No. _____

IN THE
SUPREME COURT OF ILLINOIS

STATE OF ILLINOIS (DEPARTMENT OF CENTRAL MANAGEMENT SERVICES), Petitioner, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31 and STATE OF ILLINOIS, ILLINOIS LABOR RELATIONS BOARD, STATE PANEL, Respondents.	)	Motion for Direct Appeal Pursuant to Supreme Court Rule 302(b) On administrative review from the December 13, 2016 Decision and Order of the Illinois Labor Relations Board, Cons. Nos. S-CB-16-017 S-CA-16-087, to the Appellate Court of Illinois, Fourth District, General Appeal No. 4-16-0827 and Cons. Nos. 04-17-0125, 04-17-0126, and 04-17-0127

MOTION FOR DIRECT APPEAL PURSUANT
TO SUPREME COURT RULE 302(B)

Petitioner Illinois Department of Central Management Services (the "State"), respectfully moves the Court to order that the parties' petitions for administrative review of the Respondent Illinois Labor Relations Board's ("Labor Board") December 13, 2016 Decision and Order currently pending before the Fourth District Appellate Court be taken directly to the Supreme Court pursuant to Illinois Supreme Court Rule 302(b). The State's motion arises from the Labor Board's determination that that an impasse exists in negotiations for a successor collective bargaining agreement between the State and its largest public-sector union, AFSCME Council 31 ("AFSCME"). That determination and the resulting litigation, including a stay entered by the Appellate Courts, are unprecedented and raise issues of first impression concerning the proper legal test for determining when an impasse exists under the Illinois Public Labor Relations Act ("Labor Act"). The proper test is literally a $3 billion question; that is the value of the savings

that AFSCME has prevented the State from realizing by stymying implementation of the State's last, best and final offer ("LBFO") based on the Labor Board's impasse determination. Time is of the utmost importance; with each day that passes the State incurs millions of dollars in expenditures that would not be made under the LBFO. Unless this Court grants a direct appeal and resolves this case in an expeditious fashion, the impasse with AFSCME and the stay issued by the Appellate Court pending resolution of the impasse issue will prevent the State from implementing the health insurance plan contained in its LBFO entirely.

I. BACKGROUND

A. The Labor Board found that the State and AFSCME reached an impasse in labor negotiations during the state's historic fiscal crisis

The bargaining that gave rise to the impasse at issue in this case was the longest bargaining in the parties' history. (SR 190) The parties bargained on 67 separate days over 11 months (SR 42-43) but were still more than $3 billion apart when they reached impasse on their negotiations over a new CBA on January 8, 2016 (SR 452 at ¶6).

The negotiations took place against the backdrop of the State's historic financial crisis. (SR 53-55) On January 6, 2016, shortly before the State declared impasse, the State projected a $5.6 billion deficit for FY 17, $5.3 billion deficit for FY 18, and a $5 billion budget deficit for FY 19. (SR 55) The projected budget deficit over all four years of the AFSCME contract at the time the parties reached impasse was approximately $20 billion. (*See* SR 53)

In light of these facts, the State asked AFSCME to help address this fiscal crisis at the bargaining table by, among other things: (1) establishing a new health insurance plan modeled after private sector plans that offered employees more choices of coverage and that would save nearly $1.722 billion over the life of the contract as compared to AFSCME's demands (SR 458-59 at ¶71-83); (2) freezing wages and steps during the term of the contract, which it projected

would save the State nearly $900 million over the life of the contract as compared to AFSCME's proposal (SR 454-55 at ¶24, 29, 36, & 41); and (3) agreeing to provide the State with more flexibility to subcontract but protecting bargaining unit employees through a managed competition proposal that would allow them to bid on such work. (SR 88-90) The State believed AFSCME could be a partner in addressing the fiscal crisis, because the State employees that AFSCME represents are the nation's highest paid after adjusting for cost of living (SR 521), while the base salaries paid to AFSCME employees alone, *i.e.*, not including overtime, pension contributions, or FICA taxes, cost the State $2.23 billion per year. (SR 460) However, AFSCME rejected the State's savings proposals, stating "there was 'no way' the State's fiscal crisis would be solved at the bargaining table" (SR 59), and, as the negotiations came to a halt, AFSCME's lead negotiator stated, "I have nothing else to say and I'm not interested in hearing what you have to say at this point, carry that message that back to your principals." (SR 467)

