 7th Street, S.W.)
 Washington, DC 20590,)
)
 and)
)
 MARION C. BLAKEY)
 ADMINISTRATOR)
 Federal Aviation Administration)
 800 Independence Avenue, S.W.)
 Washington, DC 20591,)
)
 Defendants.)
)

FIRST AMENDED CLASS ACTION COMPLAINT

1. By and through undersigned counsel, Plaintiffs Kathleen A. Breen, Milton J. Torres, III, Richard C. Anderson, Ronald J. Consalvo, Mark Jaffe, Darrell G. Mounts, John O'Connell, Michael J. Sheldon, and Jerry VanVacter, on their own behalf and as representatives of an 834-person class of all the above-named Flight Service Air Traffic Control Specialists employed by the Federal Aviation Administration ("FAA" or "Defendants"), an agency of the U.S. Department of Transportation, who are over 40 years of age and adversely affected by the FAA's decision to eliminate federal employment and related benefits in the next three (3) months at the 58

Automated Flight Service Stations as announced by the FAA on February 1, 2005, hereby file this First Amended Class Action Complaint. The original nine Plaintiff Class Representatives are joined by 825 additional Plaintiffs in bringing this Complaint. (See also Exhibit 1 to initial Complaint). Each of these Plaintiffs not only is a member of the class, but also asserts individual claims of age discrimination on his or her own behalf. The purpose of this Complaint is to challenge unlawful age discrimination in employment by the FAA pursuant to the Age Discrimination in Employment Act of 1967, as amended. 29 U.S.C. § 621, 633a et seq. Plaintiffs seek relief for harms caused by the Defendants' unlawful and intentional age discrimination in eliminating federal employment and related benefits for Flight Service Air Traffic Control Specialists (hereinafter "Flight Service Controllers") including Plaintiffs, which workforce consists of approximately 92 percent older¹ employees (i.e., over 40) employees, at the Automated Flight Service Stations in the continental United States, Puerto Rico, and Hawaii. The Flight Service Controllers adversely affected by the announcement, including Plaintiffs, will have their

¹ Affected Flight Service Controllers number approximately 1,935, and approximately 1,770 of them are over the age 40.

federal positions eliminated by the FAA in the next three (3) months and will be terminated from federal employment. Many will be forced to accept private employment with the designated government contractor, Lockheed Martin, which is scheduled to assume total control of the Flight Service component of Air Traffic Control in approximately three (3) months, and even the 120 employees who remain with the FAA are likely to incur moving expenses for which the government normally pays.

2. In this action, Plaintiffs seek injunctive relief for continuation of their Flight Service Controller (ATCS) positions that the FAA proposes to eliminate, plus back pay and benefits, front pay, record correction, and attorney fees.

Parties

3. Plaintiff Class Representative Kathleen A. Breen is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. Her address is 58 Ames Road, Lisbon, CT 06351. At the filing of this Complaint, Ms. Breen is 44 years of age.

4. Plaintiff Class Representative Milton J. Torres, III is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 16071 S.W. 73rd Street, Miami, FL 33193. At the filing of this Complaint, Mr.

Torres is 47 years of age.

5. Plaintiff Class Representative Richard C. Anderson is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 1945 67th Avenue North, St. Petersburg, FL 33702. At the filing of this Complaint, Mr. Anderson is 45 years of age.

6. Plaintiff Class Representative Ronald J. Consalvo is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 5 Devonshire Drive, Glassboro, NJ 08028. At the filing of this Complaint, Mr. Consalvo is 46 years of age.

7. Plaintiff Class Representative Mark Jaffe is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 918 West Lovers Lane, Arlington, TX 76013. At the filing of this Complaint, Mr. Jaffe is 52 years of age.

8. Plaintiff Class Representative Darrell G. Mounts is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 10230 Melody Drive, Northglenn, CO 80260-6044. At the filing of this Complaint, Mr. Mounts is 47 years of age.

