ARGUED ON MARCH 10, 2011; DECIDED ON JULY 15, 2011;
REHEARING AND REHEARING EN BANC DENIED ON SEPTEMBER 12, 2011; MANDATE ISSUED ON SEPTEMBER 21, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRONIC PRIVACY INFORMATION CENTER, ET AL.,	)	
Petitioners,	)	
v.	)	No. 10-1157
JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, ET AL.,	)	
Respondents.	)	

RESPONSE IN OPPOSITION TO MOTION TO ENFORCE MANDATE

Respondents Janet Napolitano, in her official capacity as Secretary of the U.S. Department of Homeland Security, et al., hereby oppose petitioners' motion, filed on October 28, 2011, to enforce this Court's mandate of September 21, 2011.

In this case, this Court rejected the merits of petitioners' attacks against the use of Advanced Imaging Technology (AIT) as a primary screening method at airport checkpoints in order to protect air travel security. However, the Court held that the

Transportation Security Administration (TSA) had failed to provide a valid justification for not engaging in notice-and-comment rulemaking before adopting a new practice concerning use of AIT. Because of the Court's recognition that TSA's use of AIT is "an essential security operation," the Court left in place TSA's system of utilizing AIT for screening airline passengers, but remanded the matter to TSA "to act promptly on remand to cure the defect in [the agency's] promulgation [of the AIT policy]." Petitioners now ask this Court to find that TSA has unreasonably delayed in complying with the Court's mandate, and order the agency to publish a new proposed rule in the Federal Register within 45 days and engage in a public comment process.

The attached declaration of James S. Clarkson (Clarkson Decl.), the Acting General Manager of the Intermodal Security Support Division in TSA's Office of Transportation Sector Network Management, makes clear that TSA is fully compliant with this Court's direction for prompt administrative proceedings, and responded by expediting the highly complex rulemaking process here. Mr. Clarkson states in his declaration that "[i]n recognition of this Court's directive in the Opinion in this appeal . . . TSA has committed to significantly expediting the AIT rulemaking process and has placed this proposed rule among its highest priorities." Clarkson Decl. ¶ 20.

The Government has not disregarded the Court's instructions. To the contrary, TSA is responding reasonably and expeditiously given the complexity of the necessary rulemaking, the agency's available resources, and the other substantial rulemaking assignments that are by law on the agency's agenda. In such circumstances, petitioners' view that TSA is not applying this Court's mandate is wrong, and petitioners' motion should be denied.

STATEMENT

The history of this action is set forth in the Court's opinion. *Electronic Privacy Information Center v. Department of Homeland Security*, 653 F.3d 1, 3-4 (D.C. Cir. 2011) (*EPIC*). Briefly, on July 2, 2010, petitioners filed their petition for review, along with an Emergency Motion to enjoin the use of AIT as a primary screening method at airport checkpoints, pending disposition of the petition for review. The Government opposed the motion, but stated that "although there is no emergency here, we nevertheless stand ready, willing and able to meet any reasonable expedited briefing and argument schedule the Court sets." Opposition to Emergency Motion for Injunctive Relief (Govt. Opp.), 3 (filed on July 15, 2010). On September 1, 2010, the Court denied petitioners' request for injunctive relief pending disposition of the petition for review, and thereafter the case was duly briefed and argued.

On July 15, 2011, the Court issued its opinion, in which it rejected all of petitioners' substantive legal challenges to AIT (resting upon the Fourth Amendment, the Video Voyeurism Prevention Act, 18 U.S.C. § 1801, the Privacy Act 5 U.S.C. § 552a, the privacy protections in the Homeland Security Act, 6 U.S.C. § 142(a)(1), (4), and the Religious Freedom Restoration Act, 42 U.S.C. § 2000b *et seq.*). *EPIC*, 653 F.3d 1.

With respect to petitioners' procedural claim under the Administrative Procedure Act (APA), 5 U.S.C. § 553, however, the Court held that TSA "has advanced no justification for having failed to conduct a notice-and-comment rulemaking," and the Court therefore "remand[ed] this matter to the agency for further proceedings." *EPIC*, 653 F.3d at 8; *see also id.* at 3, 11. The Court further held that "[b]ecause vacating the present rule would severely disrupt an essential security operation, however, and the rule is, . . . otherwise lawful, we shall not vacate the rule, but we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation." *Id.* at 8 (citation omitted); *see also id.* at 11 ("Finally, due to the obvious need for the TSA to continue its airport security operations without interruption, we remand the rule to the TSA but do not vacate it, and instruct the agency promptly to proceed in a manner consistent with this opinion."); Judgment, July 15, 2011 (ordering in pertinent part that "the rule be remanded to TSA

for prompt proceedings, in accordance with the opinion of the court filed herein this date"). The Court rejected petitioners' request that it "enjoin the Agency Rule until [the Department of Homeland Security] undertakes a formal 90-Day rulemaking procedure[.]" Pet. Opening Br. (final version) 39.