Since impasse was reached in January 2016, the State's bill backlog has risen to more than $12 billion. (SR 476) The State projects a $5.3 billion deficit in FY 17 and over $7 billion deficits in both FY 18 and FY 19. (SR 460) Further, under the latest appropriation bill enacted into law, the State lacks the authority to spend $1.37 billion out of General Revenue Funds for FY 17 that is needed to maintain the status quo with respect to health insurance, or to spend on most expenditures after December 31, 2016 (*See* P.A. 99-0524 (the so-called stop gap budget); SR 527).[1] The State's unfunded pension liability has swelled to approximately $130 billion. (SR 483) The State's credit rating was downgraded again in November 2016 (SR 498), even though it was already the lowest of any state in the nation. (SR 419)

[1] The Supreme Court may take judicial notice of the records of the Comptroller, GOMB and COGFA, and of Public Acts such as P.A. 99-0524, the stop-gap budget bill. The State has not attached a copy of P.A. 99-0524 because it is over 800 pages.

The Labor Act allows an employer to implement its LBFO when the parties have reached a legitimate impasse. (SR 185) Here, however, the parties agreed that during bargaining, neither party would engage in a strike or a lockout. Instead, by written agreement, the parties agreed that any dispute over the existence of an impasse would be presented to the Labor Board (the "Tolling Agreement"). (SR 186) Through a pair of competing unfair labor practice ("ULP") charges, Labor Board Consolidated Case Nos. S-CB-16-017 and S-CA-16-087, the parties presented the impasse case to the Labor Board in early 2016. (SR 38)

B. The Labor Board recognized that the parties are at impasse

After 25 days of hearing on the ULPs under the Tolling Agreement, an ALJ issued a 250-page recommended decision and order ("RDO"). The RDO recommended that the Labor Board find, among other things: (1) the parties generally bargained in good faith and that four of the five factors under the traditional impasse test weigh in favor of finding an overall impasse (SR 277 & 187-0257); (2) the parties reached an agreement on eleven bargaining packages (SR 66-74) and were at impasse on nearly all of the remaining proposals (SR 258-70); (3) AFSCME failed to prove the vast majority of its unfair labor practice allegations (*see generally* SR 28-432); (4) to the extent that AFSCME's ULP allegations had any merit, the allegations did not cause the impasse (SR 277 & 205); (4) AFSCME's own conduct called into question its commitment to reaching an agreement through bargaining (SR 194-256); and (5) if the Board adopted the single critical issue impasse test applied under the National Labor Relations Act ("NLRA"), the parties were at impasse on the single, critical issue of subcontracting. (SR 276-79)

Both parties filed exceptions to the ALJ's RDO with the Labor Board. On December 13, 2016, the Labor Board issued a Decision and Order. As relevant here, that Decision and Order (1) rejected the ALJ's partial implementation remedy; (2) held that the parties were at impasse

and in doing so, adopted the NLRB's single critical issue impasse test and found that the test was satisfied (SR 15-22); and (3) held that the handful of ULPs upheld did not cause the bargaining impasse and therefore did not preclude an impasse holding. (SR 3 & 15-22)[2]

The State and AFSCME filed petitions for administrative review with the Fourth and First Districts, respectively. On January 31, 2017, this Court transferred AFSCME's petitions for administrative review to the Fourth District and consolidated those cases with the State's petition for administrative review. (*See* SR 436) The parties' respective petitions are now pending in the Fourth District as General No. 4-16-0827 and Cons. Nos. 04-17-0125, 04-17-0126, and 04-17-0127. (*See* SR 433)

While the petitions were pending, on December 22, 2016, AFSCME filed a motion in the First District to stay the Board's ruling. (*See* SR 435) The next day, before the State could respond, that court granted a temporary stay, which the Fourth District made permanent on March 1, 2017. (*Id.*) Thus, the State cannot implement the terms of its LBFO despite the Labor Board's impasse finding.

