UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED, Plaintiff, v. DANIEL C. ESTY, in his official capacity as Defendant of the CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, Defendant.	Case No. 3:13-cv-01874-JBA **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** **April 16, 2014**

SUMMARY

Plaintiff respectfully submits this opposition to the State's motion to dismiss the Complaint for failure to state a claim upon which relief can be granted. At the outset Plaintiff would like to clear up what is a basic misunderstanding that the State has regarding the Plaintiff's participation in the solicitation. Plaintiff is not claiming that Section 6 of Connecticut Public Act 13-303 ("Section 6") is pre-empted or unconstitutional. Rather, it is Defendant's action under Section 6—its order dated September 18, 2013 (the "Order")—that is pre-empted. When Plaintiff participated in the Section 6 solicitation, the Plaintiff assumed that the Defendant would implement Section 6 in accordance with federal law, which means that the Defendant would only be able to compel the Connecticut Light & Power Company ("CLP") and United Illuminating Company ("UI")(collectively, the "Connecticut Utilities") to enter into fixed-price contracts with qualifying facilities under the State's authority provided by the Public Utility

Regulatory Policies Act of 1978 ("PURPA"). *see* 16 U.S.C. § 824a-3. It therefore came as a complete surprise to Plaintiff that the State had selected a project that was more than three times the maximum size that would qualify under PURPA.

The Defendant's motion asks this Court to dismiss the complaint for two reasons: lack of Article III standing and failure to state a claim. On the threshold issue of standing, astonishingly the State's brief focuses its standing argument on issues of Connecticut state law, which are not at issue in this case and simply do not address Plaintiff's standing under federal law. The Defendant conflates what it views as the standing (or lack thereof) of disappointed bidders to challenge state action under state law with Article III standing. The Plaintiff's claims are under federal law, and state standing issues in state court with respect to state law claims are simply not determinative here.[1] Plaintiff has alleged in the Complaint that the Defendant's action has caused, and will in the future likely cause, it real and concrete financial harm. These harms easily establish standing.

On the merits, Plaintiff has alleged a straightforward claim that the Defendant's Order fixed the wholesale price of power, an act preempted by federal law. The State's brief fails even to directly address the effect of that singular critical act. Rather, the State argues that it was the bidders that fixed the price, which ignores the very act at issue in this case—that it was only through the Defendant's Order that the wholesale price was, in fact, fixed.[2] It matters not what benchmark or information (including a bid) the Defendant used to fix the price, what matters is that the price was fixed only upon Defendant's state action.

The plain and simple fact is that the Order seeks to regulate wholesale energy prices—a field that Congress has reserved exclusively for the Federal Energy Regulatory Commission (the

[1] As discussed herein, even if the state law regarding disappointed bidders were relevant, Plaintiff would satisfy standing as required by such cases.

[2] Curiously, the Defendant now questions whether he had the authority to issue the Order stating "[n]owhere in Section 6 is the Defendant permitted or authorized to pre-determine the rate at which bidders would supply power." State's Brief ("Br.") at 17. Yet that is exactly what the Defendant did. It pre-determined the price prior to ordering the Connecticut Utilities to execute the power purchase agreements.

"FERC")—presenting a textbook case of preemption. The State implicitly acknowledges this elementary fact in its brief. The State points out that "no contract exists unless there is an offer and acceptance." State Br. at 18. Here, it was only through the state action of the Order that the acceptance was completed, and the price fixed, under state law. As the Connecticut Utilities acknowledged, once the Order was issued the Connecticut Utilities were obligated. The ministerial act of the physical execution of the power purchase agreements ("PPAs") merely documented the obligation already in place. [Compl. Exh. E]. The State cannot possibly prevail on its motion to dismiss when it has ignored the very basis of Plaintiffs' claim and these determinative facts.

For these reasons, and as set forth in greater detail below, the State's motion is ill-conceived and baseless, and the State has failed to meet its burden to dismiss Plaintiff's Complaint. Indeed, the unconstitutionality of the Defendant's action is so patent that Plaintiff anticipates moving for judgment on the pleadings or for summary judgment.

FACTS

Although States have various tools to promote renewable energy, it is well-established that States may not promote renewable resources by regulating wholesale electricity sales, because any such regulation is preempted by federal law. When Congress passed the Federal Power Act[3] (the "FPA") in 1935, Congress "occupied the field" of wholesale electricity sales and gave the FERC exclusive jurisdiction over all wholesale electricity rates, charges, and terms. In so doing, the FPA preempted any State regulation within the field of wholesale electricity sales. The only exception to the blanket rule prohibiting states from engaging in any type of regulation or setting the wholesale price for energy is if the State is acting under its authority under the PURPA.

In 2013, the Connecticut legislature enacted Section 6 to promote renewable energy. Section 6 empowers the Defendant *as a matter of state law* to solicit proposals for Connecticut Class I Renewable resources and compel the Connecticut Utilities to enter into wholesale PPAs

[3] 16 U.S.C., Ch.12.

with a generator at a price and term (not to exceed 20 years) specified by the Defendant. [Compl. ¶5.] By enacting Section 6, the Connecticut Legislature recognized that executing a long-term fixed PPA with a creditworthy power purchaser is a prerequisite for almost all renewable energy projects. Without a long-term PPA, renewable energy projects, such as the Plaintiff's, would not be able to be built. [Compl. ¶6.]

