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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY, Plaintiff, v. BITTERROOT PUBLIC LIBRARY, CITY OF HAMILTON, LEE ENTERPRISES, INC., and BOONE KARLBERG P.C., Defendants.	Cause No. CV-11-064-M-DWM DEFENDANT LEE ENTERPRISES, INC.'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S FIRST REQUEST INJUNCTIVE RELIEF

COMES NOW Co-Defendant, Lee Enterprises, Inc. ("Lee Enterprises"), through its counsel, Garlington, Lohn & Robinson, PLLP, and hereby respectfully files its Brief in Opposition to Plaintiff's First Request Injunctive Relief (Dkt. 70).

INTRODUCTION

Plaintiff, Michael Spreadbury ("Spreadbury"), has filed a request for injunctive relief. However, Spreadbury has not established he is likely to succeed on the merits of his claim, has not established he is likely to suffer irreparable harm in the absence of preliminary relief, has not established the balance of equities tips in his favor, and has not established that an injunction is in the public interest. Accordingly, Spreadbury's First Request Injunctive Relief should be denied.

ARGUMENT

"A party seeking a preliminary injunction must demonstrate (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest." *Earth Is. Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (citing *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 19 (2008)). "A preliminary injunction is an 'extraordinary and drastic remedy'; it is never awarded as of right." *Gilman v. Schwarzenegger*, 638 F.3d 1101, 1105 (9th Cir. 2011) (internal quotation and citation omitted).

I. Spreadbury's Request For Injunctive Relief Should Be Denied.

Spreadbury is not likely to succeed on the merits. Rather, his claims should be dismissed as provided in Lee Enterprises' Brief in Support of Motion to Dismiss

(Dkt.7), for failing to provide the factual allegations sufficient to entitle him to injunctive relief. *See also* Findings & Recommendations (Dkt. 75). Further, Spreadbury is not likely to succeed on his defamation claim, because the articles published by Lee Enterprises were privileged and Lee Enterprises is not liable for the comments made by third parties on the *Ravalli Republic* website. Spreadbury has also not shown a likelihood of suffering irreparable harm in the absence of preliminary relief, and the balance of equities tips in favor of Lee Enterprises, not Spreadbury, as an injunction prohibiting Lee Enterprises from publishing privileged information and holding the owner of a website liable for comments made by third parties is not in the public's interest.

A. Spreadbury Is Not Likely to Succeed On The Merits.

Spreadbury is not likely to succeed on his baseless claims. Spreadbury's Amended Complaint essentially requests the Court order Lee Enterprises to stop publishing news articles and comments about Spreadbury. (Dkt. 1-1 at ¶ 214.) However, Spreadbury has not stated factual allegations sufficient to entitle him relief against Lee Enterprises. As provided in Lee Enterprises' Brief in Support of Motion to Dismiss (Dkt. 7), since it does not appear Spreadbury is entitled to the relief demanded, an injunction is not proper. *See* Mont. Code Ann. § 27-19-201 (2009).

Furthermore, an injunction is not proper because Spreadbury is essentially

requesting the Court restrain Lee Enterprises from publishing things it already published. "An injunction will not issue to restrain an act already committed." *Mustang Holdings, LLC v. Zaveta*, 2006 MT 234, ¶ 15, 333 Mont. 471, 143 P.3d 456 (quotation and internal citation omitted). "Injunction is not an appropriate remedy to procure relief for past injuries, it is to afford preventive relief only." *Mustang*, ¶ 15 (internal quotation and citation omitted).

Also, Spreadbury is not likely to prevail on his claims since the articles published by Lee Enterprises were privileged and the comments on *Ravalli Republic's* website were made by third parties. Spreadbury's Amended Complaint basically claims Lee Enterprises defamed Spreadbury by publishing articles about the criminal trespass charges brought against him, which were subsequently dropped by the City, and by publishing comments posted by third parties on the *Ravalli Republic's* website. (Dkt. 1-1 at ¶¶ 181-189.) However, Spreadbury fails to recognize the articles were true, simply reporting that criminal trespass charges were brought against Spreadbury and that he later was convicted of those charges. The fact the charges were later dropped does not change the facts which were published. Spreadbury fails to show these publications were not true and how they defamed him. Moreover, Spreadbury fails to recognize the articles were privileged.

Traditionally, the term "libel" refers to defamatory statements made in

writing. *Restatement (Second) of Torts* § 568 (WL current through Apr. 2011).

Montana Code Annotated § 27-1-802 (2009) (emphasis added) defines libel:

> Libel is a false and *unprivileged* publication by writing, printing, picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation.

However, certain communications are privileged. Montana Code Annotated § 27-1-804 (2009) establishes what types of publications are privileged.