II. ARGUMENT

Illinois Supreme Court Rule 302(b) allows the Supreme Court or a Justice thereof to order that a direct appeal be taken to the Supreme Court, where, as here, an appeal has been filed with the Appellate Court, and the public interest requires prompt adjudication by the Supreme Court. This case presents two issues of first impression regarding the proper interpretation of the

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[2] Notably, two out of the Labor Board's five members stated in a partial dissent that AFSCME's post-impasse information requests "were part of a dilatory strategy by AFSCME to lend credence to their belief that the parties were not at impasse." (SR 15, n. 13) That dissent is consistent with prior court findings that AFSCME has employed similar dilatory strategies in the past. *See, e.g., State of Illinois, Dept. of Cent. Mgmt. Servs v. ILRB*, 384 Ill. App. 3d, 342, 348-349 (4th Dist. 2008); *Village of Bellwood*, 25 PERI ¶ 95 (ISLRB 2009).

Labor Act's impasse requirement that will impact literally billions of dollars of state funding. Given the importance of this case, this Court will eventually be asked to review it regardless of what happens below. The public interest will benefit from prompt adjudication.

A. The Labor Board's ruling presents two issues of first impression for determining when negotiating parties are at impasse

The Labor Board's impasse ruling, including as most recently interpreted by the Fourth District in its March 1, 2017, stay ruling, presents two issues of first impression about the Labor Act's interpretation. First, as noted, the Labor Board's decision adopted the three-part impasse test applied under the National Labor Relations Act for determining whether the parties have reached impasse on a single critical issue. That test asks whether (1) a good faith impasse existed on a single issue; (2) the issue was critical in the sense that it was of overriding importance to the bargaining; and (3) the impasse on the single issue led to a breakdown in overall negotiations. (SR 16 (citing *Calmat Co.*, 331 NLRB 1084, 1097 (2000)). Applying this three-part test, the Board found that the parties were at impasse over the critical issue of subcontracting, stating: "We find that each prong of this test has been met and therefore conclude that the parties reached an overall impasse in negotiations." (*Id.*)

However, the Appellate Court, in ruling on AFSCME's motion for a stay, has concluded that in order to find impasse under this test there would have to be evidence that the impasse on the single critical issue would have to "prevent[] the parties from making any progress ***on any other issue*** in the negotiations." (SR 439-440 (emphasis added)) Specifically, the Appellate Court stated, "we are aware of no evidence, for example, that the Union ever told the State, 'We won't budge on wages and health insurance unless you make concessions on subcontracting,' or words to that effect." (SR 438) Further, in reaching this conclusion the Appellate Court ruled

that the ALJ misapplied the single critical issue test and the Board adopted her mistake. (*Id.* at 6-7)

The State asks this Court to order direct review to clarify that: (1) the Courts should defer to the Labor Board's interpretation of the Labor Act, including its reliance on cases decided under federal law in doing so, especially where, as here, the Appellate Court was not required to reach the issue of the legal standard for single critical issue impasse to decide the union's request for a stay; and (2) further clarify that that the Labor Board was not required to find that the impasse on a single critical issue prevented the parties from any progress on any other terms. Instead, the Labor Board properly exercised its authority under the Labor Act by holding that when impasse over a single critical issue leads to a breakdown in overall negotiations, the parties are at impasse and can apply economic pressure, and for this analysis it is irrelevant whether some progress on some other term could still be made—for to do otherwise would to impose on the State a burden of proof which could never be met.

Even if this Court is not inclined to allow a direct appeal on the single issue impasse test, there is a second issue of first impression, whether all five factors under the Labor Board's traditional test for impasse must weigh in favor of impasse or whether the totality of the circumstances will determine whether the parties are at an overall impasse. The Labor Board adopted this test from *Taft Broadcasting Co.*, 163 NLRB 475 (1967) in *Ill. Dep'ts of Cent. Mgmt. Servs. and Corrections*, 5 PERI ¶ 2001 (IL SLRB 1988), holding: "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors." The Labor Board has stated that it applies the five-factor test based on the "totality of the circumstances."

E.g., *City of East Moline*, 33 PERI ¶ 15 (IL SLRB 2016). It has not required that all five factors be met. *E.g., City of Peoria*, 11 PERI ¶ 2007 (IL SLRB 1994).