On July 8, 2013, the Connecticut Department of Energy and Environmental Protection ("DEEP") issued a request for proposals (the "RFP") pursuant to Section 6. [Compl. ¶44.] The RFP sought up to 174 megawatts ("MWs") of full-time generating capacity, which is (according to the RFP) approximately 525MWs of wind equivalent nameplate capacity. [Compl. ¶44.] In terms of nameplate solar capacity, the 174MWs is approximately equal to 1,000MWs. [Compl. ¶44.]

The Defendant received responses to the RFP that were more than enough for the Defendant to select generating resources that would fulfill the goals of Section 6 and the Comprehensive Energy Strategy ("CES"), while at the same time observing the prohibition under the FPA of not setting or regulating the wholesale price of energy except under the State's authority under PURPA. The Defendant, however, ignored that prohibition and ordered the Connecticut Utilities to execute PPAs with two projects, a 250MW wind project located in Maine ("Number Nine") and a 20MW solar project located in Connecticut ("Fusion Solar") at the fixed wholesale prices stated in the respective PPA. [Compl. ¶53]. Once the Order was issued the Connecticut Utilities were contractually obligated. The ministerial act of the physical execution of the power purchase agreements ("PPAs") merely documented the obligation already in place. [Compl. Exh. E.]

The selection of Number Nine was particularly astonishing in light of the previously stated goals of the Defendant and the Governor of Connecticut. In his testimony on March 10, 2011, before the Committee on Executive and Legislative Nominations, Defendant Esty stated [Compl. ¶41]:

> The Governor has made clear the importance of driving economic growth and

> creating jobs. DEP must also be a partner in this and pursue our work with an eye on how we will contribute to the state's economic revitalization.
> ***
> But, as we move toward a "Double E" structure, I want to emphasize a third "E" -- the Economy***. I share the Governor's belief that a commitment to job creation needs to be our top priority*** – and deeply believe that environmental progress is much easier to achieve when the public feels confident about the economic future.
>
> The addition of the "third E" - the economy - to our mission means that we as a department will become even more critical to the State's mission. We have an opportunity to help establish a clean technology and energy economy in Connecticut, which would bring jobs to the state, increase the quality of life for all of our residents, and establish Connecticut as a leader in the next great American economic growth opportunity.
>
> (Emphasis added.)

Clearly, those words from Defendant Esty's testimony were a mere distance memory. By selecting the Number Nine wind project, the "third E" went by the wayside. [Compl. ¶43.] Instead of meeting the goals of the CES, and Defendant Esty's own words, the Order results in nearly a billion dollars being sent to Maine to create jobs there. [Compl. ¶43.] Doing that is tantamount to laying off 10,000 Connecticut workers for the next year, and depriving Connecticut municipalities and schools of the benefit of the ongoing tax revenue that they would realize from home-grown renewable energy. [Compl. ¶43.] New or existing programs at Connecticut schools that could have benefitted from the tax revenue from Connecticut based projects will suffer. Instead it is Maine communities, businesses, schools and children that will benefit, not Connecticut's. [Compl. ¶43.] The selection of Number Nine was even more surprising because it foists onto Connecticut homes and businesses *Enron*-style energy trading risks that no commercial enterprise would assume over 15 years. [Compl. ¶43.] In the case of Number Nine, Connecticut ratepayers will be paying for energy that they never receive and for which they may receive no value. All this is done is secret, without disclosing the true cost and risks of the Number Nine wind project. [Compl. ¶43.]

The projects Plaintiff submitted to the Defendant

The Plaintiff submitted five solar projects to DEEP in response to the RFP, all of which were 80MW in size or smaller, thus qualifying as small power production facilities under

PURPA. [Compl. ¶45.] For all the 80MW projects, the Plaintiff offered the option to choose and evaluate such project at a size as small as 20MW because Plaintiff was aware that UI has been relieved of its PURPA mandatory purchase obligations for projects greater than 20MW. [Compl. ¶46.]

Allco's five projects were the Trumbull Solar project (which is not listed on Appendix 2 to Exhibit C to the Complaint (the "Rankings")), the Harwinton Solar project (listed as ranked #4 on the Rankings), the Bozrah Solar project (listed as #7 on the Rankings), the Bucks Solar project (listed as #10 on the Rankings), and the Franklin Solar project (listed as #13 on the Ranking). [Compl. ¶46.] The Trumbull Solar project was the lowest price project of all five submitted by the Plaintiff, and was a lower price than the selected Fusion Solar project. [Compl. ¶47.] As a result, its absence from the Rankings in unexplainable. [Compl. ¶47.] The Defendant has offered no explanation as to its absence. [Compl. ¶47.]

The price offered by one or more of the Plaintiff's projects equaled the Connecticut Utilities' avoided costs. [Compl. ¶50.] The approximate total nameplate capacity of the top 13 projects in the Rankings (excluding the Number Nine wind project and Highland Wind[4]) is 390MW. [Compl. ¶51.] If the Number Nine wind project were not selected, the Defendant would have selected Plaintiff's Harwinton, Bozrah, Bucks and Franklin solar projects. [Compl. ¶52.]

ARGUMENT

I. THE PLAINTIFF HAS ARTICLE III STANDING.

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges the court's subject matter jurisdiction over the asserted claims. A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence.

[4] The only two projects in the top 13 in the Rankings that did not publicly disclose their size when their response to the RFP was submitted were the Number Nine wind project and Highland Wind. The Maine Governor's Office of Energy Independence and Security's March 2012 Maine Wind Energy Development Assessment lists Highland Wind as 117MW, exceeding the 80MW cap for small power production facilities. *See*, http://maine.gov/energy/pdf/Binder1.pdf, at p.15. [Compl. ¶51, fn. 6.]

Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). As the party seeking to invoke the Court's jurisdiction, Plaintiff bears the burden of establishing constitutional standing and therefore subject matter jurisdiction over its claim. *Id*. A district court accepts all allegations of fact in the complaint as true and construes them in the light most favorable to the plaintiff. *Thompson v. Cnty. of Franklin,* 15 F.3d 245, 249 (2d Cir. 1994).

To satisfy constitutional standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc*., 528 U.S. 167, 180–81 (2000).

A. PLAINTIFF HAS SUFFERED AN 'INJURY IN FACT' THAT IS (A) CONCRETE AND PARTICULARIZED AND (B) ACTUAL OR IMMINENT, NOT CONJECTURAL OR HYPOTHETICAL) AND THE INJURY IS FAIRLY TRACEABLE TO THE CHALLENGED ACTION OF THE DEFENDANT.

FERC's exclusive federal regulation over the sale of wholesale electricity.

The FPA gives FERC sweeping and exclusive authority over the interstate transmission and sale of wholesale electricity, and it bars States from regulating in that field. All sales of electricity in interstate commerce "at wholesale" fall within FERC's exclusive jurisdiction. *See* 16 U.S.C. § 824(b)(1). "Wholesale," in this context, includes any "sale of electric energy to any person *for resale*." *Id.* § 824(d) (emphasis added). Thus, any sale of electricity in interstate commerce falls within FERC's jurisdiction, unless it is a "retail" sale to the factory, business, or home that will actually consume the electricity. *See id.*

FERC's authority within its jurisdiction is plenary and exclusive. *See, FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). The FPA draws a "bright line" separating the spheres of federal and state authority, and confines the jurisdiction of state legislators and regulators to those narrow zones of local responsibility in which FERC lacks authority. *Id.* at 215. The FPA limits the sphere of state responsibility to sales at retail (*i.e.*, sales to end-user customers such as

individual homes or businesses); "facilities used in local distribution" (*i.e.*, local power substations); and "facilities used for the generation of electric energy" (*i.e.*, power plants). 16 U.S.C. § 824(b)(1); *see also Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008).

Because FERC has jurisdiction over wholesale energy and capacity markets and the "practices" or "contracts" that affect them, states are precluded from regulating in that area. *See Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371-75 (1988); *S. Cal. Edison Co.*, 376 U.S. at 215-16; *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009); *Simon v. Keyspan Corp.,* 785 F. Supp. 2d 120, 125 (S.D. N.Y. 2011). As Justice Scalia has explained, "[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light*, 487 U.S. at 377 (Scalia, J., concurring).

A state may not use its limited authority to attempt to interfere with or circumvent FERC's wholesale pricing determinations. *See, e.g.*, *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). Thus, a state may not purport to use its "retail" authority to prevent local utilities from recovering at retail the costs they are required by FERC to bear in wholesale markets. *Miss. Power & Light*, 487 U.S. at 370-77. Nor may a state in any other manner regulate conduct and transactions within FERC's jurisdiction. *See, e.g.*, *Nantahala*, 476 U.S. at 966-67. The FPA similarly limits the states' authority to regulate generating facilities to the regulation of the *physical facilities* themselves; states do not have "authority over all matters related to or that flow from 'resource adequacy.'" *N.Y. State Reliability Council*, 122 FERC ¶ 61,153, ¶ 33 (2008). States are not preempted from mandating the construction of new generation capacity or from regulating the terms on which power plants are built and retired, and they may exercise that authority to ensure the reliable delivery of electricity to end-users. *Connecticut DPUC*, 569 F.3d at 481. But States have no say as to how those plants interact with wholesale purchasers of their electricity and capacity. Any state action purporting to impose requirements relating to wholesale markets or wholesale prices is therefore preempted; such

"pricing issues . . . fall comfortably within FERC's statutory authority." *Me. PUC*, 520 F.3d at 471.

The economic and regulatory energy landscape in the New England region.

Exercising its jurisdiction under the FPA, the FERC has determined that a multistate, market-based system of setting wholesale electricity prices will lead to the most efficient allocation of generating resources by favoring efficient generators and disfavoring inefficient ones. [Compl. ¶20.] In New England, the FERC has implemented that policy by authorizing wholesale electricity sales through a multistate market operated by an entity called ISO New England. [Compl. ¶20.]

The problem faced by the Defendant and proponents of renewable energy projects is that those projects will likely fare poorly in FERC's multistate, market-based system. Renewable energy is generally more expensive than power generated by non-renewable resources. [Compl. ¶21.] Moreover, projects such as the Number Nine wind project do not deliver their power to Connecticut. [Compl. ¶21.] As a result, such a project selling to a Connecticut utility would need to take on Enron-style energy risks because of the potential difference between the locational marginal price of energy in Maine (i.e., the point of delivery) and the locational marginal price of energy in Connecticut (i.e., the point where the energy is needed). [Compl. ¶21.] Indeed, in areas of the United States where there are many wind projects, it is a regular occurrence for the price of energy to be negative, which means that the generator must pay to put its energy onto the electrical grid. [Compl. ¶21.]

The fact that the Number Nine wind project, which has been under development since 2003, has not been placed into commercial operation is a testament to the fact that the Enron-style risks are too great for any rational commercial business entity to bear for a project located in a wind-rich, but transmission poor, area such as Maine. [Compl. ¶21.] The Defendant's Order now allows those risks, which one of the world's largest wind project owners found unacceptable, to be passed onto, and borne by, Connecticut ratepayers without any economic benefits or job creation for Connecticut ratepayers. [Compl. ¶23.]

