No. 123594

IN THE
SUPREME COURT OF ILLINOIS

KENRICK ROBERTS

Plaintiff – Appellee

v.

BOARD OF TRUSTEES COMMUNITY COLLEGE
DISTRICT NO. 508 d/b/a CITY COLLEGES OF CHICAGO

Defendant – Appellant

On Appeal from the Appellate Court of Illinois
First District No. 1-17-0067
There heard on Appeal from the Circuit Court of Cook County, Illinois
County Department, Law Division
Case No. 15 L 9430
The Honorable Judge James Snyder, Presiding

REPLY BRIEF OF DEFENDANT – APPELLANT

James P. Daley
James D. Thomas
David M. Novak
Jackson Lewis P.C.
150 N. Michigan Avenue, Suite 2500
Chicago, IL 60601
Telephone: (312) 787-4949
Fax: (312) 787-4995
James.Daley@jacksonlewis.com
James.Thomas@jacksonlewis.com
David.Novak@jacksonlewis.com

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Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

Every statute expresses public policy; indeed, that is the functional definition of a statute. This Court, however, has for forty years rejected this tautology as the basis for retaliatory discharge and instead developed the exceedingly narrow concept -- hitherto always recognized as such throughout the judiciary -- of a clearly mandated public policy. "A broad general statement of policy is inadequate to justify an exception to the general rule of at-will employment." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 502 (2009).

Seizing on swollen introductory rhetoric typical of innumerable statutes, the appellate panel herein ignored this Court's admonition not to rely on broad general statements and applied the tautological functional definition assiduously avoided by this Court. The appellate panel founded its new kind of retaliatory discharge action on the Illinois Higher Education Loan Act, a statute designed solely to create a funding mechanism and nothing else, a statute cited by Plaintiff neither in the circuit nor in the appellate court: "Simply put, if our government did not think providing all citizens with access to funds for higher education was a good idea, it would not have enacted the statute in the first place." *Roberts v. Bd. of Trustees of Comm. College Dist. No. 508,* 2018 IL App (1st) 170067, ¶ 33.

The City Colleges' reply brief has three sections, each of which demonstrates that reversal of the appellate court is necessary. The first analyzes a number of this Court's most relevant retaliatory discharge decisions from 1978 to the present. The second reviews in bulletpoint fashion the constraints on the concept of a clearly mandated public policy discussed in the City Colleges' opening brief. The final section examines the statutes and regulations relied on by the appellate court and a number of points made by Plaintiff.

To preview our conclusions: The state statute at issue does nothing other than to establish a funding mechanism for loans and in no way bears on relations between educational employers and employees. The federal and state regulations at issue likewise have nothing to do with relations between educational employers and employees. The program participation agreements called for by the federal statute and regulations are designed to protect the lender -- the federal government -- and confer no rights on educational employees; moreover, the numerous sins -- for example, alleged fraud – assertedly committed by the City Colleges are not matters Plaintiff brought to the attention of his superiors or anyone else. Finally, the federal statutes and regulations at issue do not even recognize the three private sector entities relied on by Plaintiff as acceptable accreditation agencies. In short, Plaintiff has established no clearly mandated public policy.

I. THIS COURT'S LEADING CASES DICTATE REVERSAL OF THE APPELLATE COURT.

This Court's relevant retaliatory discharge cases from the origin of the tort to the present all lead to the conclusion that Plaintiff failed to state a cause of action for retaliatory discharge:

Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 181-82 (1978). This case created the tort for a woman allegedly fired for filing a worker's compensation claim: "We are not convinced that an employer's otherwise absolute power to terminate an employee at will should prevail when that power is exercised to prevent the employee from **asserting his statutory rights** under the Workmen's Compensation Act" (emphasis added). None of the statutes and regulations cited by the appellate court and Plaintiff confers any statutory right on Plaintiff.

Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130-33 (1981). This case created the citizen crime fighter variant of the retaliatory discharge tort. According to this Court, public policy "concerns what is right and just and what affects the citizens of the State collectively . . . . Once the possibility of crime was reported, Palmateer was **under a statutory duty** to further assist officials when requested to do so" (emphasis added). None of the statutes and regulations cited by the appellate court and Plaintiff imposes any statutory duty on Plaintiff, and there is no allegation of the commission of a crime by the City Colleges.

Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 506-11 (1985). Citing a federal statute barring employers from discharging or discriminating against employees who protest the presence of radioactive materials, this Court continued: "The protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes, and by the enactment of the legislation cited, Congress has effectively declared a clearly mandated public policy to that effect. We hold, therefore, that counts III and VI state a cause of action for retaliatory discharge for refusing to work under conditions which contravened the clearly mandated public policy." None of the statutes and regulations cited by the appellate court and Plaintiff imposes analogous prohibitions on educational employers. Moreover, none of those statutes and regulations affects "the citizens of the State collectively" as required by *Palmateer*. The workers protected by *Kelsay* are a substantial and ever increasing proportion of the citizenry, and the crime and radioactivity at the core of *Palmateer* and *Wheeler* respectively threaten all citizens. In contrast, the institutions and persons affected by the statutes and regulations at

issue herein -- "individuals without the private means to pay for a college education" according to the appellate court -- are not an insignificant group but fall far short of representing "the citizens of the State collectively." *Roberts*, 2018 IL App (1st) 170067, ¶ 29; see also *Palmateer*, 85 Ill. 2d at 130.

Fisher v. Lexington Health Care, Inc., 188 Ill. 2d 455, 462 (1999). This Court refused to permit a retaliatory discharge cause of action based on the Nursing Home Care Act for two employees who were silenced and then terminated for wanting to provide information about improper employee conduct leading to the death of an elderly nursing home patient. The Nursing Home Care Act requires nursing home employees who become aware of abuse or neglect of a resident to report it. Nevertheless, the Court reasoned: "The provisions of the Act reveal that it was not designed to protect nursing home employees such as the plaintiffs. Rather, the Act was clearly enacted for the purpose of protecting and benefitting nursing home **residents**" (emphasis in the original). The statutes and regulations cited by the appellate court and Plaintiff are not designed to protect employees of educational institutions but rather to benefit the institutions themselves as well as financially disadvantaged students.

Metzger v. DaRosa, 209 Ill. 2d 30, 38 (2004). This Court refused to permit a retaliatory discharge cause of action based on the Illinois Personnel Code for an employee who among other things alleged termination for reporting attendance infractions and time theft by coworkers. Relying on *Fisher*, the Court ruled: "When viewed as a whole, it is clear that the Personnel Code was primarily designed to benefit the state and the people of Illinois by ensuring competent employees for government bodies. . . . Just as state employees are not the class for whom the statute was primarily enacted to benefit, it is clear that

the Personnel Code was not primarily designed to prevent retaliation against state employees." The statutes and regulations cited by the appellate court and Plaintiff are not designed to benefit employees of educational institutions nor to prevent retaliation against them.

Turner v. Memorial Medical Center, 233 Ill. 2d 494, 503-6 (2009). This Court refused to permit a retaliatory discharge cause of action based on the public policy of patient safety said to inhere in standards promulgated by the defendant's accreditation agency and in the Illinois Medical Patient Rights Act. The case centered on the medical center's practice of electronically charting patient care at the end of the day rather than immediately after the care was administered. The Court concluded that the case did not involve a clearly mandated public policy because (1) no Illinois law or regulation "directly requires immediate bedside charting of patient care," (2) the plaintiff's complaint "fails to recite or even refer to a Joint Commission standard in support of his allegation," and (3) the statute relied on "is only concerned with record confidentiality, rather than record timeliness." The statutes and regulations cited by the appellate court and Plaintiff do not purport to establish accreditation standards and requirements. Moreover, Plaintiff quotes no specific standards or requirements from any of the private bodies he names; indeed, the City Colleges is not alleged to have, and in fact does not have, any relationship whatsoever with these bodies. (A51-52, C584-85). The City Colleges will return to *Turner* in greater detail momentarily.