The ALJ found four of the five *Taft* factors weigh in favor of impasse. (SR 187-203) Specifically, the only one of the five *Taft* factors that was not decided in favor of the State was AFSCME's subjective belief as to whether the parties are at impasse. (*Id.*) The Labor Board did not rule on the impasse issue based on the *Taft* test, relying instead on the NLRB's single critical issue test.

The Appellate Court in issuing the stay ruled that one factor—i.e., subjective belief on the part of AFSCME—is sufficient to outweigh the other four factors that the Labor Board and the ALJ found weigh in favor of impasse. (SR 440-41) The importance of this legal issue cannot be overstated. If a labor union can avoid impasse by merely stating it does not believe the parties are at impasse, then a union will always have the ability to avoid impasse and the implementation of the LBFO by merely stating its subjective belief, however unreasonable. The *Taft* test has always been applied under a "totality of the circumstances" standard. *City of East Moline*, 33 PERI ¶ 15 (IL SLRB 2016). The Labor Board has previously found that AFSCME bargaining representatives are trained to declare that the parties are not at impasse and that AFSCME is willing to move to "forestall [an employer] from implementing its final offer rather than a sincere attempt to resolve the party's differences." *City of Peoria*, 11 PERI ¶ 2007, *supra*. The Court should grant a direct appeal to make clear that a union's subjective belief does not outweigh all of the other *Taft* factors. To rule otherwise would effectively give unions veto power over impasse. In turn, that would prevent the employer from ever unilaterally implementing a LBFO to allow the parties to resolve their impasse.

Further, such a review is needed to clarify the deference the courts are to pay to the Labor Board's rulings. This Court has held that courts are required to accord deference to the Labor Board's reasonable interpretation of a statute it is charged with enforcing – *i.e.*, the Labor Act. *Burbank v. Ill. State Labor Rel. Bd.*, 128 Ill.2d 335, 345 (1989). Second, the Labor Board's findings and conclusions on questions of fact shall be held to be *prima facie* true and correct. 735 ILCS 5/3-110; *Abrahamson v. Ill. Dep't of Prof'l Reg.*, 153 Ill. 2d 76, 88 (1992). "A reviewing court is not to make an independent determination of the facts; its sole function is to ascertain whether the findings of the administrative agency are contrary to the manifest weight of the evidence." *Id.*; *Warren v. Zoning Bd. of Appeals of the City of Fairfield*, 255 Ill. App. 3d 482, 487-488 (5th Dist. 1994).

Finally, the Labor Board's conclusion on a mixed question of law and fact, is to be upheld, unless the agency's application of the facts to the law is clearly erroneous. *AFM Messenger Serv., Inc., v. Ill. Dep't of Employment Security,* 198 Ill. 2d 380, 391-95 (2001). "An agency's decision will be deemed clearly erroneous only where the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been committed." *Id.* However, if there could be two reasonable but opposing views of whether the facts satisfy the statutory standard, the Labor Board cannot have committed clear error by choosing between those views. *Dep't of Cent. Mgmt. Servs. (PSA2) v. Ill. Labor Rel. Bd.,* 2011 IL App. (4th) 090966 ¶ 129. Put another way, if evidence contained in the record supports the Labor Board's determination, that determination must be affirmed. *Edwards v. Addison v. Fire Prot. Dist. Firefighters' Pension Funds*, 2013 IL App. 2d 121262 ¶ 31.

B. The legal issues presented by this appeal are particularly important in light of the state's ongoing financial crisis

In addition to presenting issues of first impression, the legal issues presented by this appeal are particularly important in light of the State's ongoing financial crisis. The Court's resolution of this matter will not only impact the State, the numerous executive branch agencies employing the AFSCME members, and the tens of thousands of AFSCME members, but it will impact the taxpayers and the State's overall finances. The State of Illinois is in dire financial straits. The backlog of unpaid bills now exceeds $12 billion. (SR 476) Unfunded pension liabilities have ballooned to approximately $130 billion. (SR 483) The State's credit rating is the worst in the nation. (SR 519) Many providers of social services to the State's most vulnerable residents—"the elderly infirm, runaway youth, persons with AIDS, and the homeless" (SR 558)—face staff layoffs and program shutdowns, if not outright closings.

