IN ARBITRATION BEFORE
ARBITRATOR TIMOTHY D. W. WILLIAMS

TEAMSTERS LOCAL UNION NO. 117, Union, v. DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON, Employer. (Grievance No. 270-10, All Bargaining Unit Employees – Temporary Layoff Administration)	FMCS Case No. 110815-58066-6 **UNION'S POST HEARING BRIEF IN SUPPORT OF COLLATERAL ESTOPPEL MOTION**

I. INTRODUCTION

Final and binding arbitration is the culmination of the parties' dispute resolution process. An arbitrator's award provides a definitive ruling, and in so doing fosters stability, predictability, as well guidance for future disputes. Here, dissatisfied with Arbitrator Anthony Vivenzio's May 5, 2011 ruling in Furlough I, the State attempts to relitigate the identical issue presented in that case in hopes of obtaining a different outcome. If the arbitration process is to retain its integrity and credibility then the State must be estopped from this misguided attempt to reargue the very issue conclusively addressed in Furlough I, namely whether the parties' collective bargaining agreement permits DOC to compel employees to take unpaid furlough days. The

present case is an extension of the very program successfully challenged by Local 117 less than one year ago.[1]

II. ISSUE

Does the decision issued by Arbitrator Anthony Vivenzio on May 5, 2011, ("Furlough I") create collateral estoppel in this dispute?

III. FACTS

A. The "Furlough I" Dispute

On May 5, 2011, Arbitrator Anthony D. Vivenzio issued an award in *Teamsters Local Union No. 117 and State of Washington, Department of Corrections,* ("Furlough I") FMCS Case No. 10-04604-8, attached to the Union's Motion For Collateral Estoppel as Exhibit A ("Vivenzio Award"). The Furlough I arbitration was conducted pursuant to the parties' Collective Bargaining Agreement (CBA) effective July 1, 2009 to June 30, 2011, the same CBA at issue in this case. *See Id.* p. 2. The issue in that dispute was whether so-called temporary layoffs imposed by the Washington State Department of Corrections (DOC or Department), scheduled for July 12, August 6, September 7, October 11, and December 27, 2010 and January 28, 2011, violated provisions of the CBA, including Articles 16, 26, 35, 44, and 45. *Id.* p. 5. Those temporary layoffs were implemented as a result of a statute, ESSB 6503.

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[1] If collateral estoppel is held to apply, the Union agrees that the argument they raised before Arbitrator Vivenzio – that the CBA prohibited outright the DOC's Furlough II program – is also foreclosed because Arbitrator Vivenzio decided against the Union on this point after a full hearing on this issue. However, if this Arbitrator decides that collateral estoppel does not apply as argued herein, the Teamsters reserve the right to argue any and all issues present in this proceeding, including its argument that the "temporary layoffs" are prohibited outright by the CBA because they are reductions in hours rather than true layoffs.

An arbitration hearing was held in Tacoma, Washington on February 11, 2011, and Arbitrator Vivenzio observed, "[d]uring the course of the hearing both Parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument." *Id.* at 3. Post-hearing briefs were submitted on March 29, 2011. *Id.*

In the Furlough I dispute, the State argued that it did not need to abide by contractual seniority when implementing its temporary layoffs. *Id.* pp. 10-12. The Teamsters in pursuing their grievance argued that the temporary layoffs were prohibited outright by the collective bargaining agreement. *Id.* pp. 9-10, Tr. 208-209. As an alternative, the Teamsters argued that if the DOC was permitted to engage in such short term staff reductions, they were nonetheless required by the CBA to follow unbroken state service seniority. See Tr. 208-210, 290.

Arbitrator Vivenzio stated the issue before him as, "Did the Employer violate the Collective Bargaining Agreement between the Parties when it directed certain bargaining unit employees not to report for work on certain specified unpaid days in 2010 and 2011, and, if so, what is the remedy?" Vivenzio Award p. 5. He reviewed the pertinent provisions of the CBA and the positions of the parties. *Id.* pp. 6-12. Following a twelve-page discussion, Arbitrator Vivenzio concluded that, despite the situation the Department and the State were in because of revenue shortfalls, the Employer had violated the CBA by "the denial of work to entire classifications of represented employees without regard to seniority". *Id.* p. 25. Neither party sought reconsideration from Arbitrator Vivenzio or attempted to vacate his decision through the courts.

