Motion Ex. 32

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BP AMOCO CHEMICAL COMPANY, Plaintiff/Counter–Defendant, **v.** FLINT HILLS RESOURCES LLC, Defendant/Counter–Plaintiff.	Consolidated Case No. 05 C 5661 Judge Amy J. St. Eve
FLINT HILLS RESOURCES LLC, Third-Party Plaintiff, **v.** BP CORPORATION NORTH AMERICA INC., Defendant.	

BP AMOCO'S RESPONSE TO FHR'S MOTION *IN LIMINE* NO. 10

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S RESPONSE TO FLINT HILLS RESOURCES, LLC'S MOTION *IN LIMINE* REGARDING OTHER LITIGATION

Flint Hills Resources, LLC ("FHR") seeks to bar BP Amoco Chemical Company and BP Corporation North America Inc. (together, "BP Amoco") from introducing evidence of lawsuits in which FHR and related entities[1] make claims and allegations nearly identical to those that

[1] FHR is wholly owned by Koch Industries. Koch witnesses and employees are involved in this litigation. The Koch law department provides counsel to FHR in a shared service context. The Koch Business Development group was the initial contact point in this transaction, identified the opportunity to purchase the Joliet Plant, and so forth. As a functional matter, and for diversity jurisdiction purposes, FHR is treated as part of Koch. (*See* Dkt. No. 14, FHR Answer at ¶ 3; Ex. 1, Bettius Dep. at 100:24-103:24, 107:23-108:9; Ex. 2, Sanders Dep. at 24:7-16, 39:2-20, 40:25-41:5, 41:25-42:7, 88:5-89:14; Ex. 3, Sementelli Dep. at 17:3-20, 19:15-21, 22:1-25, 119:13-120:2, 227:2-228:3, 238:17-239:6; Ex. 4, Dep. Ex. 1174; Ex. 5, Dep. Ex. 1280; Ex. 6, Dep. Ex. 2150; Ex. 7, Dep. Ex. 2219.)

FHR makes here.[2] According to FHR, BP Amoco intends to introduce this evidence only to "portray [FHR] . . . as a 'chronic litigant' to induce the jury to decide this case on an emotional and improper basis." (FHR MIL No. 10, at 2 ¶ 2.) FHR is flatly wrong. While it may very well be true that FHR is a "chronic litigant" as part of a business model or other approach designed to seek purchase price adjustments (reductions) in executed contracts, BP Amoco will ***not*** introduce the evidence of similar litigation in order to establish any chronic litigation strategy by FHR. Instead, BP Amoco will introduce this evidence for at least four legitimate and relevant purposes:

(i) to demonstrate, in conjunction with other evidence, that FHR did not actually and/or justifiably rely upon BP Amoco's representations regarding production capacity at the Joliet refinery. BP Amoco believes that the jury will be readily able to conclude, based upon the evidence, that FHR intended to sue from the start, thus negating the element of justifiable reliance in its fraud claims;

(ii) to show, in conjunction with other evidence, that FHR's motive in filing this lawsuit was not to remedy BP Amoco's contractual deficiencies, but simply to obtain a purchase price adjustment or other benefits it was unable to secure by pre-sale negotiations;

(iii) in conjunction with other evidence, to oppose FHR's allegations that it was prevented from conducting adequate due diligence; and

(iv) to suggest, in conjunction with other evidence, that FHR's damage claims are unreasonable and are not made in good faith.

The purposes for which this evidence will be offered at trial are proper under Federal Rule of Evidence 404(b), which states that evidence of other acts may be presented for purposes such as proof of intent, plan, knowledge, or absence of mistake. *See* Fed. R. Evid. 404(b). Evidence of other lawsuits, according to the Seventh Circuit, is admissible if it meets a four-part test:

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[2] The plaintiff in *Invista B.V. v. E.I. du Pont de Nemours & Co.*, for example, was—like FHR—a Koch Industries subsidiary that sued the seller (DuPont) shortly after purchasing its chemical plants. And like FHR here, the Koch subsidiary there alleged that, in reliance on representations made by DuPont, it conducted only limited due diligence and immediately after closing discovered various environmental and asset-condition issues purportedly worth hundreds of millions of dollars. *See DuPont*, No. 08 CV 3063 (S.D.N.Y., filed Mar. 26, 2008) (Ex. 8, at ¶ 6). In *Flint Hills Resources, LP v. Kerr-McGee Corp. & Southwestern Refining Co.*, Flint Hills alleged that, in reliance on representations from the seller (Kerr-McGee), it purchased a refinery and then discovered environmental and refinery-function issues purportedly worth millions of dollars. *See Kerr-McGee*, No. 04-5441-E (148th Judicial Dist., Texas, filed Jan. 28, 2005) (Ex. 9).

