

COURT OF APPEALS - STATE OF NEW YORK

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MARGARET GODFREY, ROSEMARIE JAROSZ,  
and JOSEPH ROSSINI,

*Plaintiffs-Appellants,*

-against-

ANDREW J. SPANO, *in his official capacity as the  
Westchester County Executive,*

*Defendant-Respondent,*

-and-

MICHAEL SABATINO and ROBERT VOORHEIS,

*Defendants-Intervenors-Respondents.*

-----X

NOTICE OF MOTION  
FOR AN ORDER  
GRANTING LEAVE  
TO APPEAL AND  
AFFIRMATION IN  
SUPPORT OF MOTION

Index No: 16894/2006  
Westchester County  
Supreme Court

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NEW YORK STATE  
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**NOTICE OF MOTION  
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TO APPEAL**


Index No: 16894/2006  
Westchester County  
Supreme Court

PLEASE TAKE NOTICE that upon the attached attorney affirmation of Brian W. Raum, dated February 10, 2009, and the papers included herewith, the undersigned will move this Court, pursuant to 22 NYCRR 500.22, at the courthouse thereof, located at 20 Eagle Street, Albany, New York 12207, on the 23rd day of February, 2009, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting Plaintiffs-Appellants leave to appeal to the Court of Appeals in accordance with CPLR 5602(a)(1)(i), and for such other and further relief as this Court may deem just and proper.

Dated: February 10, 2009

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Respectfully submitted,



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**AFFIRMATION  
IN SUPPORT  
OF MOTION**

Index No: 16894/2006  
Westchester County  
Supreme Court

I, Brian W. Raum, an attorney duly admitted to practice law in the State of New York, affirm the following under the penalties of perjury:

1) I am an attorney with the Alliance Defense Fund, counsel for Plaintiffs-Appellants (“Taxpayers”). As such, I am familiar with the facts and circumstances of this case as well as the papers and proceedings in this matter.

2) I submit this affirmation in support of Taxpayers’ motion pursuant to CPLR 5602(a)(1)(i) for leave to appeal to the Court of Appeals from a final Decision and Order of the Appellate Division, Second Department, which held that

a county executive did not act illegally by ordering the recognition of out-of-state same-sex “marriages.”

3) This affidavit sets forth the information required by 22 NYCRR 500.22(b) and the grounds supporting the motion for an order granting leave to appeal. Copies of the appellate record and all briefs submitted to the Appellate Division have been provided together with this affirmation. The Appellate Division’s decision is attached hereto as Exhibit A, and the Westchester County Supreme Court’s decision is attached hereto as Exhibit B.

Procedural History:

4) On June 6, 2006, Defendant-Respondent Andrew J. Spano (“Spano”), acting in his official capacity as County Executive of Westchester County, issued Executive Order 3 of 2006, which “order[ed] and direct[ed] each and every department, board, agency, and commission of the County of Westchester under [his] jurisdiction to recognize same sex marriages lawfully entered into outside the State of New York in the same manner as they currently recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law.” R. 67.

5) Taxpayers commenced this action in the Westchester County Supreme Court on August 23, 2006, and filed an Amended Verified Complaint on January 8, 2007. R. 36. Under their First Cause of Action (Violation of General Municipal

Law Section 51), Taxpayers assert that Spano, by issuing Executive Order 3, “has acted and is continuing to act illegally, unconstitutionally, . . . and against New York State public policy.” R. 40. Taxpayers allege “illegality” in at least two ways: (1) an executive-branch official violates common-law comity principles by ordering the recognition of same-sex “marriages” performed outside New York; and (2) a county executive who dictates which out-of-state unions will be recognized as “marriages” usurps the state government’s authority and thus violates home-rule principles. R. 38-41.

6) On January 26, 2007, Spano and Defendants-Intervenors-Respondents filed motions to dismiss the amended complaint. The Westchester County Supreme Court issued its final decision on April 16, 2007, granting those motions and dismissing Taxpayers’ claims. The Supreme Court began by rejecting Taxpayers’ first basis of illegality—that the order to recognize out-of-state same-sex “marriages” violated common-law comity principles. The Supreme Court reasoned that the judiciary “as a matter of comity will recognize out-of-state marriages . . . unless barred by positive law (statute) or natural law (incest, polygamy) or otherwise offensive to public policy.” R. 28. After incorrectly concluding that none of these comity exceptions applied to out-of-state same-sex “marriages,” the Supreme Court held that Spano’s Executive Order was consistent with governing common-law principles.