9. Plaintiff Class Representative John O'Connell is

employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 1776 Havenshire Lane, Brighton, MI 48114-8737. At the filing of this Complaint, Mr. O'Connell is 63 years of age.

10. Plaintiff Class Representative Michael J. Sheldon is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 151 Gulf Street, Milford, CT 06460. At the filing of this Complaint, Mr. Sheldon is 46 years of age.

11. Plaintiff Class Representative Jerry VanVacter is employed as an Air Traffic Control Specialist in the Flight Service component of the FAA. He resides at 2424 Poplar Avenue, Duncombe, IA 50532. At the filing of this Complaint, Mr. VanVacter is 42 years of age.

12. All 825 additional Plaintiffs named on pages 2-77 of this First Amended Complaint are current Flight Service Controllers employed by the Federal Aviation Administration and are over the age of 40, as of the date of filing this Complaint. Each of these 825 additional Plaintiffs not only is a member of the class, but also asserts individual claims of age discrimination on his or her own behalf.

13. The first Defendant in this action is the Honorable

Norman Y. Mineta, Secretary, U.S. Department of Transportation. Secretary Mineta is sued in his official capacity only. The Department of Transportation is headquartered at 400 7th Street, S.W., Washington, DC 20590.

14. The second Defendant is Marion C. Blakey, Administrator, Federal Aviation Administration. Administrator Blakey is sued in her official capacity only. The Federal Aviation Administration is headquartered at 800 Independence Avenue, S.W., Washington, DC 20591.

Jurisdiction and Venue

15. This Court has jurisdiction over this Complaint because it presents a question of federal law. 28 U.S.C. § 1331. Specifically, this Court has jurisdiction over this Complaint pursuant to 29 U.S.C. § 626(b).

16. This Court is the proper venue pursuant to 28 U.S.C. § 1391 and 29 U.S.C. § 633a(c) because all of the unlawful discriminatory decisions and transactions were determined and issued by the Federal Aviation Administration, an agency of the U.S. Department of Transportation, at its headquarters in the District of Columbia.

Exhaustion of Administrative Remedies

17. Plaintiffs Kathleen A. Breen, Milton J. Torres, III,

Richard C. Anderson, Ronald J. Consalvo, Mark Jaffe, Darrell G. Mounts, John O'Connell, Michael J. Sheldon, and Jerry VanVacter, provided Notice to the Equal Employment Opportunity Commission of their intent to file this civil action pursuant to section 15(d) of the ADEA on February 8, 2005. 29 U.S.C. § 633a(d); 29 C.F.R. § 1614.201(a). This initial Notice was supplemented on February 9, 2005.

18. The 825 additional Plaintiffs named in this First Amended Complaint (on pages 2-77) provided Notice to the Equal Employment Opportunity Commission of their intent to file this civil action pursuant to section 15(d) of the ADEA on either March 1, 2005 or April 21, 2005 (over 30 days ago, as required). 29 U.S.C. § 633a(d); 29 C.F.R. § 1614.201(a).

Definition of the Class

19. The class in this case includes approximately 834² of the FAA's 1,770 current Flight Service Controllers, who are over the age of 40 and adversely affected by the FAA's February 1, 2005 announcement. The discriminatory decision to contract out the Flight Service component of Air Traffic Control, which has historically been classified as inherently governmental, will

² Other Plaintiffs may be added in future Amended Complaints, including but not limited to Richard D. Mauck.

have the effect of terminating Plaintiffs' positions with the FAA, eliminating or reducing their pay, dramatically limiting their retirement benefits, and prematurely ending their federal careers at the conclusion of the phase-in period in or about October 2005. Prior to the February 1, 2005 announcement, no private-sector industry existed that compared to the Flight Service functions performed by the FAA's Automated Flight Service Stations. Plaintiffs have been made the targets of the FAA's discriminatory decision because they are over 40 years of age. See Exhibit 3 to initial Complaint.

20. Plaintiff Class Representatives propose to represent a class of approximately 834 current FAA Flight Service Air Traffic Control Specialists, a class whose members are over the age of 40. This class includes the 825 additional Plaintiffs.