These cases highlight the differences between legitimate and bogus retaliatory discharge complaints in Illinois. The instant case does not pass the test.[1]

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[1] One can adduce additional decisions by this Court that also highlight the deficiencies of Plaintiff's pleadings: *Michael v. Precision Alliance Group, LLC*, 2014 IL 117376, ¶ 6 (cause of action stated for terminating employee for reporting violation of law requiring seed bag weights to be stated accurately); *Blount v. Stroud*, 232 Ill. 2d 302, 306 (2009) (cause of action stated for termination in retaliation for refusal to break the law making

II. THE LIMITING FEATURES OF CLEARLY MANDATED PUBLIC POLICIES ALSO REQUIRE REVERSAL.

The City Colleges in its opening brief derived from this Court's opinions at least six requirements designed by the Court to ensure that the retaliatory discharge tort remains exceedingly narrow. Plaintiff and the appellate court ignore or at best pay lip service to these requirements. Therefore, at the risk of repetition of the City Colleges' opening brief and some overlap with the preceding section of this reply, the City Colleges succinctly sets forth the requirements and how Plaintiff's third complaint stacks up against them. The City Colleges has set forth the cases establishing these requirements in its opening brief and will not cite them again here.

- A clearly mandated public policy must be found in constitutions, statutes, or judicial decisions and nowhere else; general concepts of fairness and sound policy will not suffice. Financial assistance for disadvantaged students in the form of loans might be a good idea but as pleaded herein remains at best a general concept of fairness or sound policy.

- A clearly mandated public policy must be specific and contained in a provision of its alleged source; once again, fairness and sound policy are not enough. Plaintiff puts in front of the court approximately a thousand pages of statutes and regulations but points to nothing specific and or cogent to establish a clearly mandated public policy.

- A clearly mandated public policy must affect the citizenry collectively; retaliatory discharge has no room for anything less and no room for merely parochial concerns. Financial need among disadvantaged students

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perjury illegal); *Gould v. Campbell's Ambulance Service, Inc*., 111 Ill. 2d 54, 57 (1986) (no cause of action for reporting uncertified ambulance drivers because no law in place at the time required certification); *Price v. Carmack Datsun, Inc*., 109 Ill.2d 65, 68-69 (1985) (no cause of action based on Illinois Insurance Code for termination of employee for making a claim under the employer's health insurance plan); *Fellhauer v. Geneva*, 142 Ill. 2d 495, 509-10 (1991) (emphasizing that retaliatory discharge is "a limited and narrow cause of action," stating that "the mere citation of a constitutional or statutory provision in a complaint will not in itself be sufficient to state a cause of action for retaliatory discharge," and holding cause of action not stated for termination for refusing to violate official misconduct provisions of the Municipal Code). The City Colleges believes all other cases cited by Plaintiff focus on issues irrelevant herein, for example, preemption of retaliatory discharge by various statutes, the viability of retaliatory demotion cases, and so forth.

> is a social problem but does not run through the fabric of society -- does not affect "the citizens of the state collectively" -- as do employment injuries, victimization by crime, and exposure to radiation.

- A clearly mandated public policy must give employers notice of what constitutes impermissible conduct; a retaliatory discharge action must be fair to the employer and mindful of due process. Although Plaintiff states baldly that the City Colleges should have been aware that terminating him was illegal, Plaintiff points to no statutory or regulatory provision as a basis for this alleged imputed awareness.

- A clearly mandated public policy usually must have something to do with the relationships of individuals including the relationship between employer and employee; this is another aspect of the notice that must be afforded to employer defendants. The statutes and regulations cited by the appellate court and Plaintiff have nothing to do with the relationship between employer and employee.

- A clearly mandated public policy usually must be designed to protect the person filing a retaliatory discharge suit and be directed against the misconduct alleged; this is also part of the required notice to the defendant. The statutes and regulations cited by the appellate court and Plaintiff are not so designed or directed.

In sum, both the facts of the Court's leading retaliatory discharge opinions and the requirements set forth in those opinions make appropriate reversal of the appellate court and entry of judgment in favor of the City Colleges.