7) The Supreme Court then addressed Taxpayers’ second basis of illegality—that a county executive usurps the authority of the state legislature by dictating which out-of-state unions will be recognized in New York. The Supreme Court rejected that claim, reasoning that the Executive Order was not akin to a law, but rather, was “a policy implementation device in accordance with the current and evolving . . . law on recognition of same-sex marriages out-of-state.” R. 34. The Supreme Court thus held that “Executive Order No. 3 is a valid exercise of the County Executive’s power, not an illegal act[.]” R. 34.

8) The Appellate Division affirmed the order and judgment of the Supreme Court on December 30, 2008, although it did so without addressing the issues raised by Taxpayers. In analyzing whether Spano’s issuance of the Executive Order was “illegal,” the Appellate Division did not analyze any of the bases of illegality alleged by Taxpayers, reasoning instead:

The Executive Order at issue here requires that same-sex marriages be recognized to “the maximum extent allowed by law.” By its terms, therefore, the Executive Order can never require recognition of such a marriage where it would be outside the law to do so. Since it is within the authority of the County Executive “[t]o see that the laws of the state . . . are executed and enforced within the county” . . . , the Executive Order is not illegal.

Exhibit A at 2. Based solely upon this reasoning, the Appellate Division found no illegality in Spano’s actions, holding that Taxpayers did “not state a cause of action pursuant to General Municipal Law § 51.” Exhibit A at 2.

9) Taxpayers now seek an order from this Court granting permission to appeal pursuant to CPLR 5602(a)(1)(i).

Timeliness of this Motion:

10) A copy of the Appellate Division's Decision and Order, entered on December 30, 2008, was served on Taxpayers, via regular mail, with a notice of entry, on January 12, 2009. The notice of entry is attached hereto as Exhibit C.

Jurisdiction:

11) The Appellate Division's order, attached hereto as Exhibit A, is a final determination in this action and is not appealable as of right. This Court therefore has jurisdiction to review this matter pursuant to CPLR 5602(a)(1)(i).

Questions Presented for Review:

12) Does a county executive violates common-law comity principles and thus acts illegally by mandating the recognition of out-of-state same-sex "marriages"?

13) Does a county executive exceeds his lawful authority, violates home-rule principles, and thus acts illegally by mandating the recognition of out-of-state same-sex "marriages"?

Preservation of Questions Presented:

14) Taxpayers preserved the questions presented by raising them in their Amended Verified Complaint. Taxpayers argued the comity issue as part of their

First Cause of Action, contending that Spano acted “illegally . . . and against New York State public policy,” and also noting that “New York State law does not recognize . . . same-sex ‘marriages’ performed outside . . . the State.” R. 38-40. This issue was addressed by the Supreme Court. R. 28-33. This issue was also thoroughly argued in Taxpayers’ brief to the Appellate Division. *See* Appellant’s Br. at 31-42.

15) Taxpayers argued the home-rule issue as part of their First Cause of Action, stating that Spano, as a county official, acted illegally by “‘legislat[ing]’ in the areas of marriage and domestic relations which are under the exclusive jurisdiction of the New York State Legislature.” R. 40.<sup>1</sup> This issue was briefly—but not completely—addressed by the Supreme Court. R. 33-34. This issue was also thoroughly argued in Taxpayers’ brief to the Appellate Division. *See* Appellant’s Br. at 13-31.

The Questions Presented Merit Review by This Court:

16) In light of the criteria listed in 22 NYCRR 500.22(b)(4), this case warrants review by this Court. As will be explained fully herein, the issues presented in this appeal are novel and of public importance. In addition, the issues

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<sup>1</sup> Taxpayers have not pursued their home-rule argument as a stand-alone claim under their Second Cause of Action. Instead, Taxpayers have argued that the violation of home-rule principles is one way in which Spano’s conduct amounts to an “illegal official act,” challengeable under General Municipal Law Section 51. *See* N.Y. Gen. Mun. Law § 51.

present a conflict with prior decisions of this Court. Consequently, this Court should grant Taxpayers leave to appeal.