Class Allegations

21. This action is properly maintainable as a class action under Rule 23(a) of the Federal Rules of Civil Procedure.

22. The members of the proposed class, numbering approximately 834 FAA Flight Service Air Traffic Control Specialists, are sufficiently numerous to make joinder impracticable. See Fed. R. Civ. P. 23(a)(1).

23. Plaintiffs' claims raise questions of law or fact

common to the class. The common question is whether Defendants discriminated against the over-40 class members (represented by the Plaintiff Class Representatives) by the FAA's decision to eliminate these persons' federal employment and related benefits in the next three (3) months at the 58 Automated Flight Service Stations as announced on February 1, 2005. See Fed. R. Civ. P. 23(a)(2).

24. The FAA's discriminatory decision affected all of the approximately 834 class members; and the class members are faced with almost identical questions of fact, differing only with respect to which of the limited options they availed themselves as a result of the FAA's decision. Moreover, the class members have common issues of fact because the contracting-out and personnel decisions were entirely determined and administered by the FAA. See Fed. R. Civ. P. 23(a)(2).

25. The class members are all being subjected to age discrimination and therefore have claims in common. See Fed. R. Civ. P. 23(a)(2).

26. The class members are alleging age discrimination because 92 percent of the affected Flight Service Controllers are over age 40 and protected by the Age Discrimination in Employment Act. See Fed. R. Civ. P. 23(a)(2).

27. The claims of the Plaintiff Class Representatives are typical of the claims of the class. Like all class members, the Plaintiff Class Representatives are Flight Service Controllers who will lose their federal employment and related benefits unless they prevail in this action. See Fed. R. Civ. P. 23(a)(3).

28. The named Plaintiff Class Representatives and undersigned counsel will properly represent the interests of the class and its members. See Fed. R. Civ. P. 23(a)(4).

29. This class action should properly be maintained under Fed. R. Civ. P. 23(b)(2) because Defendant's actions in contracting out all Flight Service Controllers are generally applicable to all members of the class, and injunctive relief is appropriate and sought in this case.

30. This class action is also properly maintainable pursuant to Fed. R. Civ. P. 23(b)(1) because there is a real danger of inconsistent and varying adjudications with respect to the approximately 834 class members, who are geographically dispersed throughout the country and who might otherwise bring inconsistent claims in different jurisdictions.

31. In addition, this class action is properly maintainable pursuant to 23(b)(3) because the questions of law

and fact common to members of the class predominate over questions affecting individual members, and a class action is superior to other available methods for the fair and efficient resolution of this controversy.

Facts

32. Flight Service Controllers perform crucial functions for our country's aviation community, which are central to the core mission of the FAA and vital to our national security. These dedicated, experienced public servants provide critical services to all types of aircraft ranging from the commercial airline captain on a cross-country flight to the pilot flying his family on a vacation trip. For pilots awaiting departure and preparing to land, Flight Service Controllers monitor traffic and weather conditions. Occasionally, Flight Service Controllers will direct activities for airports where there is no control tower or where the tower has been taken off-line for a temporary period. Once airborne, pilots turn to Flight Service Controllers for briefings on hazardous weather conditions³ as well as guidance on temporary flight

³ Based on data from the National Transportation Safety Board ("NTSB"), the FAA's National Aviation Safety Data Analysis Center ("NASDAC") reports that weather contributed to or caused more than 1 out of every 5 aircraft accidents between 1991 and

restrictions, which are constantly being updated and altered. Flight Service Controllers maintain communication with the pilots in the air to provide up-to-the-minute route adjustments to avoid these severe weather conditions as well as prohibited, restricted, or special use airspace. For example, when the President travels by air, Flight Service Controllers perform a vital function in making other aircraft aware of the flight restrictions around the President's plane.