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B. The "Furlough II" Dispute

The dispute presently before the arbitrator, known as "Furlough II", alleges that the Department of Corrections, beginning about December 7, 2010, violated the parties' CBA when it once again unilaterally imposed "temporary layoffs" on bargaining unit employees and expanded the number of "temporary layoff" days from Furlough I. Ex. U-1. The DOC implemented these so-called layoffs in response to an Executive Order issued by the Governor. Tr. 31-34, Ex. ER-1, ER-2, ER-11.

Local 117 filed the grievance underlying the present dispute ("Furlough II") on December 29, 2010, after the state expanded its staff reductions beyond those covered by the Furlough I grievance. Ex. U-1, Tr. 127, 210-12. In this round, the temporary layoffs were expanded to bargaining unit members who were not directly laid off in the previous round, and as noted above, the State also expanded the temporary layoffs to additional days. Ex. U-1.

The DOC expanded its previously planned temporary layoff days by imposing a "holiday" staffing model. That is, employees who normally got holidays off with pay, were essentially told they were getting a "holiday" on the temporary layoff days (December 27, 2010 and January 28, 2011) Tr. 75, and should not show up to work. See Tr. 36-37, 165, Ex. ER-3. The criteria that the DOC used to determine who would be given this unpaid "holiday" was simply whether or not it was a mandatory fill position, and was not based on any form of seniority recognized under the CBA. See Tr. 297-98. The unpaid "holidays" were forced on employees across the bargaining unit without respect to seniority. Indeed, the evidence demonstrated that the DOC's plan actually had the effect of *punishing* those with higher seniority. Generally, employees exercise their seniority rights to bid on positions that are not mandatory fill so they can enjoy paid holidays. By forcing employees with higher seniority to

take additional unpaid layoffs, DOC essentially flipped the system on its head – the most senior employees bore the brunt of the furlough burden.

The other expansion of the temporary layoff programs encompassed in the Furlough II dispute was the "modified lockdown". See Ex. ER-6, Tr. 239-40. A "lockdown" is when all the inmates are locked in their cells, as opposed to moving around the institution for recreation, work, medical appointments, or other activities. Lockdowns are usually implemented only in emergency situations. In December 2010 and January 2011, certain DOC institutions locked down the inmates in their cells for one or two shifts. See Tr. 37-38, 76, Ex. ER-3, ER-4, ER-5. On those lockdown days, the DOC reduced staffing on the day and swing shifts (but not the graveyard shift), sending employees home without pay. See Tr. 307-309.[2] The so-called "modified lockdowns" were not true lockdowns, because inmates were permitted to leave their cells to receive medication and one hot meal. See Tr. 37-38, 76. Like the unpaid "holidays", the DOC sent employees home on unpaid furloughs during "modified lockdowns" without any regard to layoff seniority as defined in the CBA. See Tr. 23, 119. Additionally, like the unpaid "holidays" program, the "modified lockdown" furloughs paradoxically had the effect of punishing employees with higher seniority. Tr. 129-130, 136-39, 143-45, 297-99, 307-309, 315-318, Ex. U-31. Employees used their seniority under the CBA to bid for the more desirable day and swing shifts, see Tr. 99, but during the "modified lockdowns," employees on the day and swing shifts had to suffer a loss of pay for the workweek while employees on the graveyard shift did not.

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[2] Graveyard shift is already at a reduced, "lockdown" staffing level because during this time the inmates are normally locked in their cells to sleep. On modified lockdown days the graveyard shift staffing level did not change, but the day and swing shifts were reduced to graveyard staffing levels.

Compounding the situation, during the temporary layoffs, on-call employees were brought in. Tr. 149-150, Ex. U-1, U-30. These on-call employees were typically less senior than the regular scheduled employees who were sent home without pay during the furlough days. *See* Tr. 113, Tr. 149-50.

