UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on behalf of all others similarly situated,	)	Civil Action No. 08-03535
	)	Sec. R
Plaintiffs,	)	JUDGE SARAH S. VANCE
v.	)	Mag. 3
	)	MAGISTRATE JUDGE DANIEL E. KNOWLES, III
JACKSON HEWITT TAX SERVICE INC.; JACKSON HEWITT INC.; and, CRESCENT CITY TAX SERVICE, INC. d/b/a JACKSON HEWITT TAX SERVICE,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

Plaintiff, Vicki L. Pinero, submits this memorandum in support of her Motion to Compel against defendants Jackson Hewitt Tax Service Inc. ("JHTSI") and Jackson Hewitt Inc. ("JHI") (jointly referred to as "Defendants").

I. INTRODUCTION

Although Plaintiff has served very little discovery on Defendants, this is the second time Plaintiff has been forced to seek relief from the Court for Defendants' failure

to properly respond to her discovery requests. *In total*, Plaintiff has propounded on JHTSI only 3 interrogatories, 1 request for admission, and 6 document requests. As to JHI, Plaintiff has propounded the same amount of discovery, plus an additional document request. Yet Defendants have not provided ***any*** of the requested information or documents.[1]

II. PROCEDURAL HISTORY AND FACTS

On June 8, 2009, Plaintiff served a single, identical document request on both JHTSI and JHI. After Defendants refused to respond to that request, Plaintiff filed a motion to compel. *See* Docket No. 156.

In their opposition memorandum to Plaintiff's compel motion, Defendants argued Plaintiff's motion was "moot" because of Plaintiff's issuance of a second document request. *See* Docket No. 162, at p. 2. Even though Plaintiff never intended to "moot" any discovery request, the Court ruled Plaintiff's compel motion was moot in light of the issuance of Plaintiff's second document request. *See* Docket No. 165, at p. 1. The Court noted, however, that it was reserving unto Plaintiff the right to test the sufficiency of Defendants' response to Plaintiff's second document request. *Id.* Despite service of Plaintiff's second document request on JHTSI and JHI on July 10, 2009, Defendants still have *not* produced a single document to Plaintiff.[2] Instead, Defendants continue to

[1] Although not currently before the Court, Plaintiff notes defendant Crescent City Tax Service, Inc. d/b/a Jackson Hewitt Tax Service ("CCTSI") has likewise not provided any requested information or documents.

[2] *See* Exhibit A, 2d Doc. Req. to JHTSI; Exhibit B, 2d Doc. Req. to JHI.

"stonewall" Plaintiff with improper objections.[3]

On July 13, 2009, Plaintiff served a single, identical interrogatory on both JHTSI and JHI.[4] And, again, Defendants refused to answer Plaintiff's single question based upon numerous improper objections.[5]

On July 23, 2009, Plaintiff served 2 additional interrogatories and 4 additional document requests on JHTSI; and 2 additional interrogatories and 5 additional document requests on JHI.[6] And, once again, Defendants refused to answer Plaintiff's basic discovery based upon numerous improper objections.[7]

III. LAW AND ARGUMENT

As this Court has repeatedly stated, "[c]ivil discovery is *not* a game of ambush." *Vinet v. F & L Marine Management, Inc.*, 2004 WL 3312007, *3 (E.D. La. 2004) (emphasis added); *Karr v. Four Seasons Maritime, Ltd.*, 2004 WL 797728, *3 (E.D. La. 2004). Fed. R. Civ. P. 26(b)(1) allows "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things[.]" The Rule provides "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). "The Federal Rules of Civil Procedure therefore permit broad

[3] *See* Exhibit C, Defs. Comb. Resp. to 2d Doc. Req.
[4] *See* Exhibit D, 1st Interr. to JHTSI; Exhibit E, 1st Interr. to JHI.
[5] *See* Exhibit F, Defs. Comb. Resp. to 1st Interr.
[6] *See* Exhibit G, Disc. to JHTSI; Exhibit H, Disc. to JHI.
[7] *See* Exhibit I, JH Comb. Disc. Resp.

discovery, allowing inquiry into any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue related to the claim or defense of any party." *Reine v. Honeywell Intern., Inc.*, 2008 WL 1901398, *1 (M.D. La. 2008). "The discovery rules are accorded a broad and liberal treatment to achieve their purpose of adequately informing litigants in civil trials." *Crosby v. Blue Cross/Blue Shield of Louisiana*, 2009 WL 1870245, *2 (E.D. La. 2009).