On August 29, 2011, petitioners filed a rehearing petition, which this Court denied on September 12, 2011.[1] The Court's mandate issued on September 21, 2011.

The attached Clarkson Declaration fully explains the legal requirements concerning the initiation of the TSA rulemaking process, as well as the actions already undertaken by the agency to comply with the mandate. *See* Clarkson Decl, ¶¶ 3-16. In particular, this declaration states that TSA "initiated its internal rulemaking process on July 25, 2011," and "had an initial, very preliminary draft prepared by August 11, 2011" (*id.* at ¶ 14); that the agency "has committed significant resources to comply with this Court's opinion," including "several economists, attorneys, and subject matter experts," in light of "the importance of this issue" (*id.* at ¶ 16); and that TSA "has prioritized the rulemaking directed by the Opinion[.]" *Id.* at ¶ 18. The declaration also explains the challenges of rulemaking in this area, which involves both classified information and nonpublic sensitive security

[1] Accordingly, the time to petition for certiorari does not expire until December 12, 2011.

information ("SSI"). *Id.* at ¶ 17. Mr. Clarkson sums up the situation by unequivocally explaining that, "[i]n recognition of this Court's directive in the Opinion in this appeal . . . TSA has committed to significantly expediting the AIT rulemaking process and has placed this proposed rule among its highest priorities." *Id.* at ¶ 20.

ARGUMENT

In this situation, where this Court's mandate did not issue until September 21, 2011, and TSA is committing substantial resources to comply promptly with this Court's instructions, petitioners' motion to enforce that mandate is meritless and should be denied.

1. In its opinion, the Court remanded the matter to TSA for further proceedings with respect to APA rulemaking, but left in place the continued use of AIT as a primary screening mechanism, stating that "we do nonetheless expect the agency to act promptly on remand to cure the defect in its promulgation." 653 F.3d at 8; *see also id.* at 11 (Court "instruct[s] the agency promptly to proceed in a manner consistent with this opinion"); Judgment, July 15, 2011 (Court orders "the rule be remanded to TSA for prompt proceedings, in accordance with the opinion of the court filed herein this date"). The Court did not impose a specific deadline on TSA, notwithstanding petitioners' request that the Court "enjoin the Agency Rule until [the

Department of Homeland Security] undertakes a formal 90-Day rulemaking procedure[.]" Pet. Opening Br. (final version) 39.

Petitioners acknowledge in their Motion that the term "promptly" entails no necessary or inherent time frame – there is no further elaboration in this Court's Opinion, the Federal Rules of Appellate Procedure, the Rules of this Court, or this Court's prior decisions, as to a specific deadline dictated by the use of that term. Pet. Mot. 11. Petitioners' effort to impute their own meaning to the Court's directive by recourse to the dictionary definition of promptly elides the initial definition provided by petitioners' own selected source: "being ready and quick to act *as occasion demands*." *See id.* & n.3 (adding emphasis to alternative definition). In light of this Court's directive – and as demonstrated below – TSA has already begun the process of curing the defect of promulgation identified in the Court's Opinion in a prompt manner, with the participation of various agency experts and as agency rulemaking requires. Given the extensive preparation required before a Notice of Proposed Rulemaking (NPRM) may issue, TSA's actions in the immediate wake of the Court's Opinion demonstrate that the agency has been "quick to act as [the] occasion demands." The Clarkson Declaration explains the requirements for initiating the regulatory process (Clarkson Decl. ¶¶ 3-16), and establishes that TSA is acting promptly on remand given these substantial preliminary requirements. *See id.* at ¶¶

14, 16, 18, 20 (noting that TSA took affirmative steps by July 25, 2011, to initiate the required internal NPRM process). This declaration further explains that the two recently-published NPRMs cited by petitioners (*see* Pet. Mot. 9) have been in the works for a long time, and "were initiated several years" before their issuance. Clarkson Decl. ¶ 21. TSA is indeed acting promptly in this matter by any reasonable definition of the term, and the rulemaking examples cited by petitioners only reinforce the complexity and time-consuming nature of the federal rulemaking process.

