

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

MARILYN McCLAIN GOFF,)	
Plaintiff,)	
)	Case No. 08-CV-71-TCK-FHM
v.)	
)	
SHEREE L. HUKILL, individually and)	
DR. JOE A. WILEY, individually and)	
ROGERS STATE UNIVERSITY BOARD OF)	
REGENTS,)	
Defendants.)	

PLAINTIFF'S RESPONSE AND OBJECTION TO MOTION TO DISMISS

COMES NOW the Plaintiff Marilyn McClain Goff (Plaintiff) and hereby submits her Response and Objection to the Motion to Dismiss filed by Defendants [Docket 13]. In support thereof, Plaintiff alleges and states as follows:

INTRODUCTION

On January 14, 2008, Plaintiff filed a Petition in this matter predicated on wrongful termination in violation of Plaintiff's free speech rights as well as her due process rights under the First and Fourteenth Amendments, respectively, to the United States Constitution. Accordingly, Plaintiff is seeking claims in her Petition under 42 U.S.C. § 1983. Plaintiff's 42 U.S.C. § 1983 claims are against Defendants Wiley and Hukill. Plaintiff also alleged a breach of contract claim against Defendant RSU.

On January 17, 2008, Plaintiff filed a First Amended Petition. Plaintiff's First Amended Petition did not add any claims. It merely changed the name of Defendant RSU to its proper name State of Oklahoma, *ex rel.* Board of Regents of the University of Oklahoma, Cameron University and Rogers State University. On about January 23, 2008 service of the original Petition was effected by Defendants and Defendants thereafter timely removed this matter.

On or about February 21, 2008, Defendants filed a motion to dismiss alleging that service was improper and further alleging numerous pleading deficiencies. Contrary to Defendants' assertions, the Motion to Dismiss should be denied. Plaintiff's Petition clearly states a claim in which relief can be granted and as such the Motion to Dismiss should be denied. Further, service has been properly obtained. For the reasons set forth below, Defendants' motion should be denied.

PROPOSITION NO. I

**THIS CASE SHOULD NOT BE DISMISSED FOR INSUFFICIENCY OF SERVICE
BECAUSE PROPER SERVICE HAS BEEN OBTAINED AND ALTERNATIVELY
DISMISSAL IS NOT THE PROPER REMEDY**

Defendants allege that this matter should be dismissed because proper service has not been obtained. However, these assertions are misguided and should be denied by this Court.

A. Service in this matter is proper as it comports with due process.

In the instant case, Plaintiff mailed a copy of the Petition and Summons to Rogers State University, c/o Joe Wiley, President via certified mail. Plaintiff also mailed, via certified mail separately a copy of the Petition and Summons for Joe Wiley to Joe Wiley. Plaintiff also mailed, via certified mail, a copy of the Petition and Summons for Sherri Hukill to Sherri Hukill at Rogers State University, 1701 West Will Rogers Boulevard, Claremore, Oklahoma 74017, which is the address of RSU. See Certificate of Service, Exhibit "5" to Notice of Removal [Doc. 2]. Defendants allege service as to the other Defendants is improper because it does not comport with the strict statutory requisites. Defendants' assertions are misplaced.

Under the Federal Rules of Civil Procedure service is valid if, *inter alia*, it is proper according to the "law of the state." Fed. R. Civ. P. 4(e)(1) and 4(j)(2). In the instant case, service is proper according to Oklahoma law.

Nowhere in the cited authorities by Defendant does it provide that the Secretary of the Board of Regents is the sole service agent as alleged by Defendants. In Shamblin v. Beasley, 1998 OK 88, 967 P.2d 1200, the Oklahoma Supreme Court specifically stated as follows:

"Service is not subject to invalidation for any departure from the mode prescribed by statute. When it is alleged that there was want of strict compliance with the statutory requirements for service, the court must in every case determine whether the found departure offends the standards of due process and thus may be deemed to have deprived a party of its fundamental right to notice."