At the time the instant grievance was filed, there was not yet any decision in the Furlough I dispute – Arbitrator Vivenzio's ruling was issued on May 5, 2011. See Vivenzio Award, Tr. 216. In the meantime, the Teamsters continued to take the position in Furlough II that the CBA prohibited these kinds of temporary staff reductions outright, or, alternatively, that they at least would have to be done in accordance with seniority. Tr. 210-11, 215-16, 222-25, 277-78, Ex. U-1, U-23. The Union's position was that the DOC could not impose furloughs *at all* because they are actually reductions in hours rather than a separation from employment, which properly characterizes a "layoff". Tr. 268.

The DOC continued to take the position that its actions were permitted under the CBA and they were not required to follow unbroken state service, or any, seniority. Tr. 57, Tr. 101, 118. The DOC argued that its method of not properly using seniority was more "fair" and "equitable" because if seniority were used, junior employees would end up getting hit harder than other employees, and could even end up taking more reductions in hours than DOC (then) Secretary Eldon Vail, in violation of the DOC's unilateral and self-imposed goal. See Tr. 40-42, Tr. 111. The Teamsters' position was that the CBA clearly required seniority to be used, and as is typical under a seniority system, more junior employees would (and should) bear more of the burden in certain situations. See Tr. 261, Ex. U-1.

On June 23, 2011, having reached no resolution even after Arbitrator Vivenzio's decision was issued, the parties submitted the present Furlough II dispute to Arbitration. On December 6,

2011, the Union filed the instant Motion arguing that Arbitrator Vivenzio's decision created collateral estoppel in the Furlough II dispute.

IV. ARGUMENT

Washington courts and labor arbitrators both recognize the doctrine of collateral estoppel. According to the state supreme court, to establish collateral estoppel (also referred to as issue preclusion) requires:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

City of Aberdeen v. Regan, 170 Wn.2d 103, 108, 239 P.3d 1102 (2010). *See also, Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145, 2152 (2009); Restatement (Second) of Judgments § 27 (1982). As explained in the Union's Motion for Collateral Estoppel, at pp. 4-5, this concept is also familiar in labor arbitration, and has particular meaning when the parties agree that disputes resolved through arbitration shall be "final and binding". As Arbitrator Fowler held in *Northern Indiana Public Service Company*, 116 LA 426 (2001):

> [A]rbitrators frequently defer to prior holdings when such holdings involve the same parties with the same issue and there is final and binding language in the Agreement between the parties. It is assumed such adherence to the terms of the collective bargaining Agreement will avoid forum or arbitrator shopping. Arbitrator Yaffe in *City of Milwaukee*, 78 LA 89, while deferring to a prior award set forth this standard:
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> > [t]he undersigned believe it is essential, in order to give some integrity to the binding arbitration process to which the parties have agree[d], to reach the same conclusion and to be bound by the rulings which have been rendered to date. To do otherwise would negate the basic purpose of binding arbitration.... To allow parties to relitigate the same issue repeatedly under the same contractual terms undermines the purpose of binding arbitration and the stability and predictability in contract administration which it is designed to foster.

Id. See also Elkouri & Elkouri, *How Arbitration Works*, 577-78 (6th ed. 2003). The decision issued by Arbitrator Vivenzio should be given collateral estoppel effect in this case because the same parties and issues are involved, and the parties have expressly agreed that arbitration decisions to resolve disputes under the CBA will be "final and binding upon the Union, the Employer and the grievant." *See* Article 9.5, p. 20 of the parties' Collective Bargaining Agreement, attached to the Union's Motion for Collateral Estoppel as Exhibit B.

1. Arbitrator Vivenzio's decision should have collateral estoppel effect in the instant case because there are identical issues.

In each of these cases, the same legal issues were involved. In both Furlough I and Furlough II, the DOC, purportedly compelled by law (ESSB 6503 for Furlough I, or EO 10-04 for Furlough II), instituted reductions of hours for large groups of the Teamsters 117 DOC bargaining unit on certain predetermined days. The main allegation by the Teamsters - the grieving party in each dispute – was that provisions of the 2009-2011 CBA prohibited these reductions in hours, or alternatively, that the CBA required the employer to use unbroken state service seniority when conducting the temporary layoffs.