> A privileged publication is one made:
>
> (1) in the proper discharge of an official duty;
> (2) in any legislative or judicial proceeding or in any other official proceeding authorized by law;
> (3) in a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information; and
> (4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

Section 27-1-804(4), "makes a fair and true report without malice of a judicial proceeding a privileged publication." *Cox v. Lee Enters., Inc.*, 222 Mont. 527, 529, 723 P.2d 238, 239-240 (1986). In *Cox*, the Montana Supreme Court held pursuant to § 27-1-804(4):

> a qualified privilege is available as a defense for a newspaper publisher in a defamation case when the alleged defamation consists of facts taken from preliminary judicial pleadings

> which have been filed in court but which have not been judicially acted upon.

Cox, 723 P.2d at 240. The Court noted the definitions of "judicial proceedings" include:

> Any proceeding wherein judicial action is invoked and taken; [a]ny proceeding to obtain such remedy as the law allows; [a]ny step taken in a court of justice in the prosecution or defense of an action.

Cox , 723 P.2d at 240 (internal quotations and citation omitted). The Court also noted a modern trend of jurisdictions applying a qualified privilege to reports of judicial pleadings which have not yet been the subject of judicial action.

> Certainly, the administration of justice is of utmost importance to the citizenry. While we are aware that pleadings are one-sided and may contain, by design, highly defamatory statements, we believe the information found in such pleadings is of sufficient value as to warrant the encouragement of its publication.

Cox, 723 P.2d at 240 (citing *Newell v. Field Enters., Inc.*, 415 N.E.2d 434, 444 (Ill. App. 1980) (internal quotations omitted).

Stacey Mueller is the publisher of the *Missoulian*, a newspaper owned by Lee Enterprises. (Foundational Aff. Jeffery B. Smith, Ex. A at ¶ 1 (June 21, 2011) (Dkt. 57-1).) As part of her employment, she currently oversees both the *Missoulian* newspaper and the *Ravalli Republic* newspaper. (Dkt. 57-1, Ex. A at ¶ 2.) Ms. Mueller has personally reviewed the articles published by the *Ravalli Republic* which are the subject of Spreadbury's Amended Complaint. These

articles do not contain opinions from the reporters. Instead, the articles are based purely on the charges brought against Spreadbury, reporting facts according to official Ravalli County documents. (Dkt. 57-1, Ex. A at ¶ 3.) Pursuant to § 27-1-804(4), these articles are privileged and Spreadbury's allegations against Lee Enterprises fail as a matter of law.

Similarly, Spreadbury is not likely to prevail on his claim of defamation regarding the comments posted on the *Ravalli Republic's* website because they were made by third parties - not Lee Enterprises.

"Section 230 of the CDA [Communications Decency Act] immunizes providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). Specifically, § 230(c) provides: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c) (1998).

"The CDA is intended to facilitate the use and development of the Internet by providing certain services an immunity from civil liability arising from content provided by others." *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). "Absent § 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of

the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement." *Batzel v. Smith*, 333 F.3d 1018, 1026-1027 (9th Cir. 2003).

Lee Enterprises should be considered an "interactive computer service" as to the claims that Lee Enterprises published defamatory comments about Spreadbury on the *Ravalli Republic* website. "Recognizing that the Internet provided a valuable and increasingly utilized source of information for citizens, Congress carved out a sphere of immunity from state lawsuits for providers of interactive computer services to preserve the "vibrant and competitive free market" of ideas on the Internet." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (citing 47 U.S.C. § 230(b)(2)). "Through this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

> The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(f)(2).

The definition of "interactive computer service" includes a wide range of cyberspace services. *Carafano*, 339 F.3d at 1123 ("reviewing courts have treated

§ 230(c) immunity as quite robust, adopting a relatively expansive definition of "interactive computer service"); *see e.g. Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n. 7 (Cal. App. 4. Dist. 2002) (on-line auction website is an "interactive computer service"); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40-41 (Wash. App. Div. 1 2001) (on-line bookstore Amazon.com is an "interactive computer service"); *see also Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (parties conceded that AOL was an interactive computer service when it published an on-line stock quotation service); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (AOL assumed to be interactive computer service when it operated bulletin board service for subscribers).

"The prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posed by others." *F.T.C.*, 570 F.3d at 1196. In fact, Congress enacted the Communications Decency Act ("CDA") in response to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 at *5 (N.Y. Sup. May 24, 1995), which held a provider of an online message board could be liable for defamatory statements posted by third parties. [Note: *Stratton* was superseded by statute as stated in *Zeran*.] *See Fair Hous. Council*, 521 F.3d at 1163.