Shamblin, 1998 OK 88 at ¶ 12. The court further stated that "[s]o long as the notice-giving process does not fall below the standard of that which is due, it is not subject to invalidation. The court further noted that as long as there is "a reasonable probability that the person who was not individually served will receive actual notice from one by whom service was accepted," service is acceptable. See id. at ¶13. The court further stated that "[i]t is the totality of the circumstances-not the particular norms of statutory requirements-that dictates the quality of service necessary to safeguard an individuals property interest at stake. Id. The court held that if there is a reasonable probability that the person to whom service is directed will receive actual notice from one who accepted service, then due process is satisfied and service is proper. See id. at ¶ 14. In the instant case, this is satisfied. The Petition and Summons on the behalf of RSU was mailed to Joe Wiley and Joe Wiley's was mailed to him at RSU and Sherri Hukill's was mailed to her at RSU. Apparently a mail clerk signed for them. There was a reasonable

probability that they would be received by them and in fact they did receive them in this matter.

Cognizance should also be made of Fed. R. Civ. P. 4(d)(2) which provides that "[a]n individual...that receives notice of an action in the matter provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. Further, Fed. R. Civ. P. 1 provides that the rules of civil procedure "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." In addition, Fed. R. Civ. P. 4(j)(2) provides that service upon government agency shall be effected by delivering a copy of the summons and the complaint to the chief executive officer, President Wiley in this instance, which was done. Defendants have, as is there want, once again avoided service, delaying the matter and causing unnecessary and unjust expenses.

Another factor to be considered in the totality of the circumstances is Defendants prior conduct. A process server by the name of Tyson Wynn, in Northern District Case No. 05-CV-389, attempted personal service on Defendant Wiley and was thwarted on numerous instances. See Memorandum of Tyson Wynn attached hereto as Exhibit "1". This includes driving across the campus lawn around a vehicle and over the curb to avoid service and other overt acts of service avoidance. Additionally, in a prior case, RSU employees, including President Joe Wiley and Debra Hendrick were being sued, service on both of them was via certified mail, restricted delivery. See Exhibit "2", Return of Service in prior case. Notwithstanding that it was mailed certified, the documents were signed by a mail clerk. Similarly, in this case the documents were signed, presumably, by a mail clerk. Further in Case Nos: 04-CV-190; 05-CV-00389; 04-CV-251, RSU and its employees obstructed service and raised issues pertaining to proper

service. Such continual efforts to object to service should not be condoned by this Court. Therefore, under the circumstances of this case, the totality of the circumstances of service in this matter was proper and as such service of the Petition was proper. Plaintiff did not serve the First Amended Petition as it was filed shortly before service of the Petition while the original Petition was mailed and en route to Defendants. However, Defendants removed this action and received a copy of the First Amended Petition. Fed. R. Civ. P. 15(a) requires a response to an amended petition being filed...within ten days after the service of the amended pleading... Plaintiff has not served the first amended petition upon Defendants, but they have responded to it. In the event the court deems service of the original petition to be sufficient, Plaintiff will serve the First Amended Petition within any time prescribed by the court.

B. In the event that service of the Petition is insufficient, dismissal is not the proper remedy.

In the instant case, Defendants are asking that the matter be dismissed for insufficiency of service of process. Defendants' request should be denied. Dismissal is not the proper remedy.

When a service of a summons is defective, a court may dismiss the suit or quash the service. See Sanderford v. Prudential Ins. Co. of America, 902 F.2d 897, 900-01 (11th Cir. 1990). Dismissal for defects in the service of summons is disfavored; rather quashing service is the favored remedy. Gregory v. U.S., 942 F. 2d 1498, 1500 (10th Cir. 1991). In the instant case, if service was insufficient, quashing rather than dismissing is the appropriate remedy. Further, pursuant to Fed. R. Civ. P. Rule 4(e), Plaintiff has 120 days to effect service, which has not ran yet. Thus, in the event that the Court finds service improper, Plaintiff still has time to serve the Petition within the allotted time.