33. The tragic events of September 11, 2001, demonstrate the vital role that Flight Service Controllers play for our nation. All safety and security directives relayed on 9/11 to the aviation community before take-off were made through Flight Service Controllers at the Automated Flight Service Stations.⁴ In the days following that fateful day, Flight Service Controllers as well as other Air Traffic Controllers were an essential human link between the pilots in the air and the FAA.

2001. NASDAC, Office of System Safety, FAA, "NTSB Weather Related Accident Study, 1991-2001," available at: https://www.nasdac.faa.gov/aviation_studies/weather_study.

⁴ In the wake of 9/11, the government decided that it had to federalize those employees who check passengers and baggage at airports. There is, of course, no logical reason to treat the highly experienced FAA Controllers who manage communications and monitor safety and security for the aviation community any differently.

34. Without the vital experience and dedication of the present Flight Service Controllers, the number of weather-related accidents is sure to increase. Pilots in the air will suffer, and such suffering may result in loss of life or property, which will affect all Americans.

35. The FAA has long treated its older employees in Air Traffic Control abysmally. See, e.g., Torres v. Mineta, Civil Action No. 04-0015 (GK) (D.D.C., filed Jan. 8, 2004).

36. The FAA has long wanted to eliminate its predominantly older Flight Service Controllers. According to widely available FAA materials, the Automated Flight Service Stations were targeted for contracting out to the private sector because a large percentage of the Flight Service Controller workforce was or would soon become "retirement eligible." FAA, "Background on AFSS," available at: <http://www.faa.gov/aca/afss/afss.html> (last accessed, Feb. 1, 2005), copy attached as Exhibit 2 to initial Complaint. The Defendants have thus openly admitted an age discriminatory motive in eliminating this highly experienced, highly dedicated group of public servants.

37. On February 1, 2005, the FAA announced that Lockheed Martin was awarded the contract for the nation's Flight Service work for the next five years at a cost of \$1.9 billion, with an

option of five additional years. FAA, "AFSS A-76 Performance Decision: Text of Remarks by Dennis DeGaetano, Vice President of Acquisition and Business Services, FAA," available at http://www.faa.gov/aca/perf_decision/Dennis%20DeGaetano.pdf.

The FAA's February 1, 2005 decision will shrink the 58 existing Automated Flight Service Stations to 20 new, consolidated facilities. See Exhibits 3 and 4 attached. This will naturally result in a reduction of the number of employees who staff the new consolidated Stations as Lockheed Martin contractors, as well as necessary relocations of those incumbent employees selected to staff the new facilities but currently working out of one of the soon-to-be-closed stations. The February 1st decision is certain to cause high attrition among the current Flight Service Controllers. These soon-to-be former federal employees have been asked to give up a meaningful federal career and significant retirement benefits. Many will likely have to move to new locations, and some of these Controllers will not receive the moving assistance benefits currently available to federal employees.

38. The FAA will be separating from federal service 1,935 Flight Service Controllers, approximately 92 percent of whom are over the age of 40, who staff the Automated Flight Service

Stations. The years of experience accrued by the current Flight Service Controller workforce, as the FAA well knows, cannot be replaced. On average, it takes a full two years to properly train a new Flight Service Controller from the date of hire to when that employee attains his or her full performance level.

39. The actions at issue here will allow the FAA to replace its older, dedicated, experienced Flight Service Controllers with new, younger workers as contractors. Once Flight Service Controllers are over the age of 31, the FAA will not normally allow them to transfer to other kinds of Air Traffic Controller positions. See FAA, Human Resource Policy Manual, "Maximum Entry and Retention Age for Air Traffic Control Specialists," § EMP-1.20 (July 29, 2003). As a result, many current Flight Service Controllers are frozen out of potential jobs within the FAA, jobs that the FAA badly needs to fill. In 2003, the FAA began actively recruiting new Air Traffic Controllers from outside the FAA. Over the next 10 years, the FAA plans to supplement its present workforce with some 12,500 new, younger Controllers.

40. Upon information and belief, no other FAA workforce unit has more older employees (older than 40 years of age) per capita than the Defendants' Flight Service Controllers.

