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Anurima Bhargava, Chief
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Educational Opportunities Section, PHB
Washington, D.C. 20530

Email: education@usdoj.gov

**Re: R.B., T.H., T.H.2, V.J., K.R. and J.E., on behalf of themselves and all others
similarly situated, v. Florida Department of Education and Florida State
Board of Education**

Dear Chief Bhargava:

This is a civil rights complaint brought on behalf of Florida public school children who are being discriminated against on the basis of race and national origin. These students' educational opportunities are being compromised by the Florida Department of Education's recently adopted race-based achievement goals. Rather than promote the success of all of Florida's children, the State's race-based achievement goals set lower academic expectations for certain groups of children, thereby sanctioning and perpetuating differing levels of educational achievement by race or national origin. Race-based achievement goals are unsound and institutionalize self-fulfilling low expectations that promise to hinder the educational progress of an entire generation of Florida's children.

I. NATURE OF THE COMPLAINT

Congress enacted the No Child Left Behind Act ("NCLB") in order to raise educational achievement levels and reduce disparities. Among the concerns motivating the legislation was the negative impact of low expectations on children of color in the public school system.¹ As George W. Bush had observed while Governor of Texas:

Some say it is unfair to hold disadvantaged children to rigorous achievement goals. I say it is discrimination to require anything less—the soft bigotry of low expectations. Some say that schools can't be expected to teach, because there are too many broken families, too many immigrants, too much diversity. I say that pigment and poverty need not determine performance. That myth is disproved by good schools every day. Excuse-making must end before learning can begin.

Texas Governor George W. Bush, Speech at the Latin Business Association Luncheon (September 2, 1999), available at <http://campus.murraystate.edu/academic/faculty/mark.wattier/Purpose.pdf>.

At the core of NCLB were measures designed to drive broad gains in student achievement and to hold states and schools more accountable for student progress. 20 U.S.C. § 6301, et seq. The signature feature of NCLB was the requirement that states bring all students up to the “proficient” level on state tests by the 2013-2014 school year. Id. Individual schools were required to meet state adequate yearly progress (“AYP”) targets toward this goal for both their student populations as a whole, and for certain demographic subgroups defined by the state. Id.

¹ Signed into law on January 8, 2002, NCLB was a reauthorization of the Elementary and Secondary Education Act (“ESEA”). No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in sections of 20 U.S.C., et seq.). The ESEA, first enacted in 1965, encompasses Title I, the federal government’s flagship aid program for students who are eligible for free or reduced price lunches at school. Id. Title I provides for financial assistance to local educational agencies and schools with high numbers or high percentages of children from low-income families to help ensure that all children meet state academic achievement goals.

NCLB required all states to (1) set their own goals for grade-level achievement, and (2) develop a system to measure the progress of all students and subgroups in meeting those goals. Id. Racial and minority subgroups were to be identified for the purpose of data disaggregation to ensure that all students made progress toward AYP. U.S. Department of Education, Office of the Secretary, Office of Public Affairs, A Guide to Education and No Child Left Behind, 18 (October 2004), available at <http://www2.ed.gov/nclb/overview/intro/guide/guide.pdf>. Specifically, the U.S. Department of Education stated that “[t]o ensure that children who are performing poorly are not lost in averages of achievement results, each state must report the performance of various subgroups if the subgroup is large enough for statistical reliability as determined by the state.” Id. at 22.

On the verge of failing to meet required benchmarks under the NCLB, Florida sought and obtained certain waivers of its obligations under federal law.² The waivers permitted Florida to craft its own plan to improve academic achievement. Rather than develop a race-neutral plan focused on improving educational outcomes and reducing disparities, however, Florida adopted a “strategic plan” setting widely differing academic achievement goals for students based on race and national origin. Florida’s State Board of Education, Strategic Plan 2012-2018, 11 (October 2012), available at http://www.fldoe.org/board/meetings/2012_10_09/strategicv3.pdf.