In pre-empting the field of wholesale sales of energy, Congress and the FERC have made the judgment that large projects such as the Number Nine wind project must participate in the market-based energy market for all generators. On the other hand, Congress and the FERC have established the policy that small power production facilities, which are facilities not greater than 80MW in size, are to be encouraged, and that States have a role in encouraging such facilities, including some latitude in fixing the wholesale price of energy for such facilities.

The Order tramples over the Congressional preference for small power production causing harm to Plaintiff.

Congress enacted PURPA in 1978 as part of a package of legislation designed to address a nationwide energy crisis. *See, FERC v. Mississippi*, 456 U.S. 742, 745, 750 (1982). In section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), Congress required FERC to promulgate "such rules as it determines necessary to encourage cogeneration and small power production"[5] development. *See generally* 18 C.F.R. pt. 292. Accordingly, Congress specifically directed FERC to issue rules requiring electric utilities to purchase electric energy from such facilities. 16 U.S.C. § 824a-3(a)(1). In its duly promulgated regulations, the FERC interpreted section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), as imposing on electric utilities an obligation to purchase all electric energy and capacity made available from small power production facilities, which are "qualifying facilities" or "QFs". *See* 18 C.F.R. § 292.303.

Pursuant to 18 C.F.R. §292.304(a)(4) the rate for purchases from a new small power production facility must be at the utility's *full* avoided costs "i.e., the cost the utility would have incurred had it generated the electricity itself or purchased the electricity from another source."[6] Section 210(f) of PURPA, 16 U.S.C. § 824a-3(f), requires State regulatory authorities and non-regulated electric utilities to implement FERC's PURPA regulations. As provided in PURPA

[5] A cogeneration facility produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A). A small power production facility uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce no more than 80 megawatts of electric power. 16 U.S.C. § 796(17)(A).

[6] *See, Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp*., 461 U.S. 402, 404 (1983).

section 210(h)(2)(A), 16 U.S.C. § 824a-3(h)(2)(A), FERC's PURPA regulations are treated as rules enforceable under section 314 of the FPA, 16 U.S.C. § 825m.

The Defendant's Order fixing a wholesale price with respect to Number Nine not only violates the FPA but flies in the face of Congress's established preference for small power production facilities under PURPA. In that respect the Defendant's Order has harmed and will continue to harm Plaintiff—the owner, developer and operator of electricity generators that are small power production facilities within the meaning of PURPA, a participant in the RFP and a likely participant in future procurements in Connecticut. [Compl. ¶33.] Plaintiff has incurred costs to develop projects in reliance on the Defendant's adherence to the requirements of federal law. [Compl. ¶63.] Those costs far exceed the cost of a bar of soap. *See, NRDC, Inc. v. United States FDA*, 710 F.3d 71, 85 (2d Cir. 2013) (Even a small financial loss such as incurring the expense of buying a bar of soap would itself constitute an injury in fact for purposes of Article III standing.) There is nothing speculative about Plaintiff's harm.

Plaintiffs' standing to bring this suit is also clear as to prospective injury, and it is amply alleged in the Complaint. To establish such standing, Plaintiffs need only demonstrate a realistic danger of sustaining a direct injury as a result of the state action and thus a "sufficient threat of actual injury." *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The allegations in the Complaint easily meet this standard. The State's claim that the Plaintiff has failed to allege any specific or actual injury is demonstrably false.

The Plaintiff's injuries

The Plaintiff's five solar projects need to enter into long-term PPAs in order to obtain financing to allow the projects to be built. [Compl. ¶60.] Without a long-term PPA for a project, that project will not be built. [Compl. ¶60.] The need for a PPA is one of the reasons for the enactment of Section 6. [Compl. ¶61.] Plaintiff has suffered an injury in fact because the Plaintiff as a small power producer and participant in energy markets has a legally protected interest to be free from unlawful actions of State officials related to those markets. [Compl. ¶62.]

Plaintiff has a legally protected interest in being able to participate in energy market solicitations for generating facilities, such as the RFP, free from unlawful action of State officials. [Compl. ¶62.] Plaintiff as a small power producer has specific protected interests under the FPA and PURPA with respect to selling energy to utilities, such as the Connecticut Utilities. [Compl. ¶62.] Those specific interests include the right to Plaintiff sell energy and capacity, and to obtain a legally enforceable obligation to sell energy and capacity, to the Connecticut Utilities at the Connecticut Utilities' avoided costs. [Compl. ¶62.] Those rights include the right to prevent State officials from circumventing those rights by awarding contracts or directing the Connecticut Utilities to enter into contracts in violation of either the FPA or PURPA. [Compl. ¶62.]

The Plaintiff has suffered injury in fact because the costs incurred in developing the five projects are now lost because of Defendant's unlawful actions. [Compl. ¶63.] The Plaintiff has suffered injury because, by the Defendant directing the Connecticut Utilities to enter into the PPAs under the Order, the available capacity available to legally qualified generators under Section 6 is reduced and almost completely eliminated. [Compl. ¶64.] The Plaintiff has suffered injury because one or more of the Plaintiff's projects would have been selected if the Number Nine wind project was not. [Compl. ¶65.] The Rankings confirm that it is not only likely, but a near certainty, that if the Number Nine wind project had not been selected as a result of the Defendant's unlawful action, one or more of Plaintiff's projects would have been selected. [Compl. ¶65.] As a result, the Plaintiff has suffered harm by not being able to enter into a PPA with the Connecticut Utilities. [Compl. ¶65.]