> "(1) The evidence must be directed toward establishing something at issue other than a party's propensity to commit the act charged;
>
> (2) The other act must be similar enough and close enough in time to be relevant to the matter at issue;
>
> (3) The evidence must be such that the jury could find the act occurred and the party in question committed it; and
>
> (4) The prejudicial effect of the evidence must not substantially outweigh its probative value."

Gastineau v. Fleet Mortgage Corp., 137 F.3d 490, 494-95 (7th Cir. 1998). The evidence that BP Amoco will introduce—which is aimed at establishing issues other than FHR's propensity to sue—is admissible under this test and established case law.

I. THE EVIDENCE OF SIMILAR LITIGATION IS ADMISSIBLE TO ESTABLISH THAT FHR DID NOT RELY UPON BP AMOCO'S REPRESENTATIONS.

Reliance is an element of FHR's fraud claim relating to BP Amoco's production capacity representations. Reliance also was an element, throughout this litigation, of FHR's condition-of-assets fraud claims—which FHR only recently dropped. BP Amoco will argue and present evidence from which the jury can conclude that, because FHR planned all along to sue BP Amoco in order to obtain a purchase-price adjustment, FHR did not actually or justifiably rely upon the PSA's representations, production capacity or otherwise.

First, according to FHR's privilege log, internal FHR documents from as early as June or July 2004—immediately after closing—are privileged because they were created in anticipation of litigation. (*See, e.g.*, Ex. 10, FHR Privilege Log, Entry 2429 (6/14/04—"Report contains legal advice regarding plant liabilities; prepared in anticipation of litigation"), Entry 280 (7/7/04—"Email among employees contains information requested by counsel regarding faulty plant equipment; prepared in anticipation of litigation"). Those documents were created long before December 2004, which is when FHR first notified BP Amoco of its alleged claims or concerns. Another example is equally telling. Ten days after closing, on June 7, 2004, FHR prepared an internal "Joliet Project\Joliet agenda" document, titled "Joliet Environmental Discovery Project." According to this document (prepared on June 7 (bottom of page) but dated June 8, 2004), FHR's project objectives included (i) "Identify[ing] significant environmental issues (w/in 6 months)"; (ii) "Develop[ing] baseline environmental data for potential future indemnification"; and (iii) "Develop[ing] database & framework for managing environmental data to support risk

based cleanup and future claims." (Ex. 11, FHR-00417393, Joliet Environmental Discovery Project.) The project document—essentially an agenda—also includes line items for an "Indemnification Summary," a "Discovery Workplan" and "Findings/Filing Claim."

Second, notwithstanding the "anticipation of litigation" referenced in FHR's privilege log as early as June and July 2004, FHR did not contact BP Amoco or complain about the PSA, production capacity, or any of the claims it makes now until seven months after the closing, when it sent its December 2004 demand letter. BP Amoco intends to show that, during those seven months, FHR had its team work up the planned claims, and did so in a privileged manner.[3]