In each case the DOC claimed it was compelled by law to implement the reductions and was not required to adhere to unbroken state service seniority. See Tr. 85-90; Tr. 106, Tr. 115. In each case, the issue was essentially whether the DOC violated the 2009-2011 CBA in implementing temporary layoffs without using unbroken state service seniority, and if so, what should the remedy be? See Tr. 17.

That the reductions in hours in Furlough II were implemented in slightly different or expanded forms from Furlough I does not change the commonality of the legal issues. Regardless of the particular form of the reductions in hours, or the underlying conceptual model ("holidays" or "modified lock downs"), short term reductions in hours for purported financial

savings, such as these, were prohibited by the CBA (or at least had to be conducted according to unbroken state service). Additionally, the State does not even appear to proffer any different defenses in Furlough II from what was argued in Furlough I. There are no substantially new issues in the Furlough II dispute, on the merits or procedurally. *Compare General Services Admin., Region 3*, 97 LA 641 (Hockenberry, 1991) (collateral estoppel did not preclude employer from raising issues of arbitrability in new dispute which were not raised in prior arbitration).

The DOC presented testimony regarding "bargaining" sessions with the Teamsters regarding its Furlough II program, and the DOC's witnesses testified that they felt the Teamsters did not engage in bargaining or offer proposals of their own. See Tr. 24, 54-56, 81, 83-84. There was other testimony at the hearing that the Teamsters did make suggestions to the DOC while maintaining their clear position as to the CBA's requirements. See Tr. 101,151-52, 212-213, 238-39, Ex. ER-13. Despite this conflicting testimony, it is undisputed that the Teamsters did not consent to the DOC's actions. Thus, this testimony about the DOC's unsuccessful efforts to obtain a waiver of contractual rights from the Teamsters, is irrelevant and does not create a novel issue in the present dispute. It is undisputed that there was not waiver or agreement by the Teamsters, and so the issue remains simply whether the collective bargaining agreement prohibits the furloughing of bargaining unit employees.

To the extent that the DOC takes the position that it has different arguments in Furlough II than Furlough I, this would not be sufficient to preclude the application of collateral estoppel as explained by arbitrator Dichter:

> [T]he concept of collateral estoppel is important. If a party can evade the doctrine by simply presenting new arguments over the same issue, the concept could be completely eroded. If that were allowed to happen, a party could simply present one argument at one hearing, and if it lost, present a second argument at a new

> hearing. Where would it end? The doctrine of collateral estoppel applies when the issues are the same regardless of what the arguments were that led to the first decision.

Diecast Operations, The Tecumseh Products Co., 116 LA 129 (Dichter, 2001).

The Furlough I case and the instant dispute involved identical issues thereby satisfying the first element of collateral estoppel.

2. Arbitrator Vivenzio's decision should have collateral estoppel effect in the instant case because Arbitrator Vivenzio reached a final decision on the merits on these identical issues.

The second element of collateral estoppel is met because after a full hearing, Arbitrator Vivenzio issued a decision on the merits on the issues that are raised in the instant dispute. As explained above, the primary issue presented by the Teamsters' Furlough I grievance was whether the DOC's temporary staff reductions violated the CBA and if so, what the remedy should be. The Teamsters argued as an alternative that the CBA at least required the DOC to use unbroken state service seniority in implementing its staff reductions. The Teamsters raise the same issues in this case.

Arbitrator Vivenzio made a decision on the merits on these precise arguments and issues. He actually rejected the Teamsters' first argument, that the CBA simply prohibited the DOC from implementing these kinds of temporary staff reductions. However, after considering the positions of both sides, Arbitrator Vivenzio agreed with the Teamsters' alternative argument, that if the DOC wants to implement short term temporary staff reductions, the CBA requires the reductions to be according to unbroken state service seniority.

These decisions were on the merits – Arbitrator Vivenzio did not base his decisions on any procedural grounds, but based on the uninhibited arguments of the Teamsters and the DOC on the meaning of the CBA as it applied to temporary staff reductions.