PROPOSITION NO. II

PLAINTIFF'S PETITION CLEARLY STATES A CLAIM FOR RELIEF AS TO BREACH OF CONTRACT CLAIM

In the instant case, Defendants are seeking motion to dismiss pursuant to Fed. R. Civ. P. 12(B)(6). Under such provision, dismissal is proper only if "it appears that the plaintiff can prove no set of facts in support of the claims that would entitle plaintiff to relief." Roman v. Cessna Aircraft Co., 55 F.3d 542, 543 (10th Cir. 1995). The well-pleaded factual allegations and complaint must be accepted as true and construed in a light most favorable to the plaintiff. See Bryson v. City of Edmond, 905 F.2d 1386, 1390 (10th Cir. 1990). Only if no possible construction of the alleged factual entitle Plaintiff to relief is dismissal proper. See Hishon v. King Spaulding, 467 U.S. 69, 72 (1984). Under Fed. R. Civ. P. 8(a), plaintiff is merely required to state a "short and plain statement" of the facts entitling plaintiff to relief. Plaintiff has done this.

In the instant case, Defendants have alleged that Plaintiff has failed to state a breach of contract. Defendants' claim should be denied. Plaintiff has alleged that she had an employment contract with Defendants as set forth "in the policies and procedures utilized by RSU, its representatives and employees." See Petition at ¶ 7. Similarly, Plaintiff alleged that "pursuant to the employment contract, Plaintiff could only be terminated from her employment upon certain conditions and was entitled to certain procedures prior to being terminated. This includes mandatory positive and progressive discipline policies, which includes only able to be terminated for a commission of a major offense or after the implementation of positive discipline. In this case, positive discipline was not utilized nor did Plaintiff commit a major offense, or any offense for that matter. The stated reason for Plaintiff's termination was that she could not get along with people which was not true and was a fabrication created by Defendants Wiley and

Hukill. Further, Defendant Hukill was not authorized to terminate Plaintiff, but did so anyhow. See Petition at ¶ 8. Further, Plaintiff alleged that "RSU breached its contractual obligations with Plaintiff by terminating her in violation of her contract and failing to comply in conformance with her employment contract in numerous respects." See id. at ¶ 9. These allegations clearly set forth claims upon which relief can be granted.

Defendants have characterized Plaintiff's claims as a claim for breach of implied contract. However, Plaintiff has alleged that she had an employment contract and such employment contract placed certain terms and conditions of her employment. The existence of an implied contract is generally a question of fact for the jury. See Gabler v. Holder and Smith, Inc., 2000 OK CIV APP 107, ¶ 24, 11 P.3d 1269, 1275 [citing Russell v. Board of County Commissioners, Carter County, 952 P.2d 492; see also Tsotaddle v. Absentee Shawnee Housing Authorities, 2001 OK CIV APP 23, ¶ 13, 20 P.3d 153, 158. In the instant case, Plaintiff specifically alleges substantive restrictions on the right to terminate her and as such she has stated a claim for relief. Defendants attempt to argue that a disclaimer existed to negate Plaintiff's implied contract. First, whether or not a disclaimer exists is not before this court. This is not part of Plaintiff's allegations nor has any evidence been proffered of a disclaimer. Further, to disclaim the existence of contractual rights, an employee disclaimer must be clear. See Russell at ¶ 24, 952 P.2d at 502; Johnson v. Nesca, 1990 OK CIV APP 87, ¶ 11, 802 P.2d 1294, 1296-97. In Johnson, the Oklahoma Court of Civil Appeals rejected an argument similar to that of Defendant in a case at bar. See Johnson, ¶ 11, 802 P.2d at 1297. Defendants have put no evidence before this court of a disclaimer. Rather, what Plaintiff has alleged is that she had an employment contract and that she only could be terminated upon certain

terms and conditions and that there was a mandatory positive and progressive discipline policy and that she could only be terminated for commission of a major offense or after positive discipline and that Defendant Hukill was not authorized to terminate Plaintiff. All of these set forth specific contractual provisions and clearly state a claim for relief upon which relief can be granted. Therefore, Defendants' Motion to Dismiss as to breach of contract claim should be denied.