Novel Issues:

17) This Court has never addressed whether comity principles mandate government recognition of an out-of-state same-sex “marriage” in New York. Neither does this Court’s precedent provide definitive guidance on how to resolve that issue. This appeal will allow the Court to address this important issue for the first time and provide uniform guidance to the lower courts.

18) All prior decisions from this Court addressing comity and marriage recognition have involved out-of-state marriages between a man and a woman. *See, e.g., Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980). Indeed, the trial court acknowledged that all cases from this Court addressing the marriage-recognition issue have “involved a male and female as couples.” R. 28. Here, however, Spano has mandated the recognition of out-of-state unions between persons of the same sex. This Court has yet to address this wholly distinct issue: whether an out-of-state legal relationship that does not have the fundamental building blocks of a New York marriage—a man and a woman—can be recognized as a “marriage” in New York? This case provides an opportunity for this Court to resolve this emerging nuance of common-law comity principles.

19) Furthermore, this Court has never addressed whether, consistent with home-rule principles, a county official has authority to determine which out-of-state unions will be recognized as “marriages” in his jurisdiction. At least one lower court has already acknowledged that a local government’s actions in altering the institution of marriage within its jurisdiction “would be impermissible under home rule law principles,” *see Slattery v. City of New York*, 179 Misc.2d 740, 744 (Sup. Ct. N.Y. Cty.), *aff’d*, 266 A.D.2d 24 (1st Dept. 1999),<sup>2</sup> but this Court has yet to address that issue. This case provides an opportunity for this Court to clarify the role of local government officials in addressing issues of marital recognition.

20) Even though these issues were clearly raised and fully briefed by all parties, the Appellate Division avoided them for a reason that crumbles under analytical scrutiny.<sup>3</sup> Taxpayers expressly argued that Spano’s Executive Order

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<sup>2</sup> In the *Slattery* case, the plaintiffs challenged New York City’s decision to grant domestic-partner status to same-sex couples, arguing, among other things, that the city government “acted illegally by legislating in the area of marriage and domestic relations—which, by statute, is under the exclusive jurisdiction of the New York State Legislature.” *Slattery*, 179 Misc.2d at 742. The court ruled against the plaintiffs, reasoning that “a domestic partnership is different from a marriage,” but in doing so, candidly acknowledged that “[i]f, in fact, a domestic partnership is identical to a marriage, the challenged legislation would be impermissible under home rule law principles.” *Id.* at 744. In the present case, the challenged governmental action—Executive Order 3—clearly impacts marriage, by mandating the recognition thereof, and, accordingly, is impermissible under principles of home-rule law.

<sup>3</sup> The Appellate Division’s decision also displayed a thoroughly flawed understanding of Taxpayers’ claims. For instance, the Appellate Division stated that in this case “there is no allegation of waste of or injury to public funds.” Exhibit A at 2. Yet, Taxpayers’ Amended Verified Complaint contains repeated allegations of wasted public funds. *See* R. 36-37 (alleging that Spano “has caused, and is causing, public mischief including but not limited to expending County funds”); R. 39 (alleging that Spano’s unlawful “executive order has resulted and will continue to result in the illegal disbursement of County funds”); R. 40 (alleging that Spano “has spent and will spend County tax revenue”). Taxpayers also highlighted these allegations of

was unlawful because (1) he lacked the authority to determine which out-of-state unions would be recognized as “marriages” *and* (2) the Executive Order required the recognition of out-of-state legal relationships that were not entitled to recognition under New York common law. Rather than decide those issues, however, the Appellate Division reasoned that Spano’s Executive Order could not have been illegal because he inserted the words “to the maximum extent allowed by law” at the end of his order. This reasoning ignores the realities of government operation, sets bad policy for government officials, and abdicates the judiciary’s solemn duty to oversee the actions of executive-branch officials.