Pursuant to Fed. R. Civ. P. 33(a)(2), a party may serve on any other party interrogatories "relate[d] to any matter that may be inquired into under Rule 26(b)." As the Rule makes abundantly clear, "[a]n interrogatory is ***not*** objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]" Fed. R. Civ. P. 33(a)(2) (emphasis added). Such "contention interrogatories" are often used to "require the answering party to commit to a position and give factual specifics supporting its claims." *Ziemack v. Centel Corp.*, 1995 WL 729295, *2 (N.D. Ill. 1995). A party objecting to any interrogatory must state its objections with "specificity." Fed. R. Civ. P. 33(b)(4).

Pursuant to Fed. R. Civ. P. 34(b)(2)(A), "[t]he party to whom [a] request [for production of documents] is directed must respond in writing within 30 days after being served." "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). "[T]he party resisting discovery by asserting any privilege bears the burden of proof sufficient to substantiate its privilege claims and cannot rely merely on a blanket assertion of privilege." *BG Real Estate*

Services v. American Equity Ins. Co., 2005 WL 1309048, *3 (E.D. La. 2005). "Pursuant to Rule 26(b)(5), when a party withholds information that is otherwise discoverable under a claim of privilege or work-product protection, the party must make the claim expressly and describe the nature of the documents, communications, or things not produced or disclosed, in a manner that will enable other parties to assess the applicability of the privilege or protection without revealing the information itself." *Elloie v. Allstate Ins. Co.*, 2008 WL 4747214, *5 (E.D. La. 2008); *see also* Fed. R. Civ. P. 26(b)(5)(A).

"[W]here the Rule 26(b)(5) [privilege] log has not been provided, all assertions of privilege or other protections against the requested discovery have been deemed waived." *Stevens v. Omega Protein, Inc.*, 2002 WL 1022507, *3 (E.D. La. 2002); *see also Bordonaro v. Union Carbide Corp.*, 1995 WL 234545, *2 (E.D. La. 1995) ("Any objections based on work-product or attorney-client privilege has been waived by virtue of plaintiff's non-compliance with [Fed. R. Civ. P. 26(b)(5)(A).]"); *Coldwell Banker Real Estate Corp. v. Danette O'Neal*, 2006 WL 3845011, *1 (E.D. La. 2006) ("In other contexts in which a privilege log is required, failure to provide the log has resulted in a finding that any privilege has been waived.").

A. The Court Should Overrule Defendants' Unsubstantiated "Boilerplate" Objections And Privilege Arguments

In all of their discovery responses, Defendants make "general" or "blanket" objections.[8] Such objections are improper. *See, e.g., Sonnino v. University of Kansas Hosp. Authority*, 221 F.R.D. 661, 666-667 (D. Kan. 2004); *PLX, Inc. v. Prosystems, Inc.*,

[8] *See* Exhibit C, Defs. Comb. Resp. to 2d Doc. Req., at pp. 1-3; Exhibit F, Defs. Comb. Resp. to 1st Interr., at pp. 1-3; Exhibit I, JH Comb. Disc. Resp., at pp. 1-3.

220 F.R.D. 291 (N.D. W.Va. 2004) (sanctioning defendants and defense counsel for improper objections and discovery responses). As Courts have ruled, "such ostensible objections [are] 'worthless,' except to delay discovery." *Starlight Intern., Inc. v. Herlihy*, 181 F.R.D. 494, 497 (D. Kan. 1998).