² The waiver process allows states to seek relief from up to ten ESEA provisions and their associated regulatory, administrative, and reporting requirements. U.S. Department of Education, ESEA Flexibility, 1-3, (updated June 7, 2012), available at <http://www2.ed.gov/policy/gen/guid/secletter/110923.html> (The ten provision limit has since been expanded to twelve.). If a state receives a waiver, it would be exempted from the relevant ESEA provision(s) and then allowed to create a state-developed plan to improve academic achievement. U.S. Department of Education, ESEA Flexibility Request, iii-iv (revised Feb. 10, 2012), available at <http://www2.ed.gov/policy/gen/guid/secletter/110923.html>.

As to reading, the plan sets the expectation that 90% of Asian-American children and 88% of white children will read at grade level by 2018, alongside the expectation that only 81% of Hispanic children and 74% of African-American children will do so. Id. As to math, the plan sets the expectation that 92% of Asian-American children and 86% of white children will reach grade level by 2018; in contrast, Florida expects only 80% of Hispanic children and 74% of African-American children to do so. Id. Rather than promote equal educational achievement for all, Florida set alarmingly different goals for children of different racial and ethnic backgrounds. Florida's scheme sets severely lower expectations for African-American and Hispanic students, instead of marshaling its resources to ensure educational equality.

Decades of research have established that low expectations yield low achievement. By setting lower expectations for already-disadvantaged racial and ethnic groups of children, Florida promises that disparities in educational achievement on the basis of race and national origin will continue. While the State claims that its scheme will one day result in universal academic achievement, no evidence supports that claim. Science certainly does not. Instead, over the next ten years, at least, Florida's plan will fail an entire generation of students of color, limiting their educational aspirations by their race or national origin.

Florida's race-based achievement goals violate fundamental civil rights. We urge the Department of Justice to take immediate action to ensure that these children—Florida's most vulnerable children—are not left behind.

II. JURISDICTION

The U.S. Department of Justice ("DOJ") has authority to investigate violations and enforce the provisions of Titles IV and VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000 et

seq. (2012). Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. Id. § 2000d. Title IV prohibits segregation of public schools and authorizes the DOJ to enforce desegregation.³ Id. § 2000c.

Title VI provides that “[n]o person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Id. § 2000d. DOJ is authorized to enforce Title VI prohibitions through 28 C.F.R. § 42.101 et seq., which enables the Department to investigate allegations of discrimination by entities receiving federal financial assistance. The purpose of Title VI is to ensure that public monies do not support or subsidize discriminatory practices. See Cannon v. University of Chicago, 441 U.S. 677, 704 n.36 (1979) (“Title IX, like its model Title VI, sought to avoid the use of federal resources to support discriminatory practices.”); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 284-86 (1978); H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963) (“Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.”). The prohibition on discrimination applies to any operation or function of a state agency that receives federal assistance, whether or not the federal monies are used for each operation. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).

Florida’s race-based achievement goals also create a substantial risk of segregation in the form of racially motivated “tracking” or “ability grouping” in violation of Title IV. 42 U.S.C. § 2000c. Tracking labels students based upon perceived intelligence and may constitute illegal

³ Upon information and belief, Complainants allege that the Department of Justice is continuing to enforce desegregation orders in several school districts throughout the State of Florida.

segregation if children of color are significantly more likely to be placed in lower tracked classes because of either past discrimination in education or biased testing mechanisms.⁴ See generally Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (acknowledging the “self-fulfilling prophecy” of low expectations resulting in poor performance); United States v. Gadsden County School District, 572 F.2d 1049 (5th Cir. 1978) (use of ability grouping in the school district’s kindergartens perpetuated the effects of past discrimination); McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975) (court struck ability grouping practices that resulted in almost complete racial segregation in grades one through six).