Third, when FHR sought approval from its Board of Directors to purchase the Joliet plant, FHR did not present to its Board the "annualized maximum demonstrated sustainable production" capacities contained in the PSA. (Ex. 12, Dep. Ex. 1307, 2/20/2004 FHR Project Lincoln Board of Director Materials.) Instead, FHR used different, lower numbers that it copied from the "Descriptive Memorandum," or CIM—a document FHR expressly acknowledged could not be a basis for liability against BP Amoco, and upon which Judge Moran held that FHR, as a matter of law, could not rely. *See BP Amoco Chem. Co. v. Flint Hills Resources, LLC*, 489 F. Supp. 2d 853, 859-60 (N.D. Ill. 2007); *BP Amoco Chem. Co. v. Flint Hills Resources, LLC*, 2006 WL 2505691, at *3-4 (N.D. Ill. Aug. 25, 2006). (PSA § 7.3; PSA § 16.7 ("[N]o party shall be bound by or liable for any alleged representation, warranty, promise, inducement or statement of intention, whether in the Descriptive Memorandum, the Data Room, management presentations or any other form in expectation of the transactions contemplated by this Agreement, if it is not set forth in this Agreement or the Schedules or Exhibits."); Dkt. 222, BP Amoco Mem. in Support of Partial Summ. J. on Production Capacity Claims, at 12-13; Dkt. 223, BP Amoco Stmt. of Facts in Support of Partial Summ. J. on Production Capacity Claims, at ¶¶ 21-22.) The

[3] FHR's demand letters and communications regarding the demand letters were prepared by lawyers. (*See, e.g.*, Ex. 13, Dep. Ex. 2271, 12/21/04 Letter from D. Roberston to M. Wrenn; Ex. 14, Dep. Ex. 2272, 04/25/05 Letter from D. Robertson to M. Wrenn; Ex. 15, Dep. Ex. 1874, 08/10/06 Letter from D. Robertson to M. Wrenn; Ex. 16, Robertson Dep. at 259:9-260:13, 264:6-15, 265:7-14, 271:17-272:14.) These letters are one subject of BP Amoco's Motion *in Limine* No. 1. (Dkt. No. 620.) The underlying documents related to these communications with BP Amoco have been cloaked in privilege, for the most part, and thus have not been produced by FHR.

fact that FHR did not rely on the capacity figures in the PSA is evidence that FHR planned all along to sue BP Amoco.[4]

Fourth, when FHR made its December 2004 claim against BP Amoco relating to production capacity, the claim was for $850,000. (Ex. 13, Dep. Ex. 2271 (listing $850,000 as the amount related to "Issue Number 21" on the chart, or "TMA and PIA Unit Maximum Capacities Cannot Be Achieved").) That is substantially less than and different from the production-capacity claim that FHR is making today, which varies from $44 million to $62 million, depending on the different measures used by FHR.

Fifth, the wildly varying amount of FHR's claims—from a total of $10 million in December 2004, to $184 million throughout most of the litigation, to the $105 million (or so) alleged damages today—illustrates FHR's approach: to make claims, drop claims, and change positions in an attempt to achieve a purchase price adjustment after contract signing. (*Compare*, *e.g.*, Ex. 13, Dep. Ex. 2271, *with* Ex. 17, Dep. Ex. 3 (FHR 4/17/07 Claims Chart), *and* Ex. 18 (FHR 2/13/09 Claims Chart).)

The *DuPont* and *Kerr-McGee* litigations fit squarely within this pattern of the evidence—*i.e.*, that FHR did not justifiably or actually rely, and had no intention of relying, on BP Amoco's production numbers, but instead planned from the start to file a lawsuit based on those numbers. For example, in *Kerr-McGee*, which was filed before this lawsuit, FHR alleges that, despite representations and warranties to the contrary, the defendants had improperly calculated maximum allowable emission rates by using process vents to relieve the flare while calculating the emissions. FHR, it claims, did not discover the true numbers until after the purchase closed. (Ex. 9, *Kerr-McGee* Compl. ¶¶ 29-32; *id.* at ¶ 40 ("Because the Refinery's flare system violated applicable Permits and Environmental Laws at and prior to the Closing Date, the Representations and Warranties by Seller, including but not necessarily limited to those in, Sections 3.1.5(a) and 3.1.5(b) of the APA, were inaccurate and have been breached.").)