41. The FAA's decision to contract out its Automated Flight Service Station functions will have concrete, adverse effects on the careers of the Flight Service Controllers who stay with the FAA or Lockheed Martin. Although close to 1,000 Flight Service Controllers are eligible for other Air Traffic Controller positions elsewhere in the FAA, the FAA is offering positions to only 120. Controllers who are forced to accept private-sector jobs with Lockheed Martin will lose their hard-earned retirement benefits and most likely future earnings. The elimination of their federal positions at this juncture will have a severe, adverse effect on the retirement eligibility, "high three's"⁵, and retirement benefits of all Flight Service Controllers.

42. Currently, Flight Service Controllers contribute 1.3 percent of their salary to their retirement as opposed to other federal government employees who contribute only .08 percent. This additional money (.05 percent of a Flight Service Controller's annual income) allows these Controllers who earn

⁵ "High three" refers to a federal employee's highest three years of earnings, which is a base calculation for determining the employee's annuity at retirement. Generally, the longer a federal employee works, the higher his/her pay will be at retirement. Employees who retire with higher pay receive a higher annuity.

"good time" as a Controller to retire with either 20 years of "good time" at age 50 years or 25 years of "good time" at any age. If a Flight Service Controller meets these criteria, he/she will then receive 1.7 percent of his/her "high three" for the first 20 years of service and 1.0 percent for each year thereafter as part of the retirement package. If a Flight Service Controller meets these criteria, he/she will then receive 1.7 percent of his/her "high three" for each year of service as part of the retirement package. If a Flight Service Controller does not have the requisite years of service with as an Air Traffic Controller but has enough years in other government service to qualify for retirement, that employee will lose the 1.7 percent bonus and revert back to a package containing only 1.0 percent of his/her "high three" for each year of federal service. The terminated Flight Service Controllers will lose all of the additional money they have put into their retirement fund over the years, which the FAA and the U.S. Office of Personnel Management will not refund.

43. Further, the only option for a Flight Service Controller who is not eligible for regular retirement is a deferred or discontinued retirement. With substantial penalties for years below the minimum retirement age, these employees will

be left with greatly reduced retirement income. Employees who accept deferred retirement will receive a nominal annuity of \$400.00 a month and no health or life insurance benefits.

44. The FAA has announced that the award to Lockheed Martin will save the government \$2.2 billion. Logically, these savings will come from the elimination of the current older-age Flight Service Controller workforce, together with the reduction in pay and benefits for these employees now and in the future. Lockheed Martin has guaranteed three years of employment to only that portion of the current workforce that is retained at and moves to the 20 new, consolidated facilities.

45. President Bush's Presidential Management Agenda allows federal agencies to identify possible areas of competitive sourcing for "commercial" Agency functions, based on Office of Management and Budget (OMB) Circular A-76 (revised May 2003) as one of five government-wide initiatives. The Flight Service component of Air Traffic Control was the only FAA workforce unit singled out for an A-76 contracting-out study in purported response to the President's Management Agenda. The fact that Flight Service Controllers in Alaska, numbering approximately 155, are to remain federal employees for the FAA shows that Flight Service Control Work is a proper governmental function.

Flight Service Control Work has historically been considered a public function, not a private enterprise. The FAA's contracting-out decision contradicts the inherently governmental function of Air Traffic Control; the decision is based on an incorrect classification of the Flight Service Controller function to the detriment of the flying public and U.S. taxpayers for the benefit of a private corporation. Most importantly, the decision is motivated by unlawful age discrimination.

46. The pretextual nature of the FAA's reasons for its award of the contract to Lockheed through the A-76 process is evident in a number of irregularities in the in the FAA's conduct of the Circular A-76 competitive process. For example, the FAA's rating of Lockheed as "Excellent" under its evaluation of the technical factors in Lockheed's proposal completely ignored Lockheed's proposed use of voice switch technology that is neither used for air traffic control in the United States nor approved for use in the National Airspace System. Moreover, upon information and belief, Lockheed has partnered with the same company whose software in the SUA/ISE(2) project failed FAA tests in 2004. The FAA's untested and unapproved software is being imported from Australia in possible violation of the

Buy American Act, 41 U.S.C. § 10a.