Setting lower educational expectations for children of color harkens back to an era that tolerated state-sanctioned racial discrimination. Plessy v. Ferguson, 163 U.S. 537, 549 (1896) (finding that an African-American man was “not lawfully entitled to the reputation of being a white man”), overruled by Brown v. Board of Education, 347 U.S. 483 (1954). “Segregation with the sanction of law,” even when all other factors are deemed equal, has a detrimental effect on children of color, denotes the inferiority of some races as compared to others, affects the motivation of a child to learn, and has the tendency to hinder the educational development of the disadvantaged class. Brown, 347 U.S. at 494. Segregation perpetuates the barriers between the

⁴ Tracking was introduced into public education in response to Brown v. Board of Education, 347 U.S. 483 (1954). Southern states used tracking to dilute the effects of integration by ensuring that African-American and white students would not share the same classrooms. Once students are placed in remedial or lower ability groups, they perceive themselves as being “dumb.” As a result, these students lower their expectations for academic achievement and tend to have a limited view of their opportunities in life. Studies show that students tracked in lower ability groups participate less in extracurricular activities and have higher drop-out rates than students in higher ability groups. Ultimately, lower ability group students graduate significantly less prepared than their counterparts and are deprived of an equal and adequate education. See generally News Release, Stanford University, School Tracking Harms Millions, Sociologist Finds (March 2, 1994), available at <http://news.stanford.edu/pr/94/940302Arc4396.html>.

racess, and thus stereotypes, misunderstandings, and mistrust are all intensified. Hobson, 269 F. Supp. at 504-05.

The Florida Constitution of 1885 came 11 years before the Supreme Court's 1896 decision in Plessy. The Florida Constitution provided that "[w]hite and colored children shall not be taught in the same school." Fla. Const. of 1885, art. XII, § 12. After Brown, state leaders, including then-Acting Governor Charley Johns, did not offer any support for Brown. Johns went as far as suggesting to the Southern Governors' conference that the U.S. Constitution be amended to allow states "to maintain separate but equal public schools for the races." Johns Considers Special Session of Legislature, Tallahassee Democrat, May 18, 1954. Without either legal or moral support for Brown, Florida's leaders ensured that segregation would remain a fixture in the public school system for some time to come.⁵ However, as the U.S. Supreme Court stated in Brown,

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown, 347 U.S. at 493.

Florida's race-based achievement goals constitute discrimination based on race, color and national origin. See Elston v. Talladega County Board of Education, 997 F.2d 1394 (11th Cir.

⁵ Florida's leadership actively and publicly opposed integration until well into the late 1960s. The most public example is the Amicus Curiae Brief filed in the Supreme Court of the United States by Florida Attorney General Richard W. Ervin opposing desegregation in Brown itself. Brief for Attorney General of Florida, as Amicus Curiae Supporting Appellee, Brown v. Board of Education, 347 U.S. 483 (1954) (No. 1 etc.), 1954 WL 45715. Ervin was later appointed to the Florida Supreme Court where he continued to oppose the integration of Florida public schools. In 1964, both of Florida's U.S. Senators opposed the Civil Rights Act. As late as 1967 some of Florida's schools were still segregated.

1993). They also create a substantial risk of relegating children of color to lower ability classrooms. DOJ therefore has jurisdiction to investigate this complaint under Titles VI and IV of the Civil Rights Act.

III. PARTIES

A. Complainants: R.B., T.H., T.H.2, V.J., K.R. and J.E., on behalf of themselves and all others similarly situated

The children who bring this Complaint are African-American and Hispanic Florida public school students ("Students") who have been, or will be, subjected to discrimination on the basis of race and national origin as a result of Florida's race-based achievement goals. These children, simply as a matter of race or ancestry, have been viewed by the State of Florida as having different and lesser abilities than their white and Asian-American counterparts.⁶

All but one of the class representatives attend schools deemed "failing" under Florida standards and have few enrichment or remedial opportunities in their current educational settings. R.B. is an honors student who has no access to honors, gifted, or advanced placement classes.⁷ T.H. has been recommended for grade retention with no option for academic tutoring or summer school. T.H.2 is an excellent student whose achievement has been curtailed by the minimal educational offerings available at her school. V.J. has limited access to textbooks during the school day and is unable to borrow books for after-school study. K.R., who was twice retained at a failing school, is being pushed to enter a Job Corps program rather than to enroll in

⁶ R.B. is fourteen years old, T.H. is sixteen years old, T.H.2 is twelve years old, V.J. is thirteen years old, K.R. is fifteen years old, and J.E. is nine years old.