The evidence that FHR and related entities have made the same allegations elsewhere is relevant to FHR's state of mind, *modus operandi*, and the credibility of its claims—all

[4] In addition, as explained by BP Amoco's due diligence expert James Peters, FHR did not perform substantial due diligence relating to the production capacity figures in either the Descriptive Memorandum or the PSA, further suggesting that FHR never intended to rely on the PSA and instead intended to file a post-closing lawsuit. *See, e.g.*, Ex. 23, Peters Report, at 51, 55-56.

recognized purposes for admitting such evidence. *See, e.g.*, *Gastineau*, 137 F.3d at 495 (in a sex discrimination case, allowing evidence that the plaintiff had sued three former employers, because the evidence illustrated the plaintiff's state of mind regarding his employers, the mental state for which he sought damages, and the fact issue of why the defendant might have kept extra records regarding the employment); *Van Deelen v. Johnson*, 2008 WL 4683022, at *2-3 (D. Kan. Oct. 22, 2008) (denying a motion *in limine* to exclude evidence of other lawsuits, noting that "the prior civil pleadings filed by plaintiff are similar enough to the present case in their allegations, claims and/or substance, that they could in fact reveal that plaintiff had a motive, plan or scheme to bring similar kinds of claims").

II. THE EVIDENCE OF SIMILAR LITIGATION IS ADMISSIBLE FOR IMPEACHMENT PURPOSES AND TO REBUT FHR'S CLAIMS, INCLUDING DAMAGE CLAIMS.

BP Amoco intends to establish at trial that, even before closing on the Joliet plant, FHR planned or was looking to file a lawsuit based on what it learned in due diligence—indeed, that its due diligence was directed at finding post-sale claims that it could file. The evidence on record demonstrates that FHR's due diligence was extensive. (*See* Dkt. No. 297, BP Amoco Resp. to FHR Stmt. of Add. Facts ¶¶ 94-95, 99-100, 102.) In the course of that process, FHR learned about the condition of the Joliet assets and, it says, nonetheless believed that nothing about those assets would give rise to a claim for breach. (Ex. 19, Personey Dep. at 157:9-19.) FHR's due diligence team specifically concluded that there were no "show stoppers" in what they learned. (Ex. 20, Dep. Ex. 1693, at FHR-E00276130-0001.) Yet, as set forth above, FHR began preparing for litigation immediately after closing.

The *DuPont* and *Kerr-McGee* litigations, in which FHR and related entities alleged to have discovered similar issues immediately upon closing, are powerful evidence to establish that FHR's motivation in making the claims it has made here was not to remedy contractual deficiencies by BP Amoco, but simply to obtain a post-closing purchase price adjustment or other benefits it could not get through pre-sale price negotiations with BP Amoco. In December 2003, for example, FHR lowered its offer for the Joliet plant by $65 million, to $200 million for the non-working capital assets. After BP Amoco decided not to proceed on that basis and negotiations between BP Amoco and FHR broke off, FHR raised its offer by $25 million to get the deal closed. FHR now seeks to recoup that $25 million, and much more, through this lawsuit. (Ex. 3, Sementelli Dep. at 234:12-237:16, 238:17-239:6, 246:2-9, 248:22-249:5; Ex. 21,

Dep. Ex. 2246, at BPACCE0013097-0065; Ex. 22, Dep. Ex. 2251, at FHR-E00111327-0057.) *See, e.g.*, *Duckworth v. Ford*, 83 F.3d 999, 1001-02 (8th Cir. 1996) (in a case alleging that the defendant superintendent retaliated against an officer, upholding the district court's decision to admit evidence regarding a similar lawsuit against the same defendant: "Evidence that Ford had retaliated against someone else at about the same time and under similar circumstances is evidence from which the jury could reasonably infer that Ford had a similar motive or intent to retaliate against Duckworth").

Importantly, and independently, the similar litigation is relevant in another capacity as well: to counter FHR's claims of stymied due diligence. FHR has claimed throughout this litigation that BP Amoco impeded, or caused FHR to cut short, its due diligence efforts with respect to the Joliet plant. (*See, e.g.*, Dkt. No. 14, FHR Countercl. ¶¶ 47, 169; Dkt. No. 267, FHR Stmt. of Add. Facts (COA) ¶¶ 94-95, 99-100; Ex. 16, Robertson Dep. at 115:6-10, 163:20-21, 164:22-25.) It appears from the similar litigation that this is a tactic that FHR and its related entities have decided to follow generally. For example, Koch purchased the assets at issue in the *DuPont* lawsuit on April 30, 2004 (Ex. 8, *DuPont* Compl. ¶ 1)—only one month before the transaction at issue in this case—and the *DuPont* lawsuit was filed while this case was underway. The Koch entities in that litigation make allegations identical to the due diligence allegations here: "In light of DuPont's self-declared and purportedly excellent environmental and safety record, . . . and because of the broad environmental, health and safety indemnifications to be in the Purchase Agreement, [plaintiffs] agreed to DuPont's insistence on limited due diligence at several facilities." (Ex. 8, *DuPont* Compl. ¶ 28.)