21) First, the Appellate Division’s reasoning assumes that every executive-branch employee in Westchester County will evaluate and determine the extent to which recognition of out-of-state same-sex “marriages” is allowed by law. Of course, that is an unrealistic assumption: ministerial executive-branch employees lack the opportunity or expertise to determine the “maximum extent” to which they can carry out Spano’s order; they instead will rely on the general order—to recognize all out-of-state same-sex “marriages”—and act accordingly. Second, the Appellate Division’s reasoning allows a government official to insulate his directives from legal attack so long as he adds the words “to the

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public-fund waste in their briefing before the Appellate Division. *See* Appellant’s Br. at 2; Appellant’s Reply Br. at 2-3 (“Plaintiffs further assert that Spano’s illegal conduct has caused or will cause the waste of public funds”). This glaring inconsistency between Taxpayers’ allegations and the Appellate Division’s characterization of Taxpayers’ allegations suggests that the Appellate Division did not accurately understand Taxpayers’ claims.

maximum extent allowed by law.” Creating this executive “safe harbor” is not sound government policy. Third, the judiciary, when faced with these issues, has a duty to determine whether an executive-branch official ordered his subordinates to act unlawfully. Shirking this solemn duty imperils Taxpayers, subordinate executive-branch employees, and the judicial system as a whole.

22) The Appellate Division’s unsupported failure to address these issues heightens the need for review by this Court. Consequently, this Court should grant Taxpayers leave to appeal in order to address the novel issues presented in this case.

Issues of Public Importance:

23) The issues raised in this case threaten to (1) alter the fundamental components of the marital relationship in New York, (2) destroy New York’s sovereignty to determine the fundamental components of the marital relationship, (3) affect the myriad legal rights and obligations flowing from the marital relationship, (4) nullify the legislature’s policy decision to limit marital benefits to relationships between one man and one woman, and (5) allow local government officials to create splintered, conflicting treatment of a marriage-recognition issue demanding statewide uniformity.

24) Expanding comity principles to require government officials to recognize out-of-state same-sex “marriages” has already had, and will continue to

have, far-reaching effects on New York society. This expansive application of comity principles effectively ushers same-sex “marriage” into New York through judicially created common law. Every same-sex couple wanting to be “married” in New York (even though New York does not allow such unions) can take a daytrip to Canada or Connecticut, get “married”, and New York will be required to recognize it. As a result, this expansive application of comity has begun to transform the State of New York into a society with both opposite-sex marriages and same-sex “marriages,” all of which must be recognized by the State; it has fundamentally altered the structure of that most basic social institution—one man and one woman. Regardless of whether one thinks this is a positive or negative societal change, it is undeniable that through the expansive application of comity, the change has started to occur. And it is troubling, regardless of one’s personal views on same-sex “marriage,” to allow such a fundamental change to occur in the absence of legislative authority.<sup>4</sup>

25) Expanding comity principles to require recognition of out-of-state same-sex “marriages” effectively nullifies New York’s sovereign decision to

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<sup>4</sup> Lambda Legal Education and Defense Fund, attorneys for Defendants-Intervenors-Respondents, have unequivocally stated their plan to assist same-sex couples who receive “marriage” licenses from foreign jurisdictions “to win full recognition of their newly[acquired] status in their home [s]tate.” H.R. Rep. No. 104-664, at 7 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2911 (Legislative Report discussing the Federal Defense of Marriage Act). They intend to use the extension of comity principles to import same-sex “marriage” into New York—a direct effort to reform the State’s laws and public policy in the absence of legislative approval.

define marriage as the union of one man and one woman. It abdicates New York's sovereignty over marriage, favoring instead laws promulgated in jurisdictions that define marriage in a fundamentally different way than New Yorkers. In essence, it allows the "marriage" laws of foreign jurisdictions like Canada or Massachusetts—which have eradicated the basic man-woman construct—to govern here in the Empire State. Thus, this comity issue is far from an abstract legal concept; barring legislative action on this issue, it will determine the immediate future of marriage in New York.