The second element for collateral estoppel is met because Arbitrator Vivenzio reached a final decision on the merits with respect to issues presented in the instant dispute. These were interpretations of the exact same CBA provisions that are involved in the instant dispute, and if this decision is to be "final and binding" in accordance with Article 9.5, these decisions should control the instant dispute.

3. Arbitrator Vivenzio's decision should have collateral estoppel effect in the instant case because the same parties are involved.

The third element of collateral estoppel is met because there is no dispute that both Furlough I and the instant dispute involved exactly the same parties, Teamsters Local 117 and the DOC, under the exact same collective bargaining agreement.

4. Arbitrator Vivenzio's decision should have collateral estoppel effect in the instant case because applying collateral estoppel will not work an injustice on the DOC.

The fourth element of collateral estoppel requires that application of the doctrine not work an injustice. "The injustice element is 'most firmly rooted in procedural unfairness. 'Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue[s] in question.'" *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002) (quoting *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999)).

The voluminous record from the Furlough I arbitration clearly demonstrates that the parties received a full and fair hearing on the issues in question. During the arbitration hearing, 198 pages of testimony were taken from eight witnesses. Dozens of exhibits were introduced into the record. Briefs were submitted totaling 40 pages in length. The DOC has not made any perceptible attempt to argue that they did not get a full and fair hearing on the merits before Arbitrator Vivenzio. There is no allegation or evidence that Arbitrator Vivenzio somehow was

biased, or that he was impaired during the hearing, or that he reached his decision through any means other than considering the evidence and arguments presented by the parties.

The DOC suggested in its opening that there was some deficiency of evidence in the Furlough I arbitration because the Teamsters supposedly did not introduce evidence of bargaining history relating specifically to temporary layoffs, but only seniority generally. *See* Tr. 18. Arbitrator Vivenzio's award speaks for itself and states the reasoning for his interpretation of the CBA partially in the Union's favor. It is well established that the interpretation of the CBA is based on numerous factors, only one of which is the parties' testimony. The present dispute is subject to the same standards of evidence and arbitral discretion as prevailed in Furloughs I before Arbitrator Vivenzio, and so their complaints about Vivenzio's process cannot establish "injustice." *Cf. State v. Vasquez, supra,* 148 Wn.2d at 309 (recognizing that collateral estoppel may not apply where there is a differences in the standards of the two forums, for example, "permitting an adjudication in an informal administrative setting... to bar later criminal prosecutions"). Moreover, the DOC appears to have abandoned this theory after its opening, since it simply presented no evidence about the fairness, fullness, or any other aspect of the hearing before Arbitrator Vivenzio.

The DOC's main argument here appears to be that Arbitrator Vivenzio got the decision wrong on the merits. *See* Tr. 15-17. In its response to the Teamsters' motion, the DOC argued that collateral estoppel should not apply in situations where the previous decision was "egregiously in error," and suggested that is the case here. *See* Employer's Response To Motion For Declaratory Ruling That 2011 Vivenzio Arbitration Creates Collateral Estoppel ("DOC Response"), at 4. The DOC's witnesses testified that Arbitrator Vivenzio's ruling that using unbroken state seniority was required didn't make sense to them or would be difficult to comply

with. *See* Tr. 92, Tr. 120. The DOC argued that they had to use "shift seniority" rather than unbroken state service seniority because the latter could require transferring personnel between shifts, which the DOC seemed to argue would be a serious hardship. *See* Tr. 120, Tr. 122-23, Tr. 177-79.