⁷ The limitations of public school have led R.B. to leave the system altogether to attend a private school placement next year. As a result of the poor education he received in the public school system, R.B. is behind in his private school curriculum and must take remedial courses as a condition of his enrollment.

the eighth grade and continue a traditional education toward a high school diploma. J.E., a student of mixed race, initially tested into an advanced reading group, but by the end of the school year had been reassigned to a lower ability grouping, was in danger of retention, and was declared “bad” and “unmotivated” by his teachers.

Florida’s strategic plan offers no solutions, supports, or strategies that would enable Students to become academically proficient. Instead, the plan sharply reduces accountability measures for all students and codifies even lesser expectations for children of color. Reducing expectations for groups of children based on their race or national origin will harm their potential by operating as a self-fulfilling prophecy, a well-documented phenomenon in which low educational expectations bring about low achievement for any group of students, and in particular for students of already-vulnerable subgroups.

B. Respondents: Florida Department of Education and the Florida State Board of Education

The Students bring this case against the Florida Department of Education (“FLDOE”) and the Florida State Board of Education (“Board”). FLDOE is the state educational agency for the State of Florida. As such, it is responsible for overseeing the provision of public education, including the administration of statewide testing, throughout Florida. Fla. Stat. § 1001.20(1) (2011). Florida’s education system serves approximately 3.5 million students and maintains 4,200 public schools, 570 charter schools, 480 magnet schools and programs, 240 career academies, and more than 200 virtual schools. There are sixty-seven K-12 school districts throughout the State of Florida which operate under the Florida Department of Education.

The Florida State Board of Education is the chief implementing and coordinating body of public education in Florida, and is focused on high-level policy decisions. Its duties include

“exercis[ing] general supervision over the divisions of the Department of Education as necessary to ensure coordination of educational plans and programs and resolve controversies . . . [and] ensur[ing] that students moving from one level of education to the next have acquired competencies necessary for satisfactory performance at that level.” Fla. Stat. § 1001.02(c) (2011). The Board must also “authorize the allocation of resources in accordance with law and rule” and “enforce systemwide education goals and policies except as otherwise provided by law.” *Id.* §§ 1001.02(o), (r). The Board is responsible for approving the strategic plan drafted by the Florida Department of Education. *Id.* § 1001.02(3)(a).

The FLDOE and Board are recipients of substantial federal financial assistance. Federally funded programs in Florida include, but are not limited to: Adult Education and Family Literacy, Carl D. Perkins, Career and Technical Education, Farmworker Jobs and Education Program, Individuals with Disabilities Education Act, Race to the Top, Safe and Drug-Free Schools, and Title I of the Elementary and Secondary Education Act. See generally Florida Department of Education, Office of Grants Management Home Page, <http://www.fldoe.org/grants/gm> (last visited July 29, 2013). Upon information and belief, Complainants allege that the Respondents receive federal funding from the U.S. Department of Justice.

IV. THE SOFT BIGOTRY OF FLORIDA’S LOWER EXPECTATIONS: PERPETUATING THE CYCLE OF LOWER ACHIEVEMENT

Florida’s strategic plan to lower expectations for children of color disregards decades of legal precedent and scientific research that has been clear: setting low expectations for children prompts low outcomes as a self-fulfilling prophecy. See Hobson, 269 F. Supp. at 484 (citing Kenneth Clark, Educational Stimulation of Racially Disadvantaged Children, Education in

Depressed Areas 150 (1963); R. Rosenthal & L. Jacobsen, Self-Fulfilling Prophecies in the Classroom: Teachers Expectations as Unintended Determinants of Pupils' Intellectual Competence, Social Class, Race and Psychological Development (1967)).

Instead of using subgroup data to ensure the academic success of all students regardless of race as NCLB intended, Florida equates the data with academic potential. By setting dramatically lower expectations for some students solely because of their race or national origin, and enshrining those low expectations in a strategic plan shared with superintendents throughout the State, Florida perpetuates the prejudiced perception that African-American and Hispanic students are less capable than their white and Asian-American peers. Rather than increase educational equity and decrease achievement gaps, Florida's race-based expectations ensure that disparities in educational achievement on the basis of race and national origin will continue.