PROPOSITION NO. III

PLAINTIFF'S PETITION STATES A CLAIM FOR RELIEF AS TO HER 42 U.S.C. § 1983 CLAIM FOR FIRST AMENDMENT VIOLATION

Next, Defendants allege that Plaintiff's 1983 claim for First Amendment violations fails. Contrary to Defendants' assertions, Plaintiff made specific allegations regarding the speech at issue. Plaintiff alleged that "the University was involved in a pending dispute with another employee. Such employee threatened impending litigation against the university for discrimination and unlawful conduct by the university and its representatives. This matter ultimately settled via monetary settlement that the university pay the employee." See Petition at ¶ 18. Plaintiff further alleges that "the university had its attorney working on the employee's dispute and the employee had her own private counsel working on the dispute. See id. at ¶ 19. Plaintiff further alleges that "Plaintiff had a telephone conference with the university's legal counsel pursuant to his request to discuss the dispute between the university and the other employee as well as the facts and circumstances of the other employee's disputes with the university. See id. at ¶ 20. Plaintiff further alleges that she "expressed apprehension about cooperating in the investigation with RSU's counsel and was assured by RSU's legal counsel that she would not be fired nor retaliated against in anyway for discussing the investigation with him. Under these assurances, Plaintiff discussed the investigation

with RSU's attorney and was open, honest and candid and expressed her support for some of the employees at issue and questioned why Hukill was supervising the university and her department." See id. Defendant goes on to, in a blatant misreading of the Petition, allege that Plaintiff does not plead either Dr. Wiley or Hukill were aware of the substance or nature of her conversation. However, Plaintiff specifically alleges that Defendant Hukill admonished Plaintiff for "improper contact with RSU legal counsel without prior approval. This termination was upheld by Wiley. Therefore, Defendants were clearly aware of the communication with RSU's legal counsel and Plaintiff has alleged such.

Defendants allege that this conduct is not protected under the First Amendment. The mechanism for bringing a First Amendment claim on behalf of a public employee is 42 U.S.C. § 1983. In order to prove a First Amendment claim under § 1983, a court utilizes the Pickering/Connick test based on the seminal cases of Pickering v. Board of Education, 391 U.S. 563, 568 (1968) and Connick v. Meyers, 461 U.S. 138 (1983). A government employer "can not condition public employment on a basis that it fringes the employees' constitutionally protected interest and freedom of expression." Connick, 461 U.S. at 142. "Thus, a public employer can not retaliate against an employee for exercising his constitutionally protected right of free speech." Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir. 1998). The first step under the Pickering/Connick test is to determine whether the speech addressed a matter of public concern. See Connick, 461 U.S. at 146; Dill, 155 F.3d at 1201. A matter is a public concern and hence constitutionally protected if it is a matter "of interest to the community, whether for social, political or other reasons..." Dill, 155 F.3d at 1202. If the speech relates "to any matter of public, social or other concern to the community also it is protected speech.

See McFall v. Bednar, 47 F.3d 1081, 1089 (10th Cir. 2005). Speech that exposes improper operation of the government are generally matters of public concern. Curtis v. Oklahoma City Pub. Sch. Bd. of Educ., 147 F.3d 1200, 1212 (10th Cir. 1998). In the instant case, Plaintiff's speech touched upon the matter of public concern. The university was involved with a pending dispute with another employee, including threat of impending litigation against the university for discrimination and unlawful conduct by the university and its representatives. Plaintiff contacted the university's legal counsel at the request of RSU's counsel. Plaintiff discussed the ongoing investigation with RSU's attorney, questioned the way Defendant Hukill was supervising the university and her department. Plaintiff further alleged that she discussed other employees' disputes with the university with the attorney as well. Thus, these matters are matters of public concern.

Defendants allege that Plaintiff was somehow speaking pursuant to her official duties. Thus, according to Defendants, her speech would not be protected. Defendants' argument strains logic in that Plaintiff has alleged that one of the basis for her termination was "improper contact with RSU legal counsel without prior approval." See Plaintiff's Petition at ¶ 22. Is it illogical that Plaintiff could be speaking to RSU's counsel pursuant to her official duties but yet admonished for it as "improper contact". Defendant has offered no evidence of Plaintiff's job duties. This argument is thus misplaced. Next, Defendants appear to allege that the matter involved and not touch upon public concern because Plaintiff was speaking as an employee of personal interest and complaining of internal affairs. This argument is misguided. Plaintiff was solicited by Defendants' counsel to discuss ongoing litigation and threat of litigation with Defendants including discrimination claims against the university. Plaintiff discussed the