The record at the hearing actually demonstrated that using unbroken state service seniority would have been an available option for the DOC, and, had it been used, the DOC would have had several routinely-employed options at its disposal to fill shifts as needed, such as using "AL relief" or on call personnel, or simply transferring employees. *See* Tr. 120, 191-93.[3] The DOC presented arguments why they thought Vivenzio's ruling was difficult to comply with or was unreasonable, but did not show how his interpretation of the CBA was "egregiously in error" as they argued in their Response to Local 117's motion. The Union argued that the definition of seniority in the "layoff" article applied to the DOC's so-called "temporary layoff." The DOC argued that no seniority was required for "temporary layoffs" and decided to use shift seniority (which is customarily employed for assigning mandatory overtime, not for layoffs. See Tr. 42, 104, 117-18, Tr. 202). Although the DOC obviously disagrees with Vivenzio's ruling on this issue, they have far from demonstrated that his reasoning was "egregiously in error" to warrant abandoning an otherwise final and binding arbitration award. *Compare Entergy/Miss. Power & Light Co.*, 111 LA 507 (Howell, 1998) (declining to apply collateral estoppel where prior arbitrator "manifestly erred" by essentially relying on the wrong language in the wrong contract).

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[3] The DOC argued also that using unbroken state service seniority for health service personnel could cause a potential hardship because specially skilled medical employees might become unavailable. See Tr. 171. However, the DOC's witness acknowledged that the CBA actually permitted the employer to make exceptions to layoff seniority when special skills were actually demonstrably required. Tr. 185-186.

In any event, the argument that the weight of evidence before Arbitrator Vivenzio should have compelled him to decide in the DOC's favor, is an overt attempt to relitigate the dispute which Vivenzio decided. Far from being a reason not to apply the doctrine, the State's argument evokes the very purpose of collateral estoppel. *See, e.g., Thompson v. Dep't of Licensing,* 138 Wn.2d 783, 799-800, 982 P.2d 601 (1999) ("[w]here, as here, a party to the prior litigation had a full and fair hearing of the issues, and did not attempt to overturn an adverse outcome, collateral estoppel may apply, notwithstanding an erroneous result").

The State's dissatisfaction with Vivenzio's award - that it didn't make sense, that it was unworkable – is also not a basis for collateral attack with respect to his decisions on the merits on these issues. See *Nielsenv. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 265 n. 3, 956 P.2d 312 (1998) ("[a] plaintiff's dissatisfaction with the amount of damages awarded after a full trial... is not an 'injustice' that prevents application of the doctrine of collateral estoppel").

Because there can be no real dispute that the DOC received a full and fair hearing on the merits before Arbitrator Vivenzio, the fourth element of collateral estoppel is satisfied..

V. REMEDY

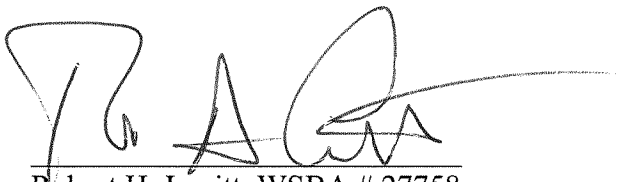
As demonstrated herein, the agreement between the parties that arbitration awards will be "final and binding" requires that the award issued by Arbitrator Vivenzio be given collateral estoppel effect. Arbitrator Vivenzio decided that the DOC was permitted under the CBA to implement "temporary layoffs," but was required to use unbroken state seniority when doing so. That decision should apply in this case as well. Because the DOC does not dispute that it did *not* use unbroken state service seniority when implementing Furlough II, the arbitrator should issue an award sustaining the Teamsters' grievance and finding that the DOC violated the CBA by failing to properly follow seniority. The arbitrator should issue the customary remedial award,

ordering the DOC to "make whole" all impacted employees. The parties are in agreement that should an issue arise as to implementation of the remedy, the arbitrator shall retain jurisdiction to resolve any remaining disputes. *See* Tr. 13, 26.

VI. CONCLUSION

This dispute presents issues of contract interpretation that were previously decided between the same parties, under the same contract, in an arbitration award issued by Arbitrator Vivenzio. The circumstances surrounding both disputes were exactly the same. Because the parties have contractually agreed that arbitration awards will be "final and binding", the Arbitrator should rule that Arbitrator Vivenzio's decision has collateral estoppel effect in the current dispute and should issue the appropriate award.

RESPECTFULLY SUBMITTED this 15th day of February 2012.



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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Union's Post Hearing Brief in Support of Collateral Estoppel Motion to be served in the manner noted below on the following individual(s):

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