As the Hobson court recognized in 1967, teachers' expectations of their students provide one of the most important influences on both academic achievement and aptitude test scores. Hobson, 269 F. Supp. at 483-84. Scientific studies have long found that teachers commonly underestimate the abilities of disadvantaged children and treat them accordingly—in the daily classroom routine, in grading, and in evaluating these students' likelihood of future achievement. Id. These studies have confirmed that the consequence of a teacher's low expectations is the tendency toward a self-fulfilling prophecy. Id. "The unfortunate students, treated as if they were subnormal, come to accept as a fact that they are subnormal. They act out in their school behavior and in the testing situation what they have been conditioned to believe is their true status in life; and in conforming to expectations, they 'confirm' the original judgment." Id. at 484.

The most famous of these studies was conducted in 1968 by Harvard psychologists Robert Rosenthal, Ph.D., and Lenore Jacobson, Ed.D., who published their findings in a study titled Pygmalion in the Classroom—Teacher Expectation and Pupils' Intellectual Development (1968). In this landmark work, teachers were given fabricated test results that randomly identified some students as having greater intelligence. Id. The teachers were not told that the students had been arbitrarily designated, and the students themselves were never made aware of the test scores. A year later, the students who were randomly designated as having greater intelligence significantly outperformed other students. The study concluded that a teacher can influence student outcomes: when the teacher believed certain students were high-achieving, those students performed better; when the teacher believed students were low-achieving, those lower expectations became a self-fulfilling prophecy of lower outcomes. Id.

The Pygmalion in the Classroom study has been replicated numerous times with the same results. Most recently, a longitudinal study completed in 2013 found that teacher expectations in the first grade predicted students' math and reading achievement in high school. Nicole S. Sorhagen, Early Teacher Expectations Disproportionately Affect Poor Children's High School Performance, 105 J. Educ. Psychol., 465-77 (2013).

Scientific research has found that lower expectations create “self-fulfilling prophecies” for three main reasons. First, teacher expectations affect student outcomes directly. Second, students internalize teacher expectations. Third, students' perceptions of themselves based upon existing stereotypes and expectations become reality. Clark McKown & Rhona S. Weinstein, Teacher Expectations, Classroom Context, and the Achievement Gap, 46 J. Sch. Psychol., 235-61 (2008).

When teachers expect more from students, they provide higher quality instruction that challenges the child. This includes a warmer climate and better feedback from the teachers. Research has found that teachers hold lower expectations for African-American and Hispanic children compared to white children, and that, per the Pygmalion Effect, these expectations may affect student academic performance. Harriet R. Tenenbaum & Martin D. Ruck, Are Teachers' Expectations Different for Racial Minority Than for European American Students? A Meta-Analysis, 99 J. Educ. Psychol., 253-73 (2007). Recent studies show that teachers already have lower expectations for minority students. In one revealing experiment, teachers' comments and feedback on a poorly written essay varied based on the perceived race of the student. Less criticism was provided if the student was believed to be African-American or Hispanic. The authors concluded that this "may contribute to the insufficient challenge that undermines minority students' academic achievement." Kent D. Harber, et al., Students' Race and Teachers' Social Support Affect the Positive Feedback Bias in Public Schools, 104 J. Educ. Psychol., 1149-61 (2012). Students' race and teachers' social support affect the positive feedback bias in public schools. Id.

After students receive cues about teacher expectations, they internalize the expectations and behave accordingly. Hobson, 269 F. Supp. at 484 ("Aside from the influence of the teacher, the whole of the school experience will shape a student's behavior. If that experience is for one reason or another a negative one for the student, his performance will likewise be negative."). African-American children are more likely than white children "to confirm teacher underestimates of ability and less likely to benefit from teacher overestimates of ability." Clark McKown & Rhona S. Weinstein, Modeling the Role of Child Ethnicity and Gender in Children's

Differential Response to Teacher Expectations, 32 J. Applied Soc. Psychol., 159-84 (2002); see also Hobson, 269 F. Supp. at 483-84.