Petitioners cite no case where an agency has been held to have engaged in "unreasonable delay" based upon a failure to publish a proposed rule roughly five weeks after the effective date of a judicial decree requiring the agency to act, and while the period in which to petition for certiorari remains open. The delays in the cases cited by petitioners typically involved at least many months, if not years, of inaction.[2] Moreover, the very case cited by Petitioners in support of their own

[2] *See, e.g., In re Core Commc'ns , Inc.,* 531 F.3d 849, 856 (D.C. Cir. 2008) (holding unreasonable "agency's failure – for six years – to respond to our own remand"); *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (holding unreasonable a nine-month delay in responding to judicial remand); *Antone v. Block*, 661 F.2d 230, 234 (D.C. Cir. 1981) (indicating that a ten-month delay can be unreasonable); *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 541 (S.D.N.Y. 2009) (holding two-and-a-half year delay unreasonable as a matter of law). Other decisions of this Court finding unreasonable delay generally (continued...)

proposed 45-day deadline for action actually directed the agency "to publish appropriate notices of proposed rulemaking" within 120 days of the order on the motion to enforce, rather than within 45 days, and did so only after twenty-one months had passed since this Court had issued its underlying decision directing remedial agency action. *See Building & Constr. Trades Dep't, AFL-CIO v. Dole*, No. 86-1359, 1989 WL 418934, at *2 (D.C. Cir. Oct. 30, 1989) (unpublished order);[3] *Building & Constr. Trades Dep't, AFL-CIO v. Dole*, 838 F.2d 1258 (D.C. Cir. Feb 2, 1988).

In *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), this Court set forth the methodology for analyzing "unreasonable delay" claims under the APA. The Court identified six factors, stating that they are not "ironclad," but are designed to provide "useful guidance in assessing claims of

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[2](...continued)
involve periods of seeming inactivity measured in years, rather than weeks. *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (finding "nothing less than egregious" agency's six-year failure to respond to a petition); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983) (holding unreasonable five-year agency delay in responding to judicial remand); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 325 (D.C. Cir. 1980) (finding agency's four-year delay unreasonable).

[3] The regulatory actions that were assigned a 45-day period for completion were clarifications of existing regulations as directed by the opinion, rather than notices of proposed rulemakings. 1989 WL 418934, at *1.

agency delay."[4] *Id.* "The first and most important factor is that 'the time agencies take to make decisions must be governed by a "rule of reason."'" *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008), citing *TRAC*, 750 F.2d at 80. The Clarkson Declaration demonstrates that there has been no unreasonable delay since issuance of the Court's mandate until now under such a rule of reason.

Petitioners, however, assert that quite apart from the Court's mandate, TSA "has refused to publish a rule and solicit comments during the more than two years since the substantial change in agency action that gave rise to" petitioners' May 2009 request for rulemaking. Pet. Mot. 14. But as this Court recognized that TSA only

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[4] The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason[]" ; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for the rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC, 750 F.2d at 80 (internal citations omitted).

"decided in early 2010 to use the scanners everywhere for primary screening."[5] 653 F.3d at 3. The "substantial change in agency action" thus had not even occurred in May 2009.[6]

Even more significantly, TSA did not initiate notice-and-comment rulemaking under the APA because of its good faith belief that it was not required to do so, as a matter of law. In its July 2011 opinion, the Court rejected TSA's position with respect to the applicability of the APA but did not suggest any lack of good faith (and also left open the question of the agency's possible invocation of the "good cause" exception to APA rulemaking). The Court's ruling became final and legally binding with the issuance of the mandate on September 21, 2011 – after the denial of petitioners' rehearing en banc petition on September 12, 2011. Although the Court has held that it "need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed," *TRAC*, 750 F.2d at 80 (citation and internal quotation marks omitted), the absence of any such impropriety

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[5] The Government's brief in this case explained that that decision was implemented through a subsequent revision to the agency's Standard Operating Procedures. *See* Corrected Final Br. for Resp'ts 28-29, 40.

[6] Furthermore, the Court held that it did not "need to reach petitioners' claim the TSA unreasonably delayed in responding to their 2009 letter," because "our remand to the agency of their 2010 petition for rulemaking gives them all the relief they would obtain in any event." *See* 653 F.3d at 5 n*.

should be entitled to weight in the "unreasonable delay" calculus. Moreover, TSA began the process of drafting a rule shortly after this Court's Opinion of July 15, 2011, and well before the issuance of the mandate in September 21, 2011.