investigation with RSU's attorney. Certainly, discussing an ongoing discrimination claim against a public entity is a matter of public concern and is not merely a personal grievance and an internal matter. Similarly, discussing other employee operations and other employee disputes is likewise a matter of public concern. Public employee speech that seeks to expose government corruption or questions the integrity of government officials has generally been held to constitute matters of public concern. McFall, 322 F.3d at 1239-40. Investigation for discrimination of the unlawful conduct seeks to challenge the integrity of the government officials often times involves credibility issues between the employee and the employer. Therefore, the speech alleged by Plaintiff in this matter is protected speech and Plaintiff has sufficiently alleged a First Amendment violation against Defendants.

Defendants have alleged that Plaintiff's claims against Wiley and Hukill should be dismissed because claims against state employees in their official capacity is not cognizable under § 1983. See Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989). However, Plaintiff's 1983 claims against Wiley and Hukill are both individually and not in their official capacity. It is not a requirement that Defendants Wiley and Hukill acted outside the scope of their employment to be individually liable under 42 U.S.C. § 1983, rather, Wiley and Hukill can be sued in their individual capacity if their alleged conduct violated clearly established law. See Murrell v. School District No. 1, Denver Colo., 186 F.3d 1238, 1251 (10th Cir. 1999). In the instant case, the defense of qualified immunity is unavailing, as Defendants have violated clearly established law as set forth below in Proposition V.

PROPOSITION NO. IV

PLAINTIFF'S PETITION STATES A CLAIM FOR RELIEF AS TO PLAINTIFF'S DUE PROCESS VIOLATIONS

Defendants argue that Plaintiff has not stated a due process violation. Such assertions are misguided and should be denied. To determine whether due process claims are proper, the court must determine whether Plaintiff had a property interest in her continued employment with Defendant. See Vinyard v. King, 728 F.2d 428, 430 (10th Cir. 1984) [citing Board of Regents v. Roth, 408 U.S. 564 (1972)]. This question must be answered by looking to Oklahoma law. See id. at 432, and specifically, Oklahoma law with respect to employment with a municipality. See Graham v. City of Oklahoma City, 859 F.2d 142, 146 (10th Cir. 1988). If an employee has a reasonable expectancy in continued employment a property interest exists and so to does procedural due process. See Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). In the instant case, Plaintiff has alleged such a reasonable expectancy for continued employment by virtue of her employment contract with RSU. Therefore, Plaintiff has alleged sufficiently that she was entitled to procedural due process.

Plaintiff has also alleged that she was entitled to due process and that she was terminated without being afforded due process. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and a meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 333 (1976). This includes a pre-termination hearing. See Patrick v. Miller, 953 F.2d 1240, 1245 (10th Cir. 1992). Plaintiff was not afforded this. Therefore, Plaintiff has sufficiently alleged a violation of procedural due process actionable under 42 U.S.C. § 1983.

PROPOSITION NO. V

**DR. WILEY AND HUKILL ARE NOT ENTITLED TO QUALIFIED IMMUNITY
BECAUSE THEIR CONDUCT VIOLATED CLEARLY ESTABLISHED LAW**

In the instant case, Defendants are asserting that defensive qualified immunity. To defeat qualified immunity, Plaintiff must establish "that the defendants' actions 1) violated a federal constitutional or statutory right; and 2) that the right violated was clearly established at the time of the defendants' actions." Greene v. Barrett, 174 F.3d 1136, 1142 (10th Cir 1999). Plaintiff has alleged the violation of federal constitutional and statutory right as set forth above. Specifically, she has alleged violations of her First Amendment rights as well as her Fourteenth Amendment procedural due process rights and thus the first prong is satisfied.

The second prong is likewise satisfied in this matter. A right is clearly established if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). The challenged action need not have been previously declared unlawful, but its unlawfulness must be evident in light of pre-existing law. Greene, 174 F.3d at 1142. "This is generally accomplished when there is controlling authority on point or when the clearly established weight of authority from other courts supports plaintiffs' interpretation of the law." The speech at issue here, despite Defendants' attempts to minimize it as an internal personal dispute, has been held to be a matter of public concern. In fact, the Connick/Pickering test suggested has been in existence for quite some time. Pickering, since 1968 and Connick since 1983. Further, Plaintiff's procedural due process rights have been clearly established for quite some time. It is required that there be a case presenting the exact same fact situation at hand in order to give the parties notice that their conduct is unlawful. Rather, what is required is that

"the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless

the very action in question has previously been held unlawful...but it is to say that in light of pre-existing law, the unlawfulness must be apparent."