The following ruling is particularly relevant to Defendants' discovery responses:

> The court finds these General Objections worthless for anything beyond delay of the discovery. [Respondents] might just as well have said they object upon every possible ground which the law may provide, so long as it may conceivably apply to an interrogatory. These ostensible objections say nothing of consequence. They do not constitute objections. [Respondents] have made no meaningful effort to show the application of any such theoretical objection to any interrogatory. They have simply stated them as hypothetical or contingent possibilities. Neither the court nor anyone else could reasonably determine beyond speculation what objection, if any, [respondents] intend to assert against any specific interrogatory. They hedge each objection with noncommittal language "to the extent" it may apply. This says nothing more than [respondents] possibly may or may not want to object to an interrogatory on any one or more of twelve different, broadly stated grounds. They have not justified the application of any "privilege, protection, or immunity." They have demonstrated nothing to be "unduly burdensome and expensive," either by affidavit or anything else of record. They have not shown how any interrogatory may exceed or conflict with the Federal Rules of Civil Procedure. They have shown nothing to be a trade secret or proprietary information. They have failed to show any supposed irrelevancy. They have done nothing of consequence to support any objection. The court finds [respondents] have waived whatever objections they might have asserted. It thus overrules their ostensible objections and sustains the motion to compel [respondents] to respond to Interrogatories Nos. 2 through 5.

Cotracom Commodity Trading Co. v. Seaboard Corp., 1998 WL 231135, *1 (D. Kan. 1998).

Further, Defendants "boilerplate" objections resist document productions based upon privilege arguments.[9] Yet, Defendants have ***not*** produced a privilege log, as required by Fed. R. Civ. P. 26(b)(5), ***and despite undersigned counsel's repeated requests to produce the log***. Defendants, therefore, have waived any privilege argument by failing to produce the required log. *See Stevens*, 2002 WL 1022507 at *3.

Considering the foregoing, the Court should overrule Defendants' unsubstantiated "boilerplate" objections, including privilege arguments, and compel Defendants to respond to Plaintiff's discovery.

B. The Court Should Compel Defendants To Properly Respond To Plaintiff's Interrogatories

As noted, Plaintiff served a total of 3 identical interrogatories on JHTSI and JHI.[10] Plaintiff's discovery and Defendants' responses[11] are as follows:

> **INTERROGATORY:**
> Please identify (as defined above) all documents that you believe evidence [JHTSI's/JHI's] attempt(s) to comply with the Federal Trade Commission's Safeguards Rule, 16 C.F.R. §§ 314.3-314.4, from January 1, 2005 until June 8, 2009.
>
> **RESPONSE:**
> Jackson Hewitt objects to this Request for all of the reasons listed above. However, subject to the objections above, and the entry of an appropriate confidentiality and protective order, and reserving all rights to supplement its response as the case progresses, Jackson Hewitt responds that it is prepared to make available relevant, non-privileged documents, ***if any***, in its possession, custody or control, sufficient to reflect the "policies,

[9] *See* Exhibit C, Defs. Comb. Resp. to 2d Doc. Req., at p. 2, objection 1; Exhibit I, JH Comb. Disc. Resp., at p. 2, objection 3.
[10] *See* Exhibit D, 1st Interr. to JHTSI; Exhibit E, 1st Interr. to JHI.; Exhibit G, Disc. to JHTSI; Exhibit H, Disc. to JHI.
[11] *See* Exhibit F, Defs. Comb. Resp. to 1st Interr. (emphasis added); Exhibit I, JH Comb. Disc. Resp. (emphasis added).

procedures, and protocols" relevant to Plaintiff's claim, in response to Plaintiff's Second Request for Production of Documents, and refers Plaintiff thereto.

INTERROGATORY:
Please identify the person(s) most knowledgeable about your marketing practices, policies, procedures, strategies, and goals.

RESPONSE:
Jackson Hewitt objects to this Interrogatory for all of the reasons listed in the General Objections, and in the Motion for a Protective Order which is being filed concurrently. Furthermore, Jackson Hewitt objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and seeks irrelevant information, including information that is beyond the substantive, temporal, and geographic scope of this case, and therefore is not reasonably calculated to lead to admissible evidence. Jackson Hewitt further objects to this Interrogatory to the extent that it is vague, and therefore overbroad and unduly burdensome, in its reference to "strategies" and "goals."

INTERROGATORY:
Please state your policy for each year from 1998 to the present for requiring JH Franchisees to retain original or "hard copies" of the tax returns such franchisees filed for their JH Customers.