Students then become concerned about being judged on the basis of their stereotypes and expectations. This creates “negative expectancy effects.” Students who are aware of a lower performance expectation for their group may confirm the expectations. According to the theory of “Stereotype Threat,” which is the fear of reinforcing negative stereotypes, a state-sanctioned plan that provides for lower expectations for subgroups who already face negative stereotypes in society will provoke a “disruptive apprehension” that leads to lower performance. Claude M. Steele, A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance, 52 Am. Psychologist, 613-29 (1997). Stereotype threat has also been shown to impair test-taking efficiency, as individuals feeling stereotype threat complete fewer test problems and with a lower level of accuracy than those in a control group. Id.; see also Hobson, 269 F. Supp. at 514 (“alienated students inevitably do not reveal their true abilities—either in school or on tests.”).

Ultimately, Florida’s race-based achievement goals will harm a great number of Florida students. Florida public schools have an annual enrollment of approximately 2.7 million students, over half of whom are African American or Hispanic. Florida Department of Education, Education Information & Accountability Services, Membership by School by Race/Gender, 2012-13, (as of Nov. 25, 2012), available at <http://www.fldoe.org/eias/eiaspubs/pubstudent.asp> (last visited July 30, 2013). In Miami-Dade County, Florida’s most populous school district, the proportion of African-American and Hispanic children is even greater, constituting more than 90% of public school students. Id. In addition, Florida’s Title I programs administer more than \$500 million in federal funds to Florida

school districts and agencies. The majority of Florida students receiving free/reduced lunches are African American and Hispanic. Florida Department of Education, Education Information & Accountability Services, Free/Reduced Lunch Counts By District By Race 2012-13, (as of May 8, 2013), available at <http://www.fldoe.org/eias/eiaspubs/pubstudent.asp> (last visited July 30, 2013). The same is true of Miami-Dade County students. *Id.* Florida's scheme of lowering expectations for African-American and Hispanic students will directly impact the poorest students and those that are most vulnerable and at risk, as evidenced by 96% of students in Miami-Dade County being eligible for Title I funding. *Id.*

Florida's strategic plan treats African-American and Hispanic public school students as less capable than their peers, solely because of race or national origin. By setting lower expectations for these students, Florida also abdicates the responsibility to affirmatively rectify gaps in achievement among subgroups.

CONCLUSION AND REQUEST FOR RELIEF


The children who bring this complaint are entitled to the benefits of a public education "on equal terms," yet the State of Florida expects far less of them than of their peers, simply because of the color of their skin. Florida's decision to establish achievement goals on the basis of race and national origin is troubling in and of itself. The fact that Florida's goals are so much lower for African-American and Hispanic students than for their white and Asian-American counterparts, and that the State does not even pretend to aim toward reducing the disparities within the next decade, contradicts the very principles upon which subgroup measurement in NCLB is predicated.

Setting different achievement goals based upon race and national origin perpetuates stereotypes that certain individuals are less capable than others. These stereotypes are detrimental enough as they pervade mainstream society. Adding lowered expectations by educators creates an irreparable self-fulfilling prophecy of low achievement for the State's most vulnerable children. They undermine the State's own educational mission to "increase the proficiency of *all students* within one seamless efficient system, by allowing them the opportunity to expand their knowledge and skills through learning opportunities and research valued by students, parents and communities." Florida's State Board of Education, Strategic Plan 2012-2018, 6 (October 2012), available at http://www.fldoe.org/board/meetings/2012_10_09/strategicv3.pdf (emphasis added). And they ultimately deprive millions of Florida's children of the educational opportunities to which they are entitled.

The Complainants, on behalf of themselves and all others similarly situated, respectfully request that the Department of Justice accept jurisdiction over this matter and take all necessary action to ensure that Florida's NCLB waiver operates to afford all children equal access to adequate educational programs, experiences, and high expectations.

Thank you for your attention to this Complaint.

Very truly yours,



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