These facts drove the State to ask that its employees, who are the nation's highest paid after adjusting for cost of living (SR 521), hold the line on wages and accept affordable health insurance options that many of our taxpayers receive. Twenty unions have accepted substantially similar proposals. AFSCME refused and has continued to make unaffordable demands. AFSCME insisted on wage and benefits proposals that, for the four-year contract, would cost the State's taxpayers over $3 billion more than the State's proposal. (SR 452 at ¶6 & SR 463) After nearly a year of negotiations, during which the parties met on 67 days, AFSCME's unmovable demands caused the State to conclude that the parties are at an impasse in negotiations. The Labor Board agreed.

The Labor Board's Decision and Order allows the State to implement its LBFO, which is a major step towards bridging the budget gap. Therefore, this Court's resolution of whether the Labor Board properly exercised its authority under the Labor Act in holding that the parties are

at impasse will have a significant impact on the State's budget and, therefore, is a matter of great public concern requiring prompt adjudication.

If this Court does not take a direct appeal (or dissolve the stay), the State will continue to be deprived of its right, pursuant to the Labor Board's Decision and Order and the Labor Act, to implement its LBFO. The mounting financial impact on the taxpayers and the State's financials is staggering. The State presented evidence to the Labor Board, when seeking to expedite the underlying hearing, establishing that each month that implementation is delayed costs the State and its taxpayers $35 to $40 million in additional health insurance costs alone (without factoring in all of the additional costs that the State and its taxpayers incur while implementation is delayed). (SR 581, ¶10; *see also* SR 587)

C. Direct appeal in this Court will help the parties reach an expeditious resolution, benefitting all involved regardless of the ultimate outcome

Given its importance, this Court will eventually receive a petition for leave to appeal, regardless whether the case remains in the Fourth District for now. The delay of waiting for Fourth Circuit adjudication will impose enormous costs. The record on appeal was filed on March 15, 2016, after the deadline was extended multiple times at the Labor Board's request. That means the present deadline for the parties' respective reply briefs is June 7, 2017. As a result, the Fourth District is unlikely to resolve this matter for another six months or longer, after allowing time for oral argument and for the Fourth District to issue its decision. Costs incurred during that time will exacerbate the fiscal crisis but add little to the adjudication of this issue by this Court.

In addition, the Group Insurance Act requires that the annual benefit choice period for group health insurance plans or programs "must begin on May 1 of the fiscal year preceding the year for which the program is to be offered." 5 ILCS 375/5(v). (*See* SR 585-88) Therefore, the

Act requires that annual benefit choice period begin on May 1 for the health insurance plans that will be offered by the State on July 1, 2017, which is the beginning of FY 2018. Thus, this appeal and the Appellate Court's stay directly impact the State's ability to meet its obligations under the Group Insurance Act. (*See* SR 585-88) This Court should take this case now.

Next, not only does the Labor Board's Decision and Order allow the State to implement its LBFO, it also allows AFSCME to apply lawful economic pressure in response. The Labor Act and Labor Board—consistent with federal labor law—expressly allow parties to use their respective economic weapons in order to reach a successor CBA once bargaining at the table has broken down. Continuing the current situation in which the parties are precluded from exercising their economic weapons for multiple months while the appeal remains in the Fourth District and then appealed to the Supreme Court is simply not tenable and will only further harm the public. This Court's prompt resolution of whether the Labor Board correctly held that the parties are at an impasse will potentially save hundreds of millions of dollars and set the stage for the parties to finally reach a successor CBA.

Finally, the Labor Act and the labor law of this state expressly contemplate that impasse, and the economic tools parties may employ after impasse is reached in negotiations, are ordinary features of the collective bargaining process that must be allowed to play out so that parties may achieve finality in collective bargaining. If the law of this State becomes either that the State can never implement the terms of its LBFO, or that it in order to do so it must first wait multiple years after impasse is reached for all legal remedies to first be exhausted, such a law would effectively end collective bargaining for the State. It is unlikely any union will ever agree to any concessions if it knows that by waiting it can drive the negotiations to impasse, dispute the existence of impasse—thereby requiring the State to maintain the status quo—and then cause the

matter to be held up through years of court proceedings. That process is not collective bargaining, but one in which the State is an onlooker unless it accedes the union's demands.