RESPONSE:
Jackson Hewitt objects to this Interrogatory for all of the reasons listed in the General Objections. Furthermore, Jackson Hewitt objects to this Interrogatory on the grounds that it is overbroad, unduly burdensome, and seeks irrelevant information including information that is beyond the temporal and geographic scope of this case. However, subject to the objections above, and the entry of an appropriate confidentiality and protective order, and reserving all rights to supplement its response as the case progresses, Jackson Hewitt responds that it is prepared to make available relevant, non-privileged documents, ***to the extent any exist***, in its possession, custody or control, sufficient to reflect the "policies" relevant to Plaintiff's claim, in response to Interrogatory No. 2, and refers Plaintiff hereto.

Defendants' responses to Plaintiff's 3 interrogatories are improper for at least 3 reasons. ***First***, with respect to Plaintiff's first and third interrogatories, Defendants do *not*

answer the questions asked. Instead, Defendants attempt to transform Plaintiff's interrogatories into *document requests* to create unfounded objections. Rather than provide the requested *information*, Defendants state they will produce *documents*, but only upon entry of a confidentiality and protective order. Defendants' response is merely a pretext for refusing to provide the requested information. The Court should compel Defendants to answer the questions asked.[12]

Second, as the above-emphasized language indicates, Defendants have *not* even undertaken the preliminary task of identifying any of the related documents in order to answer Plaintiff's basic questions. Under the circumstances, Defendants' objections are, *at best*, merely theoretical. Defendants' improper approach to answering discovery, *i.e.*, asserting objections and claims of privilege without reviewing or identifying the related documents, explains why Defendants are unable to respond to Plaintiff's simple interrogatories asking for identification of certain documents and witnesses. The Court should not permit Defendants to "presume" objections and privileges. Defendants' prospective objections, including those as to privilege, should be overruled.

Third, Defendants' objections to Plaintiff's request for identification of persons most knowledgeable about Defendants' marketing practices are inappropriate. Plaintiff's second interrogatory is the subject of Defendants' pending Motion for Protective Order and Motion to Quash. *See* Docket No. 172. As explained in Plaintiff's opposition memorandum, the requested information is relevant and discoverable. *See* Docket No.

[12] Although Fed. R. Civ. P. 33(d) permits a party, under certain circumstances, to produce records in lieu of responding to an interrogatory, Defendants have *not* made any showing that production of the records is appropriate here.

177. The Court should compel Defendants to answer Plaintiff's interrogatory.

C. The Court Should Compel Defendants To Properly Respond To Plaintiff's Document Requests

As noted, Plaintiff served 6 identical document requests on JHTSI and JHI, and one additional document request on JHI only.[13] Plaintiff's discovery and Defendants' responses[14] are as follows:

> **REQUEST FOR PRODUCTION:**
> Produce all documents setting forth, explaining, describing, and/or identifying [JHTSI's/JHI's] policies, practices, procedures, and/or protocols that: (a) ensure the security and/or confidentiality of JH Customer Information and Customer Documents; and/or (b) protect against any threats or hazards to the security or integrity of JH Customer Information and Customer Documents; and/or (c) protect against unauthorized access to or use of JH Customer Information and Customer Documents.
>
> **RESPONSE:**
> Jackson Hewitt objects to this response for all of the reasons listed above. However, subject to the objections above, and subject to the entry of an appropriate protective order, Jackson Hewitt is prepared to make available relevant, non-privileged documents, ***if any***, in its possession, custody or control, sufficient to reflect the "policies, procedures, and protocols" relevant to Plaintiff's claim.
>
> **REQUEST FOR PRODUCTION:**
> Please produce a copy of all insurance policies issued to [JHTSI/JHI] or any of [JHTSI's/JHI's] officers or directors, and any policies issued to any other person or entity naming [JHTSI/JHI] and/or any [JHTSI/JHI] employee, officer, or director as an additional insured or named insured, and any policies that may provide coverage for the acts or omissions alleged in the Complaint.
>
> **RESPONSE:**
> Jackson Hewitt objects to this Request for Production for all of the reasons

[13] *See* Exhibit A, 2d Doc. Req. to JHTSI; Exhibit B, 2d Doc. Req. to JHI; Exhibit G, Disc. to JHTSI; Exhibit H, Disc. to JHI.