In *Daubert* proceedings, the Court has ruled that the evidence and extent of FHR's due diligence is relevant to material issues in this case. (*See* Dkt. No. 511, at 4; Dkt. No. 517, at 6; Dkt. No. 519, at 4.) That ruling makes all the more relevant the fact that FHR is claiming elsewhere that it was put at risk as a result of insufficient or inadequate due diligence. The notion that one of the world's largest privately held corporations is naïve is difficult enough to credit. Yet FHR contends that it has been repeatedly naïve and misled during due diligence, with unrelated parties. *See, e.g.*, *Medley v. Turner*, 1995 WL 296942, at *2 (N.D. Ill. May 12, 1995) (in a police excessive-force case, holding that the facts of another case against one defendant were admissible to establish intent and/or absence of mistake). The evidence of similar litigation therefore speaks to whether FHR was hindered, or made the mistakes it claims, in due

diligence—*i.e.*, whether FHR was, or should have been, comfortable in simply relying on BP Amoco's representations as to production capacity or indemnification on environmental issues. *Cf. Kerr-McGee* (Ex. 9, *Kerr-McGee* Compl. ¶¶ 29, 32, 36) (alleging that, although the defendants "warranted and represented that they were selling to FHR a Refinery that was functional, in good working order, and being operated in compliance with the law," the defendants knew, but FHR discovered only after closing, that unlawful process vents had been installed throughout the facility).

The evidence of similar litigation is likewise probative of whether FHR's damage claims are reasonable and made in good faith. BP Amoco contends that the evidence establishes that FHR's many damages claims have been inflated and are not based upon facts. Indeed, by now FHR has substantially reduced or even dropped many of its damage claims. Precisely the same types of damage claims—alleged failure to indemnify environmental actions, discovery of contract violations immediately post-closing—were alleged by FHR/Koch in the *DuPont* and *Kerr-McGee* litigations. (*E.g.*, Ex. 8, *DuPont* Compl. ¶¶ 181, 187; Ex. 9, *Kerr-McGee* Compl. ¶¶ 41, 52-54, 61-63.) BP Amoco seeks to use the evidence of similar litigation to underscore its position that FHR's motive when it undertook due diligence and negotiated the Joliet transaction was, in part, to conjure issues that it could later claim as "damages." *See, e.g.*, *Tomaino v. O'Brien*, 315 F. App'x 359, 360-61 (2d Cir. 2009) (in a case alleging false arrest and malicious prosecution, upholding the admission of evidence on the plaintiff's previous, similar lawsuits: "While Tomaino argues that this evidence was admitted improperly as propensity evidence of Tomaino's litigiousness, it was admissible as legitimately bearing on Tomaino's credibility").[5]

Finally, the similar litigation is relevant if FHR is allowed to present evidence of an alleged "rescission" offer, which BP Amoco has moved to excluded in its Motion *in Limine* No. 1 (Dkt. No. 620). FHR claims to have made an offer to rescind the Joliet transaction. BP Amoco contends that this was never a real offer, given that FHR intended to sue all along and, as

[5] This is particularly true and relevant here, given the express contractual duty imposed upon FHR in Section 13.5 of the PSA, which provides that the claims FHR makes must, among other things, be made in good faith and be reasonable. *See* PSA §13.5(a)(i) ("If: . . . (B) an Indemnified Party under this Agreement shall have Losses that are subject to Indemnification under this Agreement which does not involve a Third Party Claim . . . the Indemnified Party shall with reasonable promptness send to the Indemnifying Party a written notice specifying . . . the amount of Losses sought in such Claim (the actual amount of the Losses or, if practicable, ***a reasonable, good faith estimate thereof*** if the actual amount is not known or not capable of reasonable calculation . . . .") (emphasis added).)

far as BP Amoco can determine, FHR has presented no evidence that its Board approved, or even considered, rescinding the transaction. Moreover, any such alleged rescission offer was made in the context of settlement negotiations and should be excluded pursuant to Federal Rule of Evidence 408. (*See* Dkt. No. 620, BP Amoco's Motion *in Limine* No. 1.) But if the alleged "rescission" offer is admitted into evidence, then BP Amoco must be allowed to counter it with evidence of FHR's long-standing plan to turn the Joliet transaction into litigation in hopes of obtaining a purchase-price adjustment.