Finally, through the use of an ellipsis, petitioners attempt to support their motion by distorting a representation that the Government made in July 2010, in its Opposition to petitioners' Emergency Motion. Petitioners claim that the Government "has even failed to abide by its own promise to 'stand ready, willing and able to meet any reasonable . . . schedule the Court sets.'" Pet. Mot. 15, quoting Govt. Opp. 3. Read in full context, however, the Government's opposition stated that "although there is no emergency here, we nevertheless stand ready, willing and able to meet any reasonable *expedited briefing and argument* schedule the Court sets." Govt. Opp. 3 (emphasis added). This statement obviously had nothing to do with this Court's remand order, issued many months later. The Government is neither acting inconsistently with its prior representation nor engaging in dilatory conduct here.

2. Petitioners' request that the Court now expressly prohibit TSA from invoking the APA's "good cause" exception (*see* Pet. Mot. 15-16), should also be rejected. The Clarkson Declaration makes clear that TSA does not contemplate invoking the "good cause" exception. *See* Clarkson Decl. ¶ 14 (stating that TSA staff "had an initial, very preliminary draft prepared by August 11, 2011"). Thus, an order by the Court on this point is unwarranted.

CONCLUSION

For the foregoing reasons, petitioners' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2011, I caused the foregoing Response in Opposition to Petitioners' Motion to Enforce Mandate to be filed electronically with the Court via the Court's CM/ECF system, and also caused four copies to be delivered to the Clerk of the Court by hand delivery on that same date. On the same date, service will also be made automatically upon the following CM/ECF participants:

Marc Rotenberg, Esquire (CM/ECF participant)
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JANET NAPOLITANO, in her official capacity as Secretary of the U.S. Department of Homeland Security, ET AL.,	)	
Respondents.	)	

DECLARATION OF JAMES S. CLARKSON IN SUPPORT OF RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO ENFORCE THE COURT'S MANDATE

I, James S. Clarkson, an employee of the U.S. Department of Homeland Security ("DHS"), Transportation Security Administration ("TSA"), 601 South 12th Street, Arlington, VA 20598-6002, declare as follows:

1. I am over the age of eighteen (18) and provide this declaration based on my personal knowledge and information gained in my official capacity.

2. I am the Acting General Manager of the Intermodal Security Support Division ("ISSD") in TSA's Office of Transportation Sector Network Management ("TSNM"). In this role, I oversee the regulatory process and the analyses of various proposed regulatory actions, including notices of proposed rulemaking (NPRM), among other policy and operational responsibilities. I have worked for TSA in a variety of management positions since joining the agency in 2003. My roles have included Senior Policy Advisor for Transportation Security, Acting General Manager for the Freight Rail Division, Acting Assistant Administrator for intermodal programs, and General Manager for maritime.

3. Based on my experience, I am well acquainted with the process and procedures for initiating rulemaking under the Administrative Procedure Act, including the issuance of NPRMs.

4. I am aware of this Court's opinion in this case of July 15, 2011, which directs TSA "to conduct notice-and-comment rulemaking" regarding TSA's use of Advanced Imaging Technology ("AIT") ("Opinion"). The rulemaking of the type contemplated by the Opinion requires extensive preparation, including in-depth economic analysis, that is generally measured in months.

5. I am familiar with Executive Order 12866 and Executive Order 13563 directing agencies to follow certain principles in rulemaking, such as consideration

of alternatives and careful analysis of benefits and costs before a notice of proposed rulemaking is issued.

6. Executive Order 12866 requires the Office of Management and Budget ("OMB") to review all proposed regulatory actions before they are published in the *Federal Register* or otherwise issued to the public. The Executive Order also requires agencies to provide an explanation of the need for the regulatory action and an assessment of potential costs and benefits.

7. In particular, Executive Order 12866 of September 30, 1993, Regulatory Planning and Review (58 Fed. Reg. 51735, October 4, 1993), states that agencies in developing a regulation "shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs." Beyond this, other laws – such as the Regulatory Flexibility Act and the Unfunded Mandates Reform Act – require agencies to evaluate the costs and benefits of certain rulemakings.

8. To assist agencies in crafting proposed regulatory action that will meet these standards, OMB has promulgated a 48-page guidance on best practices for regulatory analysis. Specifically, OMB's Circular A-4, entitled "Regulatory

Analysis" and released in September 2003, sets forth in some detail the particular analyses that agencies must undertake before issuing a proposed regulatory action.

9. Circular A-4 is designed to assist regulatory agencies by defining good regulatory analysis and by standardizing the measurement and reporting of the benefits and costs of Federal regulatory actions.

10. Circular A-4 sets forth the extensive analyses that must precede submission of proposed regulatory action to OMB, including an analysis of the proposed regulation's economic impact, as well as an analysis of its costs and benefits.

11. Once a component agency like TSA has completed its drafting of the proposed regulatory action and conducted the required regulatory analyses, it must submit that proposal to its parent Department, in this case DHS, for further review.

