IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

STATE EX. REL DAVID YOST, ET AL.	)	
Plaintiffs,	)	**Civil Action No. C2-04-1139 (ES/TK)**
v.	)	
NATIONAL VOTING RIGHTS INSTITUTE, ET AL.	)	
Defendants	)	
And	)	
KERRY-EDWARDS 2004, INC.	)	
Intervenor-Defendant	)	
DAVID COBB, ET AL.	)	
Counter-Plaintiffs,	)	
And	)	
KERRY-EDWARDS 2004, INC.	)	
Intervenor/Counter-Plaintiff,	)	
v.	)	
DELAWARE COUNTY BOARD OF ELECTIONS	)	
And	)	
J. KENNETH BLACKWELL, Secretary of State of Ohio	)	
Counter-Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT AND IN OPPOSITION TO COUNTER-DEFENDANT BLACKWELL'S MOTIONS TO DISMISS

Defendants/Counter-Plaintiffs, the National Voting Rights Institute, David Cobb and Michael Badnarik, through counsel, respectfully move the Court to dismiss the Complaint brought by the Delaware County Board of Elections and Delaware County prosecutor, David Yost, (hereinafter the "Complaint") as moot. Defendants/Counter-Plaintiffs further consent to the dismissal of NVRI as a counter-plaintiff.[1] Defendants/Counter-Plaintiffs also oppose Counter-Defendants' motions to dismiss since this court has jurisdiction over this case because it had jurisdiction over the Complaint, the counterclaims have their own independent basis of federal jurisdiction, and because the counterclaims are not moot.

I. PLAINTIFFS' COMPLAINT IS MOOT AND SHOULD BE DISMISSED.

Plaintiffs' Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because the Complaint is moot and more generally fails to state a claim upon which relief can be granted. The standard of review is clear. A party should prevail on a motion to dismiss for failure to state a claim for relief when, assuming everything the plaintiff says to be true, it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Simmons v. Ohio Civ. Serv. Emp. Assoc.*, 259 F. Supp. 2d 677, 681 (S.D. Ohio 2003) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

[1] As a result of consenting to the dismissal of the National Voting Rights Institute as a Counter-Plaintiff, Plaintiffs' argument in their motion to dismiss that Defendants/Counter-Plaintiffs do not have standing is now also moot. *See also infra a n. 9.*

A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *Ailor v. City of Maynardville, Tenn.*, 368 F.3d 587, 596 (6th Cir. 2004). "In other words, '[i]f events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give meaningful relief, then the case is moot and must be dismissed.'" *Ailor*, 368 F.3d at 596 (quoting *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001)).

Plaintiffs alleged two causes of action. First, Plaintiffs alleged that Defendants/Counter-Plaintiffs' application for a recount, filed on November 19, 2004, was premature because the application was for a recount of a contest submitted to electors throughout the entire state and was not filed within five days after the Secretary of State declared or certified the election as required by Ohio Revised Code § 3515.02. Thus, Plaintiffs asserted that the Delaware County Board of Election cannot accept the application. Secretary Blackwell certified the statewide results on December 6, 2004. That same day, Defendants/Counter-Plaintiffs renewed their application for a recount within the time prescribed by Ohio Revised Code § 3515.02, thereby curing any defect that might have existed with respect to the November 19, 2004 application. Moreover, the Delaware County Board of Elections has completed the recount that was the subject of the application. *See* Delaware Report to the Court (December 16, 2004); Albert Salvato, *Ohio Recount Gives Smaller Margin to Bush*, N.Y.Times, Dec. 29, 2004, *available at* http://www.nytimes.com/2004/12/29/politics/29ohio.html.