Like an online messaging board or bulletin board, the *Ravalli Republic* allowed readers to comment on articles published on its website. (Aff. Stacey

Mueller Support Lee Enterprises' Response Br. Opposition Pl.'s Req. Injunctive Relief ¶ 3 (Aug. 9, 2011), attached as Ex. A. The comments Spreadbury claims were published by the *Ravalli Republic* were made by third parties. (Ex. A at ¶¶ 4-5.) The website acted as an interactive computer service as defined in the CDA. Accordingly, Lee Enterprises cannot be liable for comments made by third parties on their website, and Spreadbury has not shown a likelihood of success for an injunction.

In *Collins v. Purdue University*, the U.S. District Court, N.D. Indiana, Hammond Division, was recently faced with the question of whether a newspaper that publishes articles on-line is liable for subsequent comments made about the articles by third parties. *Collins v. Purdue U.*, 703 F. Supp. 2d 862 (N.D. Ind. 2010). On January 13, 2007, Collins, a Purdue University student, reported being assaulted on the Purdue campus. On January 16, 2007, three days after Collins' alleged assault another Purdue University student, Wade Steffey, was reported missing. A search ensued, ending in Steffey's body being found in a utility closet on campus. Police questioned Collins regarding Steffey's death and later charged Collins with numerous criminal charges based on the results of a polygraph test. The University's newspaper ran an article regarding the charges brought against Collins. The article was later published on the newspaper's website which allowed readers to post comments about the article. Numerous comments were made

resulting in hostile treatment of Collins. *Collins*, 703 F. Supp. 2d at 867-869. Collins brought suit, alleging the University defamed him by publishing the comments made on the website. The Court dismissed these claims, finding the newspaper's website was an interactive computer service as defined under the CDA and immune from liability.

Similar to the Court's analysis in *Collins*, since *Ravalli Republic's* website is considered an interactive computer service as defined under the CDA, Lee Enterprises cannot be liable for publishing the comments made by third parties and, consequently, Spreadbury has failed to show a likelihood of success on his claim of defamation.

Arguably, the *Ravalli Republic* could also be considered an information content provider because it publishes articles on its website. Nevertheless, *Ravalli Republic* would still be immune from liability regarding the comments because they were made by third parties and the *Ravalli Republic* did not create or develop the comments.

"Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue." *Carafano,* 339 F.3d at 1123.

Critically, however, § 230 limits immunity to information

> provided by another information content provider. An information content provider is defined by the statute to mean any person or entity that is responsible, in whole in part, for the creation or development of information provided through the Internet or any other interactive computer service. The reference to *another* information content provider . . . distinguishes the circumstance in which the interactive computer service itself meets the definition of information content provider with respect to the information in question.

Batzel, 333 F.3d at 1031 (internal quotations and citations omitted) (emphasis in original).

To clarify,

> "[a] website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that is creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider."

Fair Hous. Council, 521 F.3d at 1162.

Even though the newspaper provided the article which sparked the allegedly defamatory comments, the *Ravalli Republic* is still immune from liability because it did not create or develop the posted comments, nor did it encourage the readers to comment on the articles in a defamatory manner. *Collins*, 703 F. Supp. 2d at 878-879. *See Carafano*, 339 F.3d 1119 (even if a party is considered an information content provider § 230(c) precludes treatment of a publisher if the information was provided by another information content provider).

" [A] service provider is "responsible" for the development of offensive

content only if it in some way specifically encourages development of what is offensive about the content." *F.T.C.*, 570 F.3d at 1199; *see also Carafano*, 339 F.3d at 1124 ("Under § 230(c), therefore, so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.").

Spreadbury has not shown a likelihood of success regarding his claim that Lee Enterprises defamed him by publishing comments on the *Ravalli Republic* website. Lee Enterprises is immune from liability regarding these comments because they were made by third parties. (Ex. A at ¶¶ 4-5.) Further, Lee Enterprises did not encourage, create, or otherwise develop the comments made by third parties. (Ex. A at ¶ 6.) The *Ravalli Republic* has not altered or otherwise edited the comments made by third parties on the *Ravalli Republic* website. (Ex. A at ¶ 7.) The comments were made by third parties and, therefore, Lee Enterprises is immune from liability under the CDA.

Finally, Count 23 of Spreadbury's Amended Complaint is a request for civil arrest of Lee Enterprises' employee and reporter, Perry Backus, per Montana Code Annotated § 27-16-102(2). However, Spreadbury is not likely to prevail on this portion of his claim for injunctive relief, since § 27-16-102(2) gives Spreadbury no authority to civilly arrest anyone. Clearly, Spreadbury is not likely to prevail on his claims and his request for injunctive relief should be denied.