12. Once DHS has reviewed and approved the proposed regulatory action, it is submitted to OMB for its review. OMB has 90 days to complete this review, although OMB may extend that review period by an additional 30 days at its discretion.

13. Significantly, Executive Order 13563, entitled Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011), entails a more extensive economic analysis of proposed regulatory action than was required by Executive Order 12866.

14. In accordance with the foregoing requirements, TSA initiated its internal rulemaking process on July 25, 2011, when members of my staff met with agency counsel to discuss the rulemaking required under the Opinion. Further, the staff responsible for drafting the proposed rule indicated to me that they had an initial, very preliminary draft prepared by August 11, 2011, and are available to assist the economists and subject matter experts with their analyses.

15. TSA continues to gather information and data regarding AIT for inclusion in the preamble to the rule.

16. The agency has committed significant resources to comply with this Court's Opinion. Given the importance of this issue, the agency has dedicated several economists, attorneys, and subject matter experts to provide the necessary background information, research, analysis, and general support required to engage in the rulemaking mandated by the Court.

17. Among the challenges facing the agency is the sensitive nature of the information gathered and relied upon by the agency in considering use of AIT. This information includes classified information as described in Executive Order 13526 and its antecedents, as well as Sensitive Security Information ("SSI") as set forth in 49 C.F.R. part 1520. Like classified information, SSI cannot be included in the economic analysis made available to the public and may necessitate preparation of a second analysis containing this information.

18. While TSA has prioritized the rulemaking directed by the Opinion, TSA has many important rulemakings in progress, many of them required by statute. The list includes the following rulemaking actions required by the Implementing the Recommendations of the 9/11 Commission Act of 2007 (Pub. L. No. 110–53, 121 Stat. 266 (2007):

- regulations to require security training programs for public transportation agency frontline employees. *Id.* at § 1408, 121 Stat. at 409-10;
- regulations to require security training programs for railroad frontline employees. *Id.* at § 1517, 121 Stat. at 439-41;
- regulations to require security training programs for over-the-road bus frontline employees. *Id.* § 1534, 121 Stat. at 461;
- regulations to define security-sensitive materials. *Id.* at § 1501(13), 121 Stat. at 423;
- regulations to require vulnerability assessments and security plans for railroad carriers. *Id.* at § 1512, 121 Stat. at 429-33;
- regulations to require vulnerability assessments and security plans for over-the road bus operators. *Id.* at § 1531, 121 Stat. at 454-57;
- regulations to require aircraft repair stations to implement security measures. *Id.* at § 1616, 121 Stat. at 488;
- conducting security background checks on frontline employees of public transportation agencies, which TSA has determined requires a regulation to accomplish. *Id.* at §§ 1411, 1414, 121 Stat. at 413, 419-22;

- conducting security background checks on frontline employees of railroads, which TSA has determined requires a regulation to accomplish. *Id.* at §§ 1520, 1522, 121 Stat. at 444, 448-50.

19. At this time, TSA does not have a full complement of economists available to conduct the analyses required in connection with the multiple proposed regulations being promulgated by the agency. The agency is addressing this deficiency by filling the three current vacancies for economists (out of a total of eleven positions) in the very near future.

20. On average, and absent the challenges noted above or unanticipated circumstances, the process within TSA that is necessary to issue a NPRM entails a timeframe of approximately three years, with longer timelines for more complex rules. In recognition of this Court's directive in the Opinion in this appeal, however, TSA has committed to significantly expediting the AIT rulemaking process and has placed this proposed rule among its highest rulemaking priorities.

21. In reviewing Petitioners' Motion to Enforce the Court's Mandate, I noted Petitioners' claim that DHS had issued more than seventy notices relating to more than twenty proposed rules since the Opinion in this appeal issued on July 15, 2011. The two particular NPRMs described in Petitioners' Motion, however (involving an ammonium nitrate security program and the treatment of aliens subject to EB-5 petitions), were initiated several years before the issuance of a NPRM. Indeed, the ammonium nitrate NPRM was the result of a rulemaking that

began as a result of the Fiscal Year 2008 Department of Homeland Security Appropriations Act, 76 Fed. Reg. 46908 (Aug. 3, 2011), and was based on an Advance Notice of Proposed Rulemaking issued on October 29, 2008 (73 Fed. Reg. 64280). The EB-5-related rulemaking first was in the DHS Unified Agenda in 2003 (68 Fed. Reg. 30280, 30282, 30322 (May 27, 2003)).

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on November 09, 2011.
Arlington, Virginia

James S. Clarkson
Acting General Manager
Intermodal Security Support Division
Transportation Security Administration
U.S. Department of Homeland Security