Second, Plaintiffs sought equitable and injunctive relief to avoid conducting a recount. In support of this claim, Plaintiffs alleged that the $10.00 per precinct deposit

required by Ohio Revised Code § 3515.03 was insufficient to cover the true costs of the recount and that the recount was "vain, purposeless, meaningless, wasteful, and useless" because Defendants Cobb and Badnarik received a small number of votes and were not likely to be elected to the office of President of the United States. Plaintiffs have already conducted the recount they were trying to avoid. *See id.* Simply put, there is no longer a "live" controversy between Plaintiffs ? the Delaware County Prosecuting Attorney and Delaware County Board of Election ? and Defendants ? presidential candidates Cobb and Badnarik ? because the Court can provide none of the relief sought by Plaintiffs.[2] As a result, the Complaint must be dismissed. *Ailor*, 368 F.3d at 596.[3]

II. THIS COURT HAS JURISDICTION OVER THE COUNTER-CLAIMS BECAUSE IT HAD JURISDICTION OVER THE COMPLAINT.

Contrary to Counter-Defendant Blackwell's protestations, neither this court nor other federal courts are powerless to review whether a recount is required in a federal

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[2] Unlike the amended counterclaims of Defendants/Counter-Plaintiffs, *see infra* at pp. 11-13, Plaintiffs' claims in their Complaint are not subject to the exception to the mootness doctrine that the claims are capable of repetition while evading review. This is because Counter-Defendant Secretary of State Blackwell, who is ultimately responsible for the conduct of elections in Ohio and for requiring compliance by the Delaware County Board of Elections therewith, rendered Plaintiffs' claims moot by requiring the statewide recount in Ohio of the Presidential election.

[3] Defendants/Counter-Plaintiffs do not oppose dismissal without prejudice as to Defendant NVRI, who should never have been sued by Plaintiffs inasmuch they have no basis in law or in equity for suing NVRI, which was legal counsel to Messrs. Cobb and Badnarik in connection with their application for the recount. The Ohio Supreme Court squarely has held that "an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice." *Simon v. Zipperstein,* 32 Ohio St. 3d 74, 76 (1987); *see also, Scholler v. Scholler,* 10 Ohio St. 3d 98, 103 (1984) (same). In this case, Plaintiffs are *not* in privity with NVRI's clients (Messrs. Cobb and Badnarik) and there is no basis for finding that NVRI acted in the course of the representation with malice. On the contrary, as amply demonstrated by the record of this case, NVRI has at all times acted in good faith to protect its clients' statutory and constitutional right to a recount.

election or whether the recount conducted is fundamentally unfair such that it violates the constitutional rights of those who have the right to the recount.[4] Even though Plaintiffs' Complaint should be dismissed, this Court has jurisdiction over Defendants/Counter-Plaintiffs' amended counterclaims. As we review below, the Court originally had jurisdiction over the Complaint. Moreover, this Court has jurisdiction over the amended counterclaims even though it may dismiss the Complaint, because the amended counterclaims have their own independent grounds for federal jurisdiction. *See Columbia Gas Transmission Corp. v. Drain*, 237 F.3d 366, 368-69 (4th Cir. 2001); *Md. Cas. Co. v. Knight*, 96 F.3d 1284, 1289 (9th Cir. 1996).[5]

On November 29, 2004, Defendants/Counter-Plaintiffs removed the Complaint from the Delaware County Court of Common Pleas pursuant to 28 U.S.C. § 1441. Section 1441(b) provides, in pertinent part, that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to

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[4] In their supplemental motion to dismiss, plaintiffs assert that Defendants/Counter-plaintiffs were involved in "blatant forum shopping," and state that the "first-filed rule demands this Court hear the matters concerning the start of the recount." *See Supplemental Motion to Dismiss*, at p. 1. However, it is the Delaware County Board of Election that is guilty of such blatant forum shopping. Indeed, on November 22, 2004, defendants initially filed a *federal* lawsuit in the Northern District of Ohio, raising claims similar to the counterclaims they assert here. Yet, despite this federal lawsuit in the Northern District of Ohio, the very next day, the Delaware County Board of Election filed a separate lawsuit in *state court,* seeking to stop the expedited recount asserted by Candidates Cobb and Badnarik in their federal lawsuit in the Northern District. Instead of intervening in that federal lawsuit, plaintiffs here blatantly maneuvered to bring a separate lawsuit in *state* court ? despite the undeniable relationship plaintiffs' suit had with the candidates' lawsuit filed in federal court.