Granting a direct appeal to this Court to resolve these issues is entirely consistent with this Court's prior grants of direct appeals under Rule 302(b) in matters that involve statutory construction and interpretation regarding the authority of State agencies and municipalities, concern public employment, and/or have a significant impact on government finances. The Supreme Court has previously ordered direct appeals under Rule 302(b) in cases that: (1) require a determination of a state agency's statutory responsibilities, *see, e.g.*, *Elec. Contractors Ass'n of City of Chicago v. Illinois Bldg. Auth.*, 33 Ill. 2d 587, 590 (1966) (determining state agency's statutory obligation to follow statutory bid process); *Weinstein v. Rosenbloom*, 59 Ill. 2d 475, 476 (1974) (determining statutory authority of state agency); (2) involve the authority of local municipalities that raise similar issues, *see, e.g.*, *Friends of Parks v. Chi. Park Dist*., 203 Ill. 2d 312, 314 (2003) (authority to use of public funds for improvements to public park for Soldier Field expansion); *Fumarolo v. Chi. Bd. of Educ.*, 142 Ill. 2d 54, 61 (1990) (public school reform); *Berk v. Will County*, 34 Ill. 2d 588, 592 (1966) (county's decision to construct a new courthouse); *Landmarks Pres. Council of Illinois v. City of Chicago*, 125 Ill. 2d 164, 168 (1988) (suit over rescinding building's landmark status); (3) have a significant effect on the government's finances, *see Allegro Servs., Ltd. v. Metro. Pier & Exposition Auth.*, 172 Ill. 2d 243, 246 (1996) (challenge to tax for renovation of McCormick Place); and (4) concern public employment, *see, e.g.*, *Kanerva v. Weems*, 2014 IL 115811, ¶ 1 (constitutionality of changes to health insurance of retired state employees), including payment of public employees, *see, e.g.*, *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 297-98 (2004) (cost-of-living adjustments to judicial salaries).

WHEREFORE, for the foregoing reasons, the State respectfully moves the Court to enter an order that the parties' respective petitions for administrative review of the Labor Board's Decision and Order currently pending in the Fourth District Appellate Court, Gen. No. 4-16-0827 and Cons. Nos. 04-17-0125, 04-17-0126, and 04-17-0127, be taken directly to the Supreme Court because public interest requires prompt adjudication of the matter. The State also requests that the Illinois Supreme Court order the appeal to adhere to the briefing schedule provided by Rule 307(a), and that the Supreme Court set the matter for oral argument in its May 2017 term. Finally, the State respectfully requests that, upon taking the case on direct appeal, the Court lift the stay entered by the Appellate Court. If the stay is not lifted in full, the State asks for the stay to be partially lifted with regard to health insurance, so that the State may comply with its statutory obligation to offer open enrollment by May 1, save hundreds of millions in expenditures at a time of fiscal crisis, and effectively implement its health insurance plan, as set forth in the affidavit of Theresa Flesch, attached hereto (SR 585-88).

Dated: March 17, 2017

STATE OF ILLINOIS (DEPARTMENT OF CENTRAL MANAGEMENT SERVICES),

/s/ David A. Moore
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 (2014) that on March 17, 2017 the foregoing Motion For Direct Appeal Pursuant To Supreme Court Rule 302(B) was filed electronically with the Clerk of the Illinois Supreme Court, using the i2File system, and was served by e-mail on each person named below at the address indicated.

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ORDER

THIS CAUSE COMING BEFORE THE COURT on the State of Illinois Department of Central Management Services' Motion for Direct Appeal Pursuant to Supreme Court Rule 302(b), and due notice having been given:

IT IS HEREBY ORDERED:

The Motion for direct appeal to the State of Illinois Supreme Court is ALLOWED / DENIED.

The matter will proceed pursuant to the briefing schedule set forth by Supreme Court Rule 307(a)

ENTERED:

_____
JUSTICE

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JUSTICE

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JUSTICE

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JUSTICE

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JUSTICE

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JUSTICE

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JUSTICE

DATED _____

Order Prepared By:
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