26) The judicial creation of same-sex "marriage" in New York will have countless ripple effects throughout everyday life; it is of momentous and far-reaching public importance. Whole aspects of New York society must change and respond. Government officials, employers, insurance companies, health-care providers, courts, attorneys, accountants—to name a few—must adapt their practices if same-sex "marriages" are to be recognized in New York. Divorces, inheritance rights, adoptions, pension benefits, property rights, taxation, and many other legal rights, benefits, and obligations will be changed by the recognition of out-of-state same-sex "marriages."

27) This newly imposed expansion of comity principles has already begun to have a widespread effect in many facets of state law. For the first time, New York Supreme Courts have exercised their jurisdiction to grant divorces for same-

sex couples who obtained “marriage” licenses in other jurisdictions. *See Beth R. v. Donna M.*, 19 Misc.3d 724 (Sup. Ct. N.Y. Cty. 2008); *C.M. v. C.C.*, 21 Misc.3d 926 (Sup. Ct. N.Y. Cty. 2008). At least one New York Surrogate has broken with precedent and determined that the decedent’s same-sex partner was the sole distributee because the couple had been “married” in Canada. *See Matter of the Estate of H. Kenneth Ranftle*, No. 4585-2008 (N.Y.L.J. Feb. 4, 2009). Attached hereto as Exhibit D. Furthermore, at least one New York Family Court has ruled that a partner of a same-sex couple did not need to be pre-certified as a qualified adoptive parent (as she ordinarily would need to be under applicable law) because the couple had previously obtained a “marriage” license from another jurisdiction and thus were considered to be “married” under New York law. *See In re Donna S.*, 2009 WL 69341 (Fam. Ct. Monroe Cty. Jan. 6, 2009). Attached hereto as Exhibit E. These decisions show that the unprecedented application of comity principles has begun to create the legal reality of same-sex “marriage” in New York.

28) The vast overexpansion of comity has forced even private companies and corporations to recognize out-of-state same-sex “marriages.” For example, the New York Insurance Department has issued a directive mandating that all insurance companies doing business in New York must recognize out-of-state same-sex “marriages.” *See* 2008 N.Y. St. Ins. Dept. Circular Letter No. 27 (Nov.

21, 2008). Attached hereto as Exhibit F. Given the widespread effect of this important issue, New Yorkers need the finality and consistency that only a decision from this Court can bring.

29) Forcing the government to recognize out-of-state same-sex “marriages” undermines the legislature’s policy decision to limit marital benefits to relationships between one man and one woman. “The extension of [marital] benefits entails a consideration of social and fiscal policy more appropriately left to the Legislature.” *Langan v. State Farm Fire & Casualty*, 48 A.D.3d 76, 79 (3rd Dept. 2007).<sup>5</sup> Yet, an expansive application of comity principles effectively abolishes the legislature’s social and fiscal policy determinations by mandating that marital benefits be extended to same-sex couples. This result inappropriately infringes on the realm of the legislature.

30) Permitting, as the Appellate Division has, a county executive to determine which out-of-state legal relationships will be recognized as “marriages”

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<sup>5</sup> As this Court has recognized, many biological and social reasons support the legislature’s decision to limit marital benefits to relationships between one man and one woman. That decision is neither arbitrary nor “merely a by-product of historical injustice.” *Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006). It is “based on innate, complementary, procreative roles, a function of biology.” *Hernandez v. Robles*, 26 A.D.3d 98, 104 (1st Dept. 2005), *aff’d*, 7 N.Y.3d at 338. Only unions between a man and a woman result in the natural procreation of children. *See Hernandez*, 7 N.Y.3d at 359 (recognizing that one of the “important function[s] of marriage is to create more stability and permanence in the relationships that cause children to be born”); *Mirizio v. Mirizio*, 242 N.Y. 74, 81 (1926) (reasoning that marriage “relationship[s] . . . exist with the result and for the purpose of begetting offspring”). Moreover, relationships between a man and a woman produce certain child-rearing advantages. *See Hernandez*, 7 N.Y.3d at 359 (“Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like”).

in his jurisdiction creates a splintered, conflicting treatment of an issue demanding statewide uniformity. “From time immemorial the State has exercised the *fullest control* over the marriage relation.” *Fearon v. Treanor*, 272 N.Y. 268, 272 (1936) (emphasis added). The state legislature has enacted a comprehensive and detailed regulatory scheme, *see* N.Y. Dom. Rel. Law §§ 1- 61; *Fearon*, 272 N.Y. at 272, thus preempting local government action over questions of marriage recognition. *See Consol. Edison Co. of New York v. Town of Red Hook*, 60 N.Y.2d 99, 105 (1983) (stating that local government action is preempted where “the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area”).