III. FHR'S OWN CITED AUTHORITY SUGGESTS THAT THE SIMILAR LITIGATION SHOULD BE ADMISSIBLE HERE.

FHR relies on two Seventh Circuit cases to support its argument that FHR's similar litigation should be inadmissible here, but neither of those cases leads to such a conclusion. In *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001), the plaintiff sued for discrimination when he was denied a job as a car salesman. The defendant dealership sought to introduce evidence that the plaintiff had brought identical lawsuits against at least six other area dealerships during the same time period. The district court ruled that the defendant could not introduce this evidence ***solely*** to show that the plaintiff was a litigious person or bad character. *See id.* at 775. The district court, however, ***allowed*** some of the evidence "for other purposes, such as to attack [the plaintiff's] credibility." *Id.* The Seventh Circuit agreed that the evidence could be used for proper purposes, such as showing that the plaintiff "was engaged in a plan or scheme to harass Chicago-area car dealerships, and that his methods or *modus operandi* in the prior suits were very similar." *Id.* at 776. The problem with using the rest of the evidence, the Seventh Circuit agreed, was its tendency to plunge the proceedings into mini-trials over the merits of each of the six prior suits. *See id.* No such danger exists in this case, where the issue is not the merits of the previous allegations, but only the fact that they were made. Indeed, *Mathis* supports BP Amoco's argument that the other lawsuits, such as *DuPont* and *Kerr-McGee*, are admissible: FHR already has dropped or been forced to drop more than half of the individual claims it has made in this case, and more than 43% of the damages amounts it has sought. If, as BP Amoco will argue at trial, FHR's plan was to find issues for a lawsuit first and worry about their validity only later, then the *DuPont* and *Kerr-McGee* evidence goes to the heart of FHR's credibility.

In *International Surplus Lines Insurance Co. v. Fireman's Fund Insurance Co.*, 998 F.2d 504 (7th Cir. 1993), the plaintiff sought to introduce litigation to which ***neither*** the plaintiff nor the defendant was a party. According to the plaintiff, a third-party reinsurer's contention in that litigation was evidence that the defendant at bar had not communicated a particular requirement to its reinsurers. The Seventh Circuit "defer[red] to the trial court's discretionary decision that admitting only a statement that Gen Re disputed the reinstatement provision in unrelated Michigan litigation would have been unduly prejudicial and that to allow explanations and evidence to overcome the prejudice would have required a trial within a trial." *Id.* at 508. This fact-based, discretionary decision (upon materially different facts) sheds little light on whether the particular evidence of similar litigation is proper in this case. *See, e.g., United States v. Hill*, 196 F.3d 806, 808 (7th Cir. 1999) (holding that when a discretionary "decision depends on the particular facts of the particular case . . . uniformity of outcome across cases is neither necessary nor feasible").

Unlike in *International Service Lines*, the probative value of the evidence that BP Amoco will introduce in this case outweighs any potential prejudice. BP Amoco is not seeking to show the jury half a dozen cases filed in a short time period, or to introduce third-party statements from litigation involving neither the plaintiff nor the defendant here. Instead, BP Amoco will provide evidence on such material issues as whether FHR in fact relied on BP Amoco representations in the PSA, how the parties interpreted the PSA, the amount and purpose of due diligence conducted by FHR, whether FHR (or its parent) actually was misled multiple times during diligence with different parties, and the reasonableness, good faith, and credibility of FHR's damages claims. These are all legitimate purposes for introducing evidence of similar litigation.

CONCLUSION

WHEREFORE, BP Amoco respectfully requests the Court to deny FHR's Motion *in Limine* No. 10, which seeks to preclude the admission of evidence concerning similar litigation filed by FHR and related entities.

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Respectfully submitted,

_____/s/ Scott W. Fowkes_____

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

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