[5] The counterclaims seek relief for violations of Defendant/Counter-Plaintiffs' rights under federal and state law for failure to conduct a timely and fundamentally fair recount. Each amended counterclaim alleges federal questions arising under the Constitution of the United States. *See* Amended Counterclaims (December 30, 2004).

the citizenship or residence of the parties." As plead, Plaintiffs' claims require resolution of substantial questions of federal constitutional and statutory law. That these issues were not litigated because Counter-Defendant Blackwell required Plaintiffs to conduct the recount that they sought by their Complaint to avoid, does not alter the fact that adjudication of Plaintiffs' claims would have required resolution of federal questions.

The Complaint purports to assert claims brought solely under Ohio Revised Code §§ 3515.02 and 3515.03, which the Ohio legislature enacted pursuant to authority delegated to it by Article II of the United States Constitution. Article II, Section 1, Clause 2 of the United States Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. *See* U.S. Const. Art. II, § 1, cl. 2. As the Supreme Court has observed, this constitutional provision "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). Because a state legislature's authority derives from the Constitution, the method it chooses for appointing presidential electors is a matter of federal law. *See Case of Electoral College*, 8 F. Cas. 427, 432-33 (C.C.D.S.C. 1876) ("When the legislature of the state, in obedience to [Art. II, § 1, cl. 2], has by law directed the manner of appointment of the electors, that law has its authority solely from the constitution of the United States. It is a law passed in pursuance of the constitution.").[6]

[6] The Supreme Court has addressed the strong federal interest in the appointment of Presidential electors on a number of occasions. For instance, in *Burroughs v. United States*, 290 U.S. 534, 545 (1934), the Court stated: "While presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and

Accordingly, a "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, CJ., Scalia, J., and Thomas, J., concurring) (hereinafter, simply "concurrence").

Pursuant to the grant of authority under Article II, Section 1, Clause 2, the Ohio legislature has enacted a detailed statutory scheme that provides for appointment of Presidential electors by direct election. *See* ORC § 3505.10. Under this statute, votes cast next to the names of the candidates for President and Vice-President are "counted as a vote for each of the candidates for presidential elector whose names have been certified to the secretary of state … ." *Id.* at § 3505.10(A). The legislature also has enacted a comprehensive framework of procedures for counting the votes cast for Presidential electors and for declaring the results of such an election. *See* ORC §§ 3501-3599. Importantly, that framework contemplates, and specifically providing mechanisms for, recounts. *See id.* at §§ 3515.01-3515.071.[7]

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safety of the whole people cannot be too strongly stated." (internal citation omitted). Likewise, in *Anderson v. Celebrezze,* 460 U.S. 780, 794-95 (1983) ? a case which not only arose out of *this* federal court here in Ohio, but involved Ohio state election statutes similar to those asserted in plaintiffs' Complaint here ? the Court stated: "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

[7] That the statutory framework providing for recounts applies to all elections in Ohio and not just to the election of Presidential electors does not diminish the substantial federal question presented by a lawsuit challenging Defendants/Counter-Plaintiffs' rights to apply for and obtain a recount of the votes cast in accordance with the intent of the Ohio legislature. As the Supreme Court has stated, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*).

While there is no express provision of Ohio law that states how recounts are to be conducted in the context of federal Presidential elections, certain time limitations are imposed, by federal statute, as to when the Presidential electors from each state must be certified for attendance at and conclusive voting in the Electoral College. That is to say, the United States Code informs the application of Article II, Section 1, Clause 2 to the Ohio statutory scheme for conducting recounts in the context of appointing Presidential electors. *See Palm Beach County Canvassing Bd.*, 531 U.S. at 78 (remanding, in part, for clarification of Florida Supreme Court's consideration of 3 U.S.C. § 5); *Bush v. Gore*, 531 U.S. at 113 (concurrence) ("[Title] 3 U.S.C. § 5 informs our application of Art. II, § 1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account.").

Pursuant to 5 U.S.C. § 7, the Electoral College was scheduled to meet after the November 2, 2004 Presidential election, and Ohio's Presidential electors scheduled to cast their votes, on December 13, 2004. Moreover, 3 U.S.C. § 5 provides, in pertinent part:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Thus, this statute creates a "safe harbor" for a state insofar as Congressional consideration of its electoral votes is concerned. "If the state legislature has provided for

final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors." *Palm Beach County Canvassing Bd.*, 531 U.S. at 77-78.