Murrell, 186 F.3d at 1251. In the instant case, Defendants' assertions of qualified immunity should be denied.

PROPOSITION NO. VI

THERE IS NO AUTHORITY TO PRECLUDE PLAINTIFF FROM ASSERTING TORT CLAIMS AS WELL AS TITLE VII CLAIMS

Defendants request that this Court preclude Plaintiff from asserting any tort claims and Title VII claims should be denied. Plaintiff has not asserted such claims in this action because she can not until her administrative remedies are exhausted under Title VII and her tort claims under the Oklahoma Governmental Tort Claims Act, 51 O.S. § 151 et seq. are exhausted. There is no authority nor is any authority been presented by Defendants for the proposition that this Court can preclude Plaintiff from asserting these claims. Plaintiff is required to wait until the exhaustion of her remedies under both acts before she brings those claims. Plaintiff is not required to wait until such time to file her other claims that are not subject to administrative remedies. Therefore, Defendants' request to preclude Plaintiff from asserting these claims should be denied.

PROPOSITION NO. VII

IN THE EVENT THAT THIS COURT DEEMS PLAINTIFF'S PLEADING TO BE DEFECTIVE, THIS COURT SHOULD EITHER TREAT PLAINTIFF'S RESPONSE AND OBJECTION AS A MOTION TO AMEND OR PROVIDE PLAINTIFF LEAVE TO FILE SECOND AMENDED COMPLAINT

In the instant case, it is Plaintiff's position that the Petition and the First Amended Petition satisfied her pleading requirements. Plaintiff is merely required to state a short and plain statement under Fed. R. Civ. P. 8. Plaintiff has done this and has gone beyond the pleading requirements in this regard. However, in the event that the Court finds Plaintiff's pleadings to be defective, the Court should construe Plaintiff's

response and objection as a motion to amend under Fed. R. Civ. P. 15(a). Under certain circumstances, a court may consider a response to a dispositive motion as a motion to amend. See Bruener v. Baker, 506 F.3d 1021, 1029-31 (10th Cir. 2007); Viernow v. Euripides Development Corp., 157 F.3d 785, 790 n.9 (10th Cir. 1998). In the instant case, Plaintiff is not yet seeking to add any claims. Rather, she is adding more specific facts which Defendants will learn once discovery is conducted. Obviously, there would be no prejudice as no discovery has been conducted in the case and it is in its early stages. In fact, Defendants would benefit because they are learning and becoming aware of specific facts that ordinarily they would not become aware of until discovery was conducted. Therefore, in the event the Court determines Plaintiff's claims to be defective, it should allow Plaintiff's response and objection to be treated as a motion to amend or allow Plaintiff leave to file second amended complaint. Plaintiff would further request that if the Court determines that an amendment is required, that Plaintiff be allowed to amend prior to the entry of a dismissal order.

PROPOSITION NO. VIII

ANY CLAIMS DISMISSED BY THE COURT SHOULD BE DISMISSED WITHOUT PREJUDICE

It is Plaintiff's positions that the claims should not be dismissed. However, if any claims are dismissed, they should be dismissed without prejudice. When a defect in a pleading is potentially curable any dismissal should be without prejudice. See Reynolds v. Schillinger, 907 F.2d 124, 126 (10th Cir. 1990). Here, any defects by Plaintiff can be cured and as such any dismissal should be without prejudice.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied and alternatively Plaintiff be granted leave to

amend, that any dismissal be without prejudice, that Plaintiff be allowed to amend prior to any dismissal order and any other and further relief this Court deems proper.

s/ Brendan M. McHugh
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CERTIFICATE OF ELECTRONIC FILING

This is to certify that a correct copy of the above document has been sent via the Court's ECF notification system this 10th day of March 2008 to:

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