Moreover, the Plaintiff has made investment and development decisions in reliance on the market signals sent by the federally regulated interstate capacity market, its rights under the FPA and PURPA. The Order interferes with those market forces and rights by seeking to foster uneconomic entry into the market, contrary to the Plaintiff's investment expectations based upon the Congressionally mandated framework of the FPA and PURPA. The Plaintiff has every right

to challenge the Defendant's attempt to interfere with the federally established in the interstate energy markets regulated by FERC.

The Defendant's asserting regarding Plaintiff's injuries ignore the facts.

The Defendant's assertion that Plaintiff's injury is merely a generalized grievance shared by all simply ignores the facts. Plaintiff responded to the RFP and was thereby part of a small class of specifically affected entities. Plaintiff is a small power producer which is another small class of specifically affected entities intended to benefit by a Congressional exception to the blanket prohibition on state action with regard to wholesale prices. Plaintiff is in the small group of entities that has expended funds to develop projects in Connecticut in reliance on the requirements of the FPA and PURPA. The Defendants generalized grievance assertion is completely baseless.

Defendant also asserts that Plaintiff has not been injured because what rights it had under PURPA it still has and that the lower availability of energy requirements of the Connecticut Utilities is not a specific harm. Defendant's argument makes little sense. Defendant is in effect asserting that it is free to ignore the FPA and PURPA at will so long as Plaintiff could make a claim in some future proceeding. Even if that argument made any sense (which it does not), the Defendant ignores the very obvious and concrete fact that the addition of a generating resource for 15 years that represents almost 4% of the Connecticut Utilities load has a definite adverse effect on the calculation of the Connecticut Utilities' avoided costs because there are fewer costs that could now be avoided by the addition of one of Plaintiff's projects. That, in turn, adversely affects the price that the Plaintiff could obtain under PURPA for any one of its projects. As a result, it is clear that the addition of long-term generating resources in violation of the FPA has a very real consequence on the Plaintiff's projects and their ability to be built.

A plaintiff need only show an "identifiable trifle" of harm. *LaFleur v. Whitman,* 300 F.3d 256, 270 (2d Cir. 2002); *see also NRDC, Inc. v. United States FDA*, 710 F.3d 71, 85 (2d Cir. 2013) (Even a small financial loss such as incurring the expense of buying a bar of soap would

itself constitute an injury in fact for purposes of Article III standing.) Plaintiff's Complaint unquestionably makes that showing.

B. IT IS LIKELY, AS OPPOSED TO MERELY SPECULATIVE, THAT THE INJURY WILL BE REDRESSED BY A FAVORABLE DECISION.

It is likely that the Plaintiff's injuries will be redressed by a favorable decision. [Compl. ¶66.] If the Plaintiff receives a favorable decision in this case, it is likely, if not a virtual certainty that one of two scenarios would result. [Compl. ¶66.] The first is that the Defendant would make a redetermination based upon the RFP that comports with federal law, in which case, based upon the Rankings, it is likely that one or more of Plaintiff's projects would be selected. [Compl. ¶66.] The second is that the Defendant would issue a new RFP and make a determination that comports with federal law, in which case, in light of the target goal of 4%, it is likely that one or more of the Plaintiff's proposals would be selected because the pool of available proposals is likely to be similar, and in any event not different enough to be material from the pool of projects submitted to the RFP. [Compl. ¶66.] Even, however, if Plaintiff's projects would not be selected, the participation of the Plaintiff in a subsequent RFP under Section 6 would be free from unlawful action of the Defendant because the Defendant would be required to exercise his authority in conformance with the goals set by Congress in enacting the FPA and PURPA.

In light of the stated goals of the Connecticut Legislature, the Governor, and the Defendant, it is a remote possibility that the Defendant would do nothing if a decision in Plaintiff's favor were issued in this case. [Compl. ¶67.] A re-determination based upon the RFP, or a determination under a new RFP, would likely result, based upon the Defendant's calculations shown in the Rankings, that one or more of the Plaintiff's projects would be determined to be at a price that satisfied the avoided cost standard under PURPA. [Compl. ¶68.]

In any case, whether or not a new RFP is issued under Section 6, a redetermination is made as a result of the RFP, or no further action is taken by Defendant, a favorable decision for Plaintiff in this case would redress the injuries to Plaintiff, and the future injuries that would

result from unlawful State action interfering with Plaintiff's participation in the energy markets and Plaintiff's rights under the FPA and PURPA.

Furthermore, Defendant has acknowledged that there will be future procurement opportunities in which Plaintiff's projects could participate. [Compl. ¶70.] However, unless a favorable decision is issued to Plaintiff in this case, the Defendant will more than likely continue take action in violation of the FPA, PURPA and the Supremacy Clause which will likely adversely affect Plaintiff's participation in those future procurement opportunities as well. [Compl. ¶70.]

In addition, a favorable decision in this case will reverse the adverse effects on the calculation of the Connecticut Utilities' avoided costs that would result from the addition of Number Nine. Thus the avoided cost rate under PURPA that the Plaintiff's projects would be entitled to would be restored to the status quo ante.

An injunction is necessary and appropriate because Defendant acting in his official capacity is acting in and will continue to act in violation of the Constitution and federal law. Without an injunction from this Court, the Defendant will continue to act in violation of the FPA and the Supremacy Clause and Plaintiff will likely continue to suffer harm. An injunction and declaration that the PPAs are void *ab initio* is also necessary to remedy the harm Plaintiff has suffered and to restore the status quo ante that existed before the Defendant's violation of the FPA.

C. CONTRARY TO DEFENDANT'S ASSERTION, THE LAW REGARDING UNSUCCESSFUL BIDDERS PROVIDES AN ADDITIONAL BASIS FOR PLAINTIFF'S STANDING.