[14] *See* Exhibit C, Defs. Comb. Resp. to 2d Doc. Req. (emphasis added); Exhibit I, JH Comb. Disc. Resp. (emphasis added).

listed in the General Objections. Furthermore, Jackson Hewitt objects to this Request for Production on the grounds that it is overbroad, unduly burdensome, and seeks irrelevant information, including information that is beyond the substantive, temporal, and geographic scope of this case, including but not limited to its reference to "officers or directors," and "any employee, officer or director." However, subject to the objections above, and the entry of an appropriate confidentiality and protective order, and reserving all rights to supplement its response as the case progresses, Jackson Hewitt responds that it is prepared to make available relevant, non-privileged documents, ***to the extent any exist***, in its possession, custody or control, sufficient to satisfy Rule 26(a)(l)(A)(iv).

REQUEST FOR PRODUCTION [*ONLY DIRECTED TO JHI*]:
Please produce a copy of your franchise agreement with CCTSI, including your current agreement and all prior agreements and amendments and supplements thereto.

RESPONSE:
Jackson Hewitt objects to this Request for Production for all of the reasons listed in the General Objections. Furthermore, Jackson Hewitt objects to this Request for Production on the grounds that it is overbroad, unduly burdensome, and seeks irrelevant information, including information that is beyond the geographic and temporal scope of this case. However, subject to the objections above, and the entry of an appropriate confidentiality and protective order, and reserving all rights to supplement its response as the case progresses, Jackson Hewitt responds that it is prepared to make available relevant, non-privileged documents, ***to the extent any exist***, in its possession, custody or control, sufficient to reflect a response to the above request for production.

REQUEST FOR PRODUCTION:
Please produce a copy of all Joint Marketing Agreements, Cross Marketing Agreements, Program Agreements, and Technology Agreements effective any time during May 22, 1998 to the present, including all amendments, supplements, addendums, and modifications to such agreements.

RESPONSE:
Jackson Hewitt objects to this Request for all of the reasons listed in the General Objections and in the Motion for a Protective Order which is being filed concurrently. Jackson Hewitt objects to the usage of the terms "Joint Marketing Agreements," "Cross Marketing Agreements," "Program Agreements," and "Technology Agreements" for the reason that, as defined by the Requests, those terms are overbroad, unduly burdensome, and not

reasonably calculated to lead to admissible evidence. Furthermore, Jackson Hewitt objects to this Request as overbroad, unduly burdensome, and seeking irrelevant information, to the extent that it demands information that is beyond the temporal and geographic scope of this case, and therefore is not reasonably calculated to lead to admissible evidence. Jackson Hewitt further objects to this Request for Production on the grounds that it is not properly directed at issues of class discovery, and therefore contradicts the directive in District Judge Vance's order directing that class issues be resolved prior to merits issues.

REQUEST FOR PRODUCTION:

Please produce a copy of all documents explaining, describing, or summarizing any Joint Marketing Agreements, Cross Marketing Agreements, Program Agreements, and/or Technology Agreements effective any time during May 22, 1998 to the present. Please include in your response any documents explaining, describing, or summarizing the implementation of any Joint Marketing Agreement, Cross Marketing Agreement, Program Agreement, and/or Technology Agreement effective any time during May 22, 1998 to the present.

RESPONSE:

Jackson Hewitt objects to this Request for all of the reasons listed in the General Objections and in the Motion for a Protective Order which is being filed concurrently. Jackson Hewitt objects to the usage of the terms "Joint Marketing Agreements," "Cross Marketing Agreements," "Program Agreements," and "Technology Agreements" for the reason that, as defined by the Requests, those terms are overbroad, unduly burdensome, and not reasonably calculated to lead to admissible evidence. Jackson Hewitt further objects to this Request to the extent that it is vague, and therefore overbroad and unduly burdensome, in its reference to "strategies" and "goals." Furthermore, Jackson Hewitt objects to this Request as overbroad, unduly burdensome, and seeking irrelevant information, to the extent that it demands information that is beyond the temporal and geographic scope of this case, and therefore is not reasonably calculated to lead to admissible evidence. Jackson Hewitt further objects to this Request for Production on the grounds that it is not properly directed at issues of class discovery, and therefore contradicts the directive in District Judge Vance's order directing that class issues be resolved prior to merits issues.