The requirements just reviewed are found in a large number of this Court's opinions. Most are repeated in *Turner*. It is difficult to overstate the importance of *Turner* to the instant case on account of the remarkable factual and legal similarities the cases share. For this reason, the City Colleges believes some repetition of material from its opening brief is once again salutary. *Turner* controls herein and requires reversal of the appellate court.

Plaintiff and the appellate court for all practical purposes ignore the directly on-point holding in *Turner*. The dispute in *Turner* arose under facts almost identical to the

instant dispute. The plaintiff in *Turner* alleged that his employer, a hospital, terminated him unlawfully in retaliation for complaints that he had made to the hospital's accreditor about the hospital's alleged failure to follow the accreditor's requirements for electronic charting of patient care. One of the consequences of the hospital's failure to comply with the accreditor's requirements was that the hospital would lose federal Medicare and Medicaid funding. The *Turner* plaintiff alleged that Illinois law recognizes a public policy for each patient to receive care consistent with sound practices and that the hospital's alleged failure to chart patient care immediately was not consistent with such practices and jeopardized patient care. Accordingly, the plaintiff asked this Court to find that Illinois has a public policy in favor of patient safety and that terminating an employee who speaks out about issues of patient care violates that policy. This Court declined to do so.

This Court made clear in *Turner* that, "unless an employee identifies a 'specific' expression of public policy, the employee may be discharged with or without cause." *Turner*, 233 Ill. 2d at 503. This Court found that the plaintiff had not cited any provision of Illinois law that required immediate electronic charting of patient care. *Id*. at 504. This Court closed its decision with the admonition that simply because something is in the public interest does not mean that it modifies the doctrine of at-will employment (*Id*. at 507):

> We agree with the appellate court special concurrence that the provision of good medical care is in the public interest. It does not follow, however, that all health care employees should be immune from the general at-will employment rules simply because they claim to be reporting on issues that they feel are detrimental to health care.

If the plaintiff in *Turner* failed to establish a clearly mandated public policy, then so too has Plaintiff herein. Both *Turner* and the instant case involve accreditation standards and possible loss of public funds for failing to meet them. Unlike the plaintiff in *Turner*, however, who could allege that a specific accrediting agency was actively involved with

the defendant medical center, Plaintiff does not and cannot allege any connection between the three groups he cites in his complaints and the City Colleges. In addition, although the plaintiff in *Turner* discussed an alleged requirement of immediate electronic charting of patient records, this Court emphasized that the "plaintiff's complaint fails to recite or even refer to a specific Joint Commission standard in support of his allegation." *Id.* at 505. Plaintiff herein does not even discuss a specific standard or requirement much less cite or refer to one promulgated by any of the three groups he names, none of which in any case has or had any connection with the City Colleges. (Cf. A51-52, C584-85). Moreover, this Court in *Turner* stated: "No Illinois law or administrative regulation directly requires immediate bedside charting of patient care." *Id*. at 504. Thus, this Court recognized in *Turner* that accreditation standards and requirements do not establish public policy unless they are law or required by law, neither of which is the case here.

This Court has stated that the element of the traditional formulation of the retaliatory discharge requirements "that the discharge violates a clear mandate of public policy" actually requires two separate inquiries, the first about "whether a public policy exists," the second about "whether the employee's discharge undermines the state's public policy." *Id*. at 501. With respect to the second inquiry, Plaintiff has not alleged that either the City Colleges or any of its past, present, and prospective students has lost any financial aid on account of Plaintiff's discharge or indeed on account of any matter alleged by Plaintiff. Plaintiff has not alleged that any of the City Colleges' students and graduates has lost a job opportunity on account of Plaintiff's discharge or any other matter alleged by Plaintiff. Plaintiff has not alleged that any member of the public has been harmed on account of Plaintiff's discharge or any other matter alleged by Plaintiff. Plaintiff therefore has not

alleged satisfactorily the quoted element of the traditional requirements to state a cause of action for retaliatory discharge.