The Complaint invokes these federal laws by seeking to relieve the Delaware Board of Elections from having to perform a recount in the election of the President of the United States. Plaintiffs' claims also raise other substantial federal questions under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. at 104. "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Id.* Here, the Ohio legislature "has prescribed" a recount process to ensure ? to the greatest extent possible ? that *all* votes are counted. *Bush v. Gore*, 531 U.S. at 104. Accordingly, the legislature has recognized that, without the recount procedure, many votes will *not* be counted.

The Due Process Clause also demands that citizens have a fundamental right to vote and to have their vote counted by way of election procedures that are fundamentally fair. *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). A recount is fundamental to ensure a full and effective counting of all votes. As Ohio courts have held, the legislature has determined that "[a] recount pursuant to O.R.C. § 3515.13 is the only fair and equitable procedure to ensure the correct tally of all the votes." *Matter of Issue 27 on November 4, 1997*, 693 N.E.2d 1190, 1193 (Ohio C.P. 1998).

As demonstrated, Defendants/Counter-Plaintiffs' federal constitutional and statutory rights are (1) "essential element[s]" of Plaintiffs' claims, "(2) interpretation of the federal right[s] is necessary to resolve the case, and (3) the question[s] of federal law [are] substantial." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 917 (5th Cir. 2001) (internal footnote omitted). Accordingly, this lawsuit was properly removed to the District Court.[8]

III. THE COUNTERCLAIMS ARE NOT MOOT.

Defendants/Counter-Plaintiffs' counterclaims are not moot.[9] Claims may not be dismissed where either relief may be granted on the allegations made or a claim is

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[8] In addition, Defendants/Counter-Plaintiffs removed this action to federal court on diversity grounds. 28 U.S.C. §§ 1441 (a) & (b) and 28 U.S.C. § 1332(a). From the Complaint and at the time of its removal to federal court, the amount in controversy appeared to exceed $75,000. Plaintiffs' prayer for relief requests that Defendants/Counter-Plaintiffs pay "all the costs, whatever the source or nature, incurred by the Board and/or the Board's staff, employees, or designees in processing [Defendants/Counter-Plaintiffs'] application for a recount." *See* Complaint at p.6, ¶ C. Although the Complaint does not specifically state the amount of this claim, it alleges that the cost to the Board "will far exceed" Petitioners' $1,230 deposit. *Id.* at ¶ 18. In addition, the Memorandum in Support of Plaintiffs' *ex parte* Motion for Temporary Restraining Order states that "the expenditure of money by the Board to perform the recount would be significant." *See* Mem. at p. 3. The Affidavit of Janet Brenneman, the Director of the Delaware County Board of Election, attached to Plaintiffs' Memorandum, indicates that the performance of a recount "would be *extremely expensive* and would involve substantial amount of time and the expenditure of a *substantial amount of taxpayer money*." *Id.* at p. 1 (emphasis added). Consequently, any reasonable interpretation of the amount that Plaintiffs seek demonstrates that the amount in controversy requirement of 28 U.S.C. § 1332(a) is satisfied.

[9] Defendants/Counter-Plaintiffs have standing to bring their counterclaims. A party shows Article III standing by demonstrating that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As Counter-Defendant acknowledges, Defendants/Counter-Plaintiffs are candidates for President of the United States, who applied and paid statutory costs to 88 counties in

capable of repetition yet is evading of review. *See*, *e.g.*, *Powell*, 395 U.S. at 496; *Anderson*, 460 U.S. 780, 784 n.3 (1983) (challenge to Ohio's early filing deadline for independent candidates not moot "even though the 1980 election is over").

Here, the Court has previously acknowledged that appropriate relief, including another recount, could be provided for constitutional deficiencies in a recount of the votes cast in the Presidential election. *See* Tr. of December 10, 2004 Telephonic Hearing at pp. 14-15.[10] That is, if the absence of meaningful uniform statewide procedures resulted in

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Ohio to exercise their statutory right, as candidates, to a recount of the 2004 Presidential election. Indeed, in Secretary Blackwell's Motion to Dismiss, he concedes ? rightfully ? that "only *candidates* who were not certified as the winner of the election can ask for a recount." Motion to Dismiss, p. 3 (emphasis added). Candidates Cobb and Badnarik have not received a timely or fundamentally fair recount, which injury is the direct result of Counter-Defendants failure to conduct a timely recount pursuant to fair, accurate and uniform statewide standards. The candidates' injury may also be redressed by declaratory and injunctive relief, including the order of a proper recount using uniform standards and procedures.