REQUEST FOR PRODUCTION:

Please produce a copy of all documents setting forth the document retention policies you mandated to your JH Franchisees for each year from 1998 to the present.

RESPONSE:

Jackson Hewitt objects to this Request for all of the reasons listed in the General Objections. Furthermore, Jackson Hewitt objects to this Request for Production on the grounds that it is overbroad, unduly burdensome, and seeks irrelevant information, including information that is beyond the temporal and geographic scope of this case. Jackson Hewitt further objects to this Interrogatory to the extent that it is vague, and therefore overbroad and unduly burdensome, in its reference to "mandated." However, subject to the objections above, and the entry of an appropriate confidentiality and protective order, and reserving all rights to supplement its response as the case progresses, Jackson Hewitt responds that it is prepared to make available relevant, non-privileged documents, ***to the extent any exist***, in its possession, custody or control, sufficient to reflect Jackson Hewitt's "policies" in response to the above request for production.

Defendants' responses to Plaintiff's document requests are improper for at least 5 reasons. ***First***, nearly all of Defendants' responses to Plaintiff's document requests suffer from the same deficiency in Defendants' responses to Plaintiff's interrogatories, namely Defendants' objections and claims of privilege/confidentiality are theoretical and premature, as Defendants have ***not*** yet identified the existence of responsive documents.

Second, to make matters worse, Defendants make contradictory and inconsistent objections. In their "boilerplate," general objections, Defendants object to the production of the requested documents based upon the contention that the requested documents are "readily available in the public domain or public record[.]"[15] Yet, at the same time, Defendants refuse to produce the requested documents based upon privilege and confidentiality arguments.[16] Defendants are simply double-dealing.

Third, Defendants' objections to production of their insurance policies are

[15] *See* Exhibit C, Defs. Comb. Resp. to 2d Doc. Req., at p. 3, Objection 6; Exhibit I, JH Comb. Disc. Resp., at p. 2, Objection 5.

[16] *See* Exhibit C, Defs. Comb. Resp. to 2d Doc. Req., at pp. 1-2; Exhibit I, JH Comb. Disc. Resp., at pp. 1-2.

improper. Defendants make no showing that their insurance policies are in any way "privileged," "confidential," or "proprietary." Nor can they make such a showing, as insurance companies may be sued directly per Louisiana's Direct Action Statute.

Fourth, Defendants' objections to Plaintiff's request for production of JHI's franchise agreement with CCTSI is also improper. In various pleadings, Defendants have alleged they are *not* liable for CCTSI's actions. *See, e.g.*, Docket No. 123. Plaintiff is entitled to examine all agreements between JHI and its franchisee, CCTSI, to evaluate the veracity of Defendants' contention.

Fifth, Defendants' objections to Plaintiff's request for documents with their third-party "business partners" are inappropriate. Plaintiff's requests are the subject of Defendants' pending Motion for Protective Order and Motion to Quash. *See* Docket No. 172. As explained in Plaintiff's opposition memorandum, the requested documents are relevant and discoverable. *See* Docket No. 177. The Court should compel Defendants to produce the documents.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's Motion to Compel; compel Defendants to properly respond to Plaintiff's discovery; and, award Plaintiff all costs and attorneys' fees incurred in bringing this motion.

Respectfully Submitted,

/s/ Bryan C. Shartle
David Israel (LSBA No. 7174) (T.A.)
Bryan C. Shartle (LSBA No. 27640)
Justin H. Homes (LSBA No. 24460)
SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.P.
3850 N. Causeway Blvd.
Lakeway II, Suite 200
Metairie, Louisiana 70002
Telephone: (504) 828-3700
Facsimile: (504) 828-3737

Attorneys for Plaintiff,
Vicki L. Pinero

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record ✓ by ECF; __ by email; __ by hand; __ by fax; __ by FedEx; __ by placing a copy of same in the U.S. Mail, postage prepaid this 8th day of September 2009.

/s/ Bryan C. Shartle
Bryan C. Shartle

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