Plaintiff has standing to challenge the bidding process under state and federal law. As a matter of state law, the Plaintiff has standing because the Order was based upon an unlawful procedure. The Order was executed unlawfully under the FPA and is pre-empted and void under the Supremacy Clause. As a result, under the precedent established by the Connecticut Supreme Court, the Plaintiff would have standing.

The Connecticut Supreme Court has recognized standing for unsuccessful bidders "where fraud, corruption or acts undermining the objective and integrity of the bidding process existed." *Ardmare Construction Co. v. Freedman*, 191 Conn. 497, 504-505 (1983). In *Connecticut Associated Builders & Contrs. v. Hartford*, 251 Conn. 169, 179-180 (1999), the Connecticut Supreme Court explained that the standing granted to an unsuccessful bidder is like "a comparable action based on federal law, such a suit is '"brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general,'"' citing *Ardmare* and quoting *Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859, 864 (D.C. Cir. 1970). As the court in *Scanwell* stated "the essential thrust of [the unsuccessful bidder's] claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'" *Id.*

That is the case here. The Order constitutes an unlawful act under the FPA, and as a result, the Plaintiff would have standing to challenge the Order and the PPAs.

In addition, the Second Circuit has adopted the approach in *Scanwell. See, e.g.*, *B.K. Instrument v. United States*, 715 F.2d 713, 721 (2d Cir. 1983) and *Gosnell v. FDIC*, 938 F.2d 372, 376 (1991) quoting *Scanwell:*

> When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interests.

That is exactly the case here. Congress has laid down specific rules in the FPA and PURPA of what states can and cannot do. The Plaintiff as a market participant and as a small power producer is an intended beneficiary of those rules. The Plaintiff alleges that the Defendant violated those rules as part of the bidding process. It is clear under *Scanwell* as

adopted by the Second Circuit and the Connecticut Supreme Court that the Plaintiff has standing. *See also, Connecticut Legal Services, Inc. v. Heintz*, 689 F. Supp. 82, 89 (D. Conn. 1988)(stating "although the bidding procedures are designed for the benefit of the public generally, it is the bidders who have the real economic incentive to bring arbitrary governmental action to light.").

II. THE PLAINTIFF HAS STATED A VALID CLAIM ON WHICH RELIEF CAN BE GRANTED.

LEGAL STANDARD

To survive a 12(b)(6) motion to dismiss for failure to state a claim, the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Pleadings must be so construed so as to do justice." Fed. R. Civ. P. 8(e). While "detailed factual allegations are not required," a complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 566 U.S. 652, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard asks for "more than a sheer possibility that a defendant acted unlawfully." *Id*. This determination is a context-specific task requiring the court "to draw in its judicial experience and common sense." Id. at 1950. A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc*., 748 F.2d 774, 779 (2d Cir. 1984) (quoting *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980)). When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and decide whether it is plausible that plaintiff has a valid claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

A. THE ORDER IS PREEMPTED BY FEDERAL LAW.

The Order violates the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2; Compl., ¶¶ 72-90. Under the Supremacy Clause, "[w]hen Congress intends federal law to 'occupy [a] field,' state law in that area is preempted." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). In addition, a state law is preempted when the law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 373 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941)).

In this case, the Order violates the Supremacy Clause both because it (i) intrudes on an area—the regulation of wholesale transactions for capacity and energy—in respect to which Congress intended federal law to occupy the field ("field preemption"), *see* Compl., ¶ 73, and (ii) erects obstacles to the accomplishment of the goals of Congress and FERC in regulating the wholesale capacity and energy markets ("conflict preemption"), *see id.*, ¶ 73.

B. FIELD AND CONFLICT PREEMPTION: BY FIXING THE PRICE TO BE PAID BY THE CONNECTICUT UTILITIES, THE ORDER IMPERMISSIBLY ACTS IN AN AREA OF EXCLUSIVE FEDERAL JURISDICTION.

FERC has exclusive jurisdiction over the wholesale energy and capacity market. The FPA "left no power in the state to regulate" in that field. *S. Cal. Edison Co*., 376 U.S. at 215. Yet the Order impermissibly does exactly that by setting the price that the Connecticut Utilities will pay for energy and capacity. Congress "unambiguously authorize[d] FERC to assert jurisdiction over two separate activities – transmitting and selling" electric energy at wholesale. *New York v. FERC*, 535 U.S. 1, 19 (2002). The FPA applies "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce," and it provides that "[t]he Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy." 16 U.S.C. § 824(b)(1). The Act reserves for the States "jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.*

As relevant here, the Commission has exclusive jurisdiction to determine whether "rates and charges made, demanded, or received . . . for or in connection with the transmission or sale subject to the jurisdiction of the Commission" are just and reasonable. 16 U.S.C. § 824d(a)-(b). The Commission's jurisdiction extends to "any rule, regulation, practice, or contract affecting" such rates and charges. *Id*. § 824e(a).

Pursuant to the FPA, the FERC has adopted an elaborate regulatory framework to regulate wholesale electric energy rates. By enacting the FPA, Congress intended to give the FERC exclusive jurisdiction over setting wholesale electric energy and capacity rates or prices and thus intended this field to be occupied exclusively by federal regulation. Thus, state action that regulates within this field is void under the doctrine of field preemption.

In addition, under the federal regulatory framework, wholesale electric energy prices must be freely negotiated between electric generation facilities and distributors. Any attempt by a State to compel distributors to purchase energy from generation facilities at a particular price is void under the doctrine of conflict preemption. Neither the Defendant nor the State of Connecticut can directly dictate the price of a wholesale electricity contract except under PURPA.