47. Similarly, while the FAA downgraded continued Flight Service from the government allegedly because of inability to fill key positions, the FAA's analysis took no account of the risk to Lockheed Martin that it would not be able to hire experienced Controllers. The FAA discounted the likelihood that Controllers would continue to be unionized at Lockheed, a likelihood that is coupled with greater union bargaining power in the private sector.

48. In sum, FAA management officials are intentionally destroying their Flight Service Controller workforce, targeting these older workers simply because they are older. Moreover, the FAA rejected job reduction alternatives that would have had much less impact on older Controllers, including but not limited to alternatives proposed by the Union (National Association of Air Traffic Specialists), the Inspector General, and the Agency's own "Most Efficient Organization." Plaintiffs and their fellow Flight Service Controllers are being asked to pay a heavy price simply because of the Defendants' unlawful age discrimination against older employees. The FAA contracting-out decision at issue in this Complaint reflects disparate treatment and has a disparate impact on its older Flight Service

Controllers.

Causes of Action

(Disparate Treatment - Violation of the Age Discrimination in Employment Act)

49. Based on the facts described in the foregoing Paragraphs, Defendants and their agents at the FAA unlawfully discriminated against the Plaintiffs on the basis of their age (over 40) in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, 633a et seq. Approximately 92 percent of Flight Service Controllers are federal employees over the age of 40. The FAA has engaged in disparate treatment of its older "retirement eligible" workforce of Flight Service Controllers by deliberately and cynically targeting their jobs for elimination in order to replace them over time with younger contractors. See supra, at ¶ 39. Further, on information and belief, the Flight Service Control workforce is older than other FAA workforces not contracted out.

(Disparate Impact - Violation of the Age Discrimination in Employment Act)

50. Alternatively, based on the facts described in the foregoing Paragraphs, Defendants and their agents are unlawfully discriminating against the Plaintiffs on the basis of their age (over 40) for no legitimate reason in violation of the Age

Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, 633a et seq. The decision at issue here, the FAA's decision to contract out its Automated Flight Service Stations, has a disparate impact upon a disproportionately older workforce of the FAA, i.e., the approximately 92 percent of Flight Service Controllers over the age of 40. There is no reasonable factor other than the age of the workforce that is motivating this contracting-out decision. The FAA's purported reasons for its actions are unjustified and baseless, not to mention arbitrary and capricious.

Prayer for Relief

51. WHEREFORE, Plaintiffs respectfully request this Court to:

- a. Issue preliminary and permanent injunctions to prevent the loss to the Plaintiffs of their federal employment and related benefits;
- b. Award appropriate back pay and benefits, front pay, and record correction to the Plaintiffs;
- c. Award reasonable attorney's fees and expenses of bringing this action and the earlier administrative action; and
- d. Order such other and further relief as the Court

deems just and proper.

Jury Trial Demand

52. The Plaintiffs hereby demand a jury trial on all counts triable by a jury.

Respectfully submitted,

/s/

JOSEPH D. GEBHARDT
(DC Bar No. 113894)
CHARLES W. DAY, JR.
(DC Bar No. 459820)
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(Admitted in CA)
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(202) 496-0400

June 24, 2005

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing First Amended Class Action Complaint was served this 24th day of June, 2005, via certified first class mail (return receipt requested), upon Defendants and their counsel as follows:

Hon. Norman Y. Mineta
U.S. Department of Transportation
400 7th Street, S.W.
Washington, DC 20590

Hon. Marion C. Blakey
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591

Hon. Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Hon. Kenneth L. Wainstein
United States Attorney
555 Fourth Street, N.W.
Washington, DC 20350

_____/s/_____
JOSEPH D. GEBHARDT