Plaintiff devotes just under two full pages to *Turner*, most of which simply quotes from or summarizes the opinion. Plaintiff seems to feel that student loan aid is somehow more specific than patient safety; the City Colleges states, however, that student loan aid is certainly narrower than patient safety and even more removed from affecting the citizenry collectively as required by this Court. Plaintiff also contends that this Court decided *Turner* the way it did because the plaintiff cited conflicting statutes and regulations; try as it might, the City Colleges finds nothing to this effect in *Turner*. In the end, Plaintiff herein comes no closer and actually winds up farther from stating a clearly mandated public policy than did the plaintiff in *Turner*. Both relied impermissibly on mere "broad general statements of policy." *Id.* at 502.

III. PLAINTIFF HAS NOT ESTABLISHED A SOURCE FOR NOR A CLEARLY MANDATED PUBLIC POLICY.

Plaintiff relies on the voluminous and sometimes opaque federal Higher Education Act of 1965, the only slightly less voluminous regulations issued in accordance therewith, and now on the Illinois Higher Education Loan Act not mentioned by Plaintiff anywhere in the proceedings below and in fact injected into this matter for the first time by the appellate court in the decision under review. The City Colleges starts the analysis with the state legislation.

Plaintiff does not even attempt to justify the appellate panel's reliance on the Illinois Higher Education Loan Act, reliance which really amounts to an impermissible amendment of Plaintiff's pleadings in and by the appellate court. Moreover, Plaintiff does not counter the City Colleges' section-by-section analysis of the statute, which exists solely

to establish a funding mechanism. The Illinois Higher Education Loan Act fails to meet any of this Court's limitations on and requirements for a clearly mandated public policy set out at the beginning of the preceding section herein and in greater detail in the City Colleges' opening brief.

In its opening brief, the City Colleges warned against broadening the retaliatory discharge tort because such an expansion would lead to baseless actions in anticipation of litigation taken by employees fearful of imminent termination. That might well have happened here. Thus, Plaintiff inexplicably alleges near the very front of his original complaint the recent terminations of two of his friends and colleagues and then points not to federal or state laws and regulations concerning accreditation standards and requirements but instead to standards developed internally by the City Colleges. Compl. Pars. 7-9, 13 (A20-21, C5-6). "In compliance with the City Colleges of Chicago policy and the College of Health Science credentialing standards and requirements, it is my responsibility as Program Director to review, evaluate and approve the recommendation of each faculty member that [sic] is approved to teach in a program [of] which I am the director." Compl. Par. 14 (A21, C6). Only after Judge Snyder rejected this complaint did Plaintiff, who clearly views himself as something of an expert on accreditation standards and requirements, bring federal laws and regulations into his pleadings and introduce the National Accrediting Agency for Clinical Laboratory Sciences, the National Phlebotomy Association, and the American Society of Clinical Pathologists. One of the most fundamental defects of Plaintiff's position, however, is that none of these bodies is recognized by the federal government as an approved accreditation or certification agency.

To understand this point, one must know how accreditation standards and requirements work under the federal Higher Education Act of 1965. The federal government itself does not accredit but instead compiles and publishes in the Federal Register a list of private entities performing such services in a manner deemed acceptable to the government with whom an educational institution seeking such services may contract. 20 U.S.C. § 1099b; 34 C.F.R. 600.2 (definition of nationally recognized accrediting agency); 34 C.F.R. 668.13 (certification procedure). The relevant list from the Federal Register is a public record of which this Court may take judicial notice. 65 Fed. Reg. 53277-82. The list also appears on the Department of Education's website at https://www2.ed.gov/print/admins/finaid/accred/accreditation.html (last accessed Dec. 18, 2018). The National Accrediting Agency for Clinical Laboratory Sciences, the National Phlebotomy Association, and the American Society of Clinical Pathologists are not on the lists in the Federal Register or on the Department of Education's website. The National Accrediting Agency for Clinical Laboratory Sciences was on the list long ago but withdrew in or around 2001. See Dianne M. Cearlock, PhD, Chief Executive Officer, *CEO's Corner: The Changing Landscape of External Recognition of Accreditors*, THE NAACLS NEWS (Jan. 27, 2017), https://naaclsnews.org/category/ceos-corner/ (last accessed Dec. 18, 2018).