In the most widely known case during the past few years, *California Public Utilities Commission*, 132 F.E.R.C. ¶61,047 (2010) at P64, the FERC re-iterated that, except with respect to qualifying facilities under PURPA, there is no room for a State to take any action regulating the wholesale price of energy for a generation facility, such as what the Defendant did here:

> The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. [*citing* 16 U.S.C. §§ 824, 824d, 824e; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988)]. While Congress has authorized a role for States in setting wholesale rates under PURPA, *Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority*. . . . . Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA. (Emphasis added.)

The Order blatantly intrudes on FERC's exclusive jurisdiction because it fixes a long-term wholesale energy price and guarantees that State-selected generators will receive that price for their sales of energy for resale. *See* 16 U.S.C. § 824(b); Compl. ¶ 53. The Order requires Connecticut's two local utility companies to enter into long-term wholesale purchase contracts with generators chosen by the Defendant.[7] Each contract fixes a wholesale energy price. By directing the Connecticut Utilities to enter into a PPA at a particular price, the Defendant intruded on the FERC's exclusive jurisdiction to regulate wholesale electric energy prices. Accordingly, the Number Nine wind project and Fusion Solar project contracts are the product of state action that is illegal under the doctrine of field preemption and void *ab initio*.[8]

In addition, by requiring the Connecticut Utilities to purchase power at a fixed price from the State's favored generator, pursuant to criteria developed by the State, prevents the Connecticut Utilities from freely negotiating for a different contractual price, thus violating federal law and policy which requires wholesale electric energy prices to be set pursuant to freely-negotiated market transactions. For example, as the Defendant admits, undisclosed non-price criteria were used to select projects. Had the Defendant allowed the Connecticut Uilities the freedom to conduct their own solicitation, they may have based their selections on different criteria, resulting in a different decision. Accordingly, the PPAs are the product of state action that is illegal under the doctrine of conflict preemption.

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[7] This factual situation was same type of action found to violate the FPA and the Supremacy Clause in *PPL EnergyPlus, LLC v. Hanna*, 2013 U.S. Dist. LEXIS 147273 (D. N.J. 2013). There the state action at issue required New Jersey's four local utility companies to enter into long-term wholesale purchase contracts with in-state generators chosen by the state. N.J.S.A. 48:3-51. There, as here, each contract established a fixed price. The District Court held that the state action of fixing of the price violated the FPA and was pre-empted by the Supremacy Clause.

[8] *See*, *Connecticut Light and Power Company,* 70 FERC P61,012, 61,030 (1995) (stating "[h]enceforth, however, if parties are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered to be void ab initio.") *See also, PPL EnergyPlus LLC v. Nazarian*, 2013 U.S. Dist. LEXIS 140210, * 110 (D. Md. 2013)(holding that no matter how disguised a fixed contract price set by the State to be paid to the generator is void); *PPL EnergyPlus, LLC v. Hanna*, 2013 U.S. Dist. LEXIS 147273 (D. N.J. 2013)(holding to the same effect but holding that incentives for local generation because of reliability concerns is reasonable).

For these reasons, the State is demonstrably incorrect in claiming that the Order does not regulate the sale at wholesale of electric energy. The State, in making that assertion, ignores the plain text of the PPAs that explicitly provide for a fixed energy price for the term of the contract.

C. THE ORDER WAS NOT A PERMISSIBLE EXERCISE OF THE STATE'S AUTHORITY TO REGULATE FACILITIES.

The State also contends that the Order is a permissible exercise of the State's authority to regulate "facilities used for the generation of electric energy," 16 U.S.C. § 824(b)(1). This argument fails. To be sure, in *Connecticut DPUC,* 569 F.3d at 481-482, the court noted that states are not barred by the FPA from regulating the terms on which power plants are sited, built, maintained, and retired. That permissible scope of regulation allows states limited mechanisms to discourage or encourage new energy and capacity – for example, by altering or granting exemptions from the regulations governing the operation of power plants – that do not invade FERC's exclusive jurisdiction over wholesale capacity prices.

The FERC's jurisdiction under the FPA extends to regulating contracts and practices directly "affecting" rates. 16 U.S.C. §§ 824d(c), 824e(a). This would include Defendant's price determination as well as Defendant's non-price criteria.

Thus, the Order is preempted because it sets rates for wholesale sales of energy. *Compare Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm'rs of N.J.*, 44 F.3d 1178, 1192 (3d Cir. 1995) (state agency's attempt to modify the rate in a power purchase agreement preempted by federal law), *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at PP 64-65 (2010) (finding California law that sets wholesale purchase price preempted by the FPA), *Midwest Power Sys., Inc.,* 78 FERC ¶ 61,067 at P 61,246 (1997) (state statute requiring electric utilities to purchase energy from a special state-defined category of generating facilities at a rate to be set by the state utility commission preempted), and *Conn. Light & Power Co*., 70 FERC ¶ 61,012 (1995) (same), *with Wheelabrator Lisbon, Inc. v. Conn. Dept. of Pub. Utils*., 531 F.3d 183 (2d Cir. 2008) (state agency action that interprets rights to renewable energy credits but does not modify the purchase price or rates in a wholesale power purchase agreement not preempted by

federal law), and *WSPP Inc*., 139 FERC ¶ 61,061 at PP 21-24 (2012) (transactions involving state-created renewable energy credits alone are not themselves FERC-jurisdictional, but where the sale of a renewable energy credit is bundled with a jurisdictional transaction, and where it "affects the rate for wholesale energy," it becomes FERC jurisdictional).