31) The State of New York needs uniform statewide treatment of marriage-recognition issues, not variations between individual cities and counties. Suppose, for example, that each county and municipal government issued a proclamation regarding the recognition of out-of-state same-sex “marriages,” with some officials mandating recognition and others deciding against it.<sup>6</sup> Allowing each local government independently to determine these marriage-recognition questions results in unnecessary legal confusion and potential inconsistency. As same-sex couples travel throughout New York, their “marriage” status (for county and municipality purposes) might change depending on a locality’s independent

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<sup>6</sup> This situation is far from hypothetical: many local government officials have already issued proclamations regarding the recognition of out-of-state same-sex “marriages.” *See* R. 612-32 (containing various letters and memoranda from local officials indicating their independent decisions regarding the recognition of out-of-state same-sex “marriages”).

proclamation. This Court cannot allow such inconsistency and uncertainty to surround the legal status of these couples' relationships. Thus, this Court should grant leave to appeal and declare that local government officials lack the authority to determine which out-of-state unions will be recognized as "marriages" in their respective jurisdictions.

32) In sum, this Court should grant Taxpayers leave to appeal to address the issues of public importance presented in this case.

Conflict with Prior Decisions of this Court:

33) The Supreme Court's and the Appellate Division's approval of Spano's Executive Order conflicts with this Court's decision in *Hernandez*. To be sure, *Hernandez* did not address the precise questions at issue in this case: *Hernandez* held that the state legislature did not violate the New York Constitution by defining marriage as the union of one man and one woman; whereas, this case presents questions of common-law comity and county-government authority concerning marriage recognition. Nevertheless, this Court in *Hernandez* spoke extensively about changing the fundamental components of marriage in New York—one man and one woman—which is precisely the result of the lower courts' decisions in this case.

34) In *Hernandez*, this Court stated its "conclusion" that "any expansion of the traditional definition of marriage should come from the Legislature."

*Hernandez*, 7 N.Y.3d at 361. This Court similarly remarked that “the present generation should have a chance to decide [the same-sex ‘marriage’] issue through its elected representatives [*i.e.*, the legislature].” *Id.* at 366. Here, however, the lower courts’ decisions have effectively ushered same-sex “marriage” into New York, thus altering the fundamental components of marriage through judicial fiat, and robbing this “present generation” of New Yorkers of its opportunity to decide the same-sex “marriage” issue through its elected legislators. This judicial restructuring of marriage in New York directly violates part of this Court’s decision in *Hernandez*. The lower courts of this State cannot accomplish indirectly what this Court has ruled they cannot do directly—namely, the redefinition of marriage. This Court must intervene to correct this conflict between the lower courts’ decisions and its own precedent.

35) This Court should therefore grant Taxpayers leave to appeal to address the conflict between the lower courts’ decisions in this case and this Court’s decision in *Hernandez*.

WHEREFORE, for all the above reasons, I respectfully request that this Court issue an order granting Taxpayers leave to appeal to the Court of Appeals from the order of the Appellate Division, Second Department, entered on December 30, 2008.

Dated: February 10, 2009.

Respectfully submitted,



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## AFFIRMATION OF SERVICE

I, Brian W. Raum, an attorney duly licensed in the State of New York, affirm under the penalties of perjury that the following is true and correct:

That on the 10th day of February 2009, I served copies of the foregoing Notice of Motion, Attorney Affirmation in Support, and supporting papers by depositing true copies with the United Parcel Service, via *Next Day Air* overnight service, pre-paid, addressed as follows:

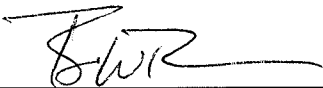
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those being the addresses designated on the latest papers served by them in this action.

  
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Brian W. Raum, Esq.