[10] The transcript of the December 10, 2004, hearing provides in relevant part:

THE COURT: I don't know of any reason why a month from now if it turns out that there has been some type of violation, just for the sake of argument, by a board of elections, that an updated recount couldn't be ordered. But I think in light of the circumstances and the lateness of the hour, I understand that this whole case is moving on a fast track, that's not meant as a criticism, but the point is any relief would have to be issued forthwith for the deadlines to be met in the number of days given to the various boards of elections. But under these circumstances it does not seem to me impractical to be able to say that at a later date, if there are some violations of how the recount is conducted according to state law or federal law, that relief could still be granted at that point.

MR. MCTIGUE: Your Honor, this is Don McTigue. And I think I understand exactly what you are saying, but I think we have to take into consideration if we are talking about violations of state or federal law, federal law includes the equal protection issue.

THE COURT: No question. And my point is, if it turns out that these circumstances are analogous to the Bush v. Gore case regarding equal protection issues, given variations among the counties, it seems to me, though, still a solution here, that we are not in a situation that we are going to affect the electoral college; and that being the

the use of disparate procedures among Ohio's 88 counties, then relief could be had for violation of the equal protection or due process provisions of the 14th Amendment to the United States Constitution. In light of the recount conducted, Defendants/Counter-Plaintiffs have amended their counterclaims to more fully set forth their claims for denial of their right to a fundamentally fair recount of the votes cast in Ohio for President. *See* Amended Counterclaims (December 30, 2004). The relief that they seek includes a proper recount of the ballots cast in Ohio for the 2004 Presidential election, using uniform standards and procedures.[11]

Moreover, all of the claims presented in these counterclaims are capable of repetition yet evading review. The law is clear that claims raised in connection with an election remain viable after the election, or any part thereof at issue, has occurred. *See, e.g., Morse v. Republican Party*, 517 U.S. 186, 235 (1996) ("Like other cases challenging electoral practices, therefore, this controversy is not moot because it is 'capable of repetition, yet evading review,'" citing *Anderson*, 460 U.S. at 784 n. 3 and *Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974); *see also ACLU of Ohio, Inc. v. Taft*, 385 F.3d 641, 646-47 (6th Cir. 2004) (noting the "well-established exception" to the mootness doctrine for injuries capable of repetition, while evading review and finding that case brought against governor for failure to issue a writ of special election when one of Ohio's seats in the House of Representatives was vacated was not moot even though subsequent Congress had convened because the case and similar election cases were peculiarly capable of repetition while evading review); *Suster v. Marshall*, 149 F.3d 523, 527 (6th

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case, this could still be rectified through proceedings that would follow involving a preliminary injunction rather than a temporary restraining order.

[11] Defendants/Counter-Plaintiffs amended their counterclaims as of right pursuant to Federal Rule of Civil Procedure 15.

Cir. 1998) ("Although the 1996 election is over, all of the parties assert that this action is not moot as the controversy is 'capable of repetition, yet evading review.').

Here, Defendants/Count-Plaintiffs are candidates for Presidential of the United States and Badnarik is likely to be a candidate for that office again in 2008. Amended Counterclaims at ¶5. Cobb is also considering his candidacy for President of the United States in 2008. *Id.* ¶ 4. They have a vested interest in the outcome of this litigation which seeks to vindicate their statutory right to a recount of the ballots cast in Ohio for President of the United States.

CONCLUSION

For the reasons stated, Defendants/Counter-Plaintiffs motion to dismiss the Complaint should be granted and Counter-Defendant Blackwell's motions to dismiss the Counterclaims denied.

Dated: December 31, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically filed this 31st day of December, 2004. Notice of this filing will be sent to all parties by operation of the Court's electronic filling system. Parties may access this filing through the Court's system.

/s/Richard M. Kerger