A state statue is consistent with federal law to the extent that the state is directing the planning and resource decisions of electric utilities under its jurisdiction. *See Midwest Power Sys., Inc*., 78 FERC ¶ 61,067 at p. 61,248 (Iowa statute not preempted "to the extent that [it] require[s] [state utilities] to purchase from certain types of generating facilities"); *see also S. Cal. Edison Co*., 71 FERC ¶ 61,269 (1995) (states have broad powers to direct the planning and resource decisions of utilities under their jurisdiction, including encouraging certain types of generation facilities through tax structure or direct subsidies). Notably, states have numerous ways to incentivize construction of new generation facilities that do not directly affect the setting of FERC-jurisdictional wholesale rates. *See PPL EnergyPlus, LLC v. Hanna,* 2013 WL 5603896, at *30 (citing state's tax-exempt bonding authority, property tax relief, favorable site lease agreements, and easing permit approvals); *see also PPL EnergyPlus LLC v. Nazarian*, 2013 WL 5432346, at *31 (listing means by which states may legitimately promote resource development).

The State's focus on what could have been done fails to address what was done. Defendant could have, if permitted under State law, required the Connecticut Utilities to obtain a certain percentage of their energy from certain types of resources under short-term or long-term contracting similar to what neighboring states Rhode Island and Massachusetts have done. The Defendant would have also been able to supervise the Connecticut Utilities' procurement process, again, similar to what is done in Rhode Island and Massachusetts. But as Defendant admits[9] the State's involvement would then be limited to "after-the-fact prudence reviews", in order to allow the utilities to recover the costs in rates. Those circumstances would not involve the State fixing the price.

[9] State's Br. at p.21.

D. THE BIDDERS HAD NO ABILITY TO FIX PRICES; ONLY THE DEFENDANT HAD THAT AUTHORITY.

The Defendant's argument that it was the bidders and not the Defendant that fixed the wholesale price of energy ignores the very action complained of here. Under that logic there seems to be no reason for Section 6 at all. Yet it is only through the authority provided to the Defendant under Section 6, the most important aspect of which is fixing the price, did a price at which the Connecticut Utilities must buy become fixed.

The bidders' price proposals did not (except to the extent compelled under PURPA) compel the Connecticut Utilities to purchase energy from their facilities. Rather it was Defendant's action under Section 6 ordering the Connecticut Utilities to execute the PPAs that compelled the purchase. It is that state action which fixed the wholesale price of energy. Regardless of the price fixing, the Defendant admits that he used other non-price criteria, which in and of itself, interferes with the wholesale electricity market. Factors that may be of concern to the Defendant may be irrelevant in a transaction between a utility and a generator.

E. THE DEFENDANT FAILS TO PROVIDE ANY SUPPORT FOR ITS ASSERTION THAT THIS CASE BELONGS BEFORE THE FERC OR A STATE COURT.

The Defendant argues in the alternative that this case belongs before either a state court or the FERC. The Defendant, however, cites no authority for its claim because no authority exists. To the contrary, the FPA specifically provides for jurisdiction in this Court. *See*, 16 U.S.C. 825p stating:

> The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of this chapter or any rule, regulation, or order thereunder. . . Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found.

F. UI'S PARTIAL EXEMPTION FROM PURPA'S MANDATORY PURCHASE OBLIGATION IS NOT RELEVANT.

Defendant asserts makes a statement that implies that UI has been relieved of its obligations under PURPA. That is only partially true. The relief that UI was granted was relief from the mandatory purchase obligation with respect to qualifying facilities larger than 20MW. It has not been relieved of its obligations to purchase from QFs that are 20 MWs or smaller. *United Illuminating Company*, 123 FERC ¶61,269 (2008).

III. VIOLATION OF 42 U.S.C. §1983.

Under 42 U.S.C. § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

If the price of the Fusion Solar Project was equal to the Connecticut Utilities avoided costs and thus a valid exercise of the State's authority under PURPA, the Defendant impermissibly discriminated against the Plaintiff's projects that offered a price at or below avoided costs, and below the price of the Fusion Solar Project.

In addition, the Plaintiff has suffered injury because one or more of the Plaintiff's projects would have been selected if the Number Nine Wind Project was not. The price offered by one or more of the Plaintiff's projects equaled the Connecticut Utilities avoided costs.

The Rankings confirm that it is not only likely, but a near certainty, that if the Number Nine Wind Project had not been selected as a result of the Defendant's unlawful actions, one or more of Plaintiff's projects would have been selected. As described above, the Plaintiff's rights are derived from the FPA and PURPA. By violating the FPA and PURPA, the Defendant has injured Plaintiff. As a result, the Plaintiff has suffered harm and damages by not being able to enter into a PPA with the Connecticut Utilities and costs to develop projects as the result of

Defendant's violation of the FPA and PURPA which constitutes the "deprivation of … rights, … secured by the Constitution and laws" of the United States under 42 U.S.C. § 1983.

IV. CONCLUSION.

In summary, the Defendant's arguments miss the point. The Defendant's cited authorities merely relate to non-price fixing actions a state may take. Similarly, its attempt to claim that it was the bidders that fixed the price and not the Defendant ignores the very step required to create the contract at the fixed wholesale price. While the Defendant determined the fixed prices based upon what the bidders submitted (and whatever undisclosed other non-price criteria), it is the Defendant that fixed the price at which the Connecticut Utilities would purchase the energy. For the reasons stated above, the Defendant's motion to dismiss should be denied.

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Dated: April 16, 2014

Respectfully submitted,

/s/ Thomas Melone

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2014, a copy of the foregoing PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to any one unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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