Even if one or more of these entities were on the Federal Register list, Plaintiff's position must be rejected for at least two other reasons:

First, as this Court has recognized, there is a substantial problem in stating that standards developed in the private sector can constitute clearly mandated public policies. Such a proposition presents philosophical and practical problems. *Turner*, 233 Ill. 2d at 504-5. Public policy, the City Colleges believes, should emanate from the legislature, the

courts, or perhaps in a few cases directly from a governmental agency rather than from private entities. That is the philosophical problem. The practical problem arises if the standards developed by one private entity are more detailed than those by another private entity in the same field or even contradict each other. At this point, the policy ceases to be "clear" as required by *Turner*. *Id.* at 503.

Although Plaintiff claims that the mere presence of an allegedly unqualified professor means that the City Colleges misrepresented the nature of its educational program and the employability of its students to the federal government, risked the termination of loan programs, and did not give students -- who were allegedly defrauded -- what they paid for, Plaintiff does not allege that he brought any of this to the attention of the City Colleges. All Plaintiff did is contained in the following quotation from a letter cited in his complaint (Second Am. Compl. Par 19 (A57, C521):

> In compliance with the City Colleges of Chicago policy and the College of Health Science credentialing standards and requirements, it is my responsibility as Program Director of HeaPro 101 to review, evaluate and approve the recommendation of each faculty member that is approved to teach in a program which I am the director. Taking into consideration I had no input into the department decision to appoint a nurse to teach HeaPro 101 without my review of the credentials and necessary certifications and licenses put our programs and students at risk. Please note this is a breach of the standards that were developed to ensure that the students obtain the best outcomes moving forward with their education in the medical field. Please note I am very concerned about the direction in which we are traveling and wish to address this matter.

Plainly, neither at the time Plaintiff drafted these words nor at any other time during his employment with the City Colleges nor at the time of the original complaint were federal or state requirements even in Plaintiff's consciousness. Plaintiff, in sum, brought none of the alleged infractions of federal or state law to the attention of the City Colleges.

All Plaintiff is left with is his opinion that two professors were unqualified according to the standards of three entities not recognized for accreditation and related work by the federal government. There is neither a direct nor an indirect link to federal or state law in this alleged lack of qualification.

In the end, the City Colleges returns to the following statement in this Court's *Turner* decision (*Turner*, 233 Ill. 2d at 507):

> We agree with the appellate court special concurrence that the provision of good medical care is in the public interest. It does not follow, however, that all health care employees should be immune from the general at-will employment rules simply because they claim to be reporting on issues they feel are detrimental to health.

Analogously, federal loan aid to disadvantaged students is undoubtedly a good idea; that does not make it a clearly mandated public policy that disrupted Plaintiff's at-will status.

CONCLUSION

This is not the case in which to expand the tort of retaliatory discharge. The appellate court's decision to the contrary must be reversed. Expansion of the tort in this case risks confusion among employers, abandons the core premise that retaliatory discharge is a narrow tort, and will without doubt engender waves of meritless litigation that will threaten the efficiency of the judiciary and clog the courts to the disadvantage of those with legitimate claims for relief.

Dated: December 19, 2018

Respectfully submitted,

BOARD OF TRUSTEES COMMUNITY COLLEGE DISTRICT NO. 508

By: /s/ James P. Daley
One of Its Attorneys

James P. Daley
James D. Thomas
David M. Novak
Jackson Lewis P.C.
150 N. Michigan Ave.
Suite 2500
Chicago, IL 60601
james.daley@jacksonlewis.com
james.thomas@jacksonlewis.com
david.novak@jacksonlewis.com

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 341(a) is 15 pages.

/s/ James P. Daley

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies on oath that on the 19th day of December, 2018, at Chicago, Illinois, he caused the foregoing **Reply Brief and Certificate of Compliance** to be electronically submitted for filing to the Supreme Court of Illinois consistent with the requirements set forth in the Court's Electronic Filing User Manual and served on the following via email:

Brian R. Holman
Dennis H. Stefanowicz, Jr.
Holman & Stefanowicz, LLC
233 South Wacker Drive, Suite 9305
Chicago, IL 60606
BRH@HS-Attorneys.com

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ James P. Daley