B. Spreadbury Is Not Likely to Suffer Irreparable Harm.

Spreadbury's request for injunctive relief should be denied, since he has failed to show a likelihood of prevailing on his claims. Furthermore, Spreadbury has not shown he will not likely suffer irreparable harm absent a preliminary injunction. "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction . . . ; *see also* 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed.1995) . . . (applicant must demonstrate that in the absence of a preliminary injunction, 'the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered'); . . . 'Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*). *Winter*, 555 U.S. at 22. "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Winter*, 555 U.S. at 22 (internal quotation and citation omitted).

Spreadbury has failed to show he will likely suffer irreparable harm if a preliminary injunction is not granted. Spreadbury seeks an injunctive relief ". . . to stop defamation of character from Defendant Lee Enterprises Inc . . ." (Dkt. 70 at

2.) However, Spreadbury does not provide any claim of irreparable harm which will occur if the preliminary injunction is not granted. Instead, Spreadbury simply states the standard in his Amended Complaint, without any supporting factual allegations to show he will suffer irreparable harm if the injunction is not granted.

Furthermore, as stated above, it appears Spreadbury is requesting the Court restrain Lee Enterprises from publishing something it already published. "An injunction will not issue to restrain an act already committed." *Mustang Holdings,* ¶ 15 (internal quotation and citation omitted). "Injunction is not an appropriate remedy to procure relief for past injuries, it is to afford preventive relief only." *Mustang*, ¶ 15 (internal quotation and citation omitted). Spreadbury has presented no factual support that Lee Enterprises will likely publish subsequent articles and/or comments, and, making an assumption on alleged past acts is insufficient to show Spreadbury is likely to suffer irreparable harm in the future. "[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury." *Winter*, 555 U.S. at 22 (internal quotation and citation omitted). Since Spreadbury has not shown he will suffer irreparable harm if a preliminary injunction is not granted, his request should be denied.

C. The Balance of Equities Does Not Tip in Spreadbury's Favor, and an Injunction Is Not in the Public's Interest.

Spreadbury's request for injunctive relief should be denied because he has

not shown a likelihood of success on the merits of his claim and has not shown he will suffer irreparable harm if a preliminary injunction is not granted. Further, the balance of equities tips in favor of Lee Enterprises, not Spreadbury, and the requested injunctive relief is not in the public's best interest.

"In issuing an injunction, the court must balance the equities between the parties and give due regard to the public interest." *High Sierra Hikers Ass'n v. Moore*, 561 F. Supp. 2d 1107, 1112 (N.D. Cal. 2008). "In each case, courts 'must balance the competing claims of injury and consider the effect on each party of the granting or withholding of the requested relief,'" paying particular attention to the public consequences. *U. S. v. Ariz.*, 703 F. Supp. 2d 980, 1007 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011) (internal citation omitted). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter,* 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982) (internal quotation omitted)); *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1086 (S.D. Cal. 2010) *aff'd*, F.3d ____, 2011 WL 2400779 (9th Cir. June 9, 2011). "[T]he less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Nat. Resources Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 847 (C.D. Cal. 2007) (internal quotation and citation

omitted).

The balance of equities in this matter tip in favor of Lee Enterprises and it would not serve the public interest to grant Spreadbury's requested injunctive relief. In *Cell Assocs., Inc. v. Natl. Instit. of Health, Dept of Health, Educ. & Welfare*, 579 F.2d 1115 (9th Cir. 1978), the Ninth Circuit denied plaintiff's request for a preliminary injunction in part, because on the balancing of the equities-the public and medical community were better served by free distribution of information. Similarly, here, the balancing of the equities tips in favor of Lee Enterprises and it betters serves the public to allow Lee Enterprises to publish privileged information. As provided above, Spreadbury claims Lee Enterprises defamed him by publishing articles about the criminal trespass charges brought against him, which were subsequently dropped by the City, and by publishing comments made by third parties on *Ravalli Republic's* website. (Dkt. 1-1 at ¶¶ 181-189.) However, Spreadbury fails to recognize the articles were privileged. Section 27-1-804(4), "makes a fair and true report without malice of a judicial proceeding a privileged publication." *Cox*, 723 P.2d at 239-240. The articles published about Spreadbury were privileged because they contain no opinions from the reporters. Instead, the articles are based purely on the charges brought against Spreadbury, reporting facts according to official Ravalli County documents. (Dkt. 57-1, Ex. at ¶ 3.) Likewise, the comments published on the

Ravalli Republic's website were made by third parties, not Lee Enterprises. As such, Lee Enterprises is immune from liability. *See* B*arnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099-1102 (9th Cir. 2009); *Fair Hous. Council*, 521 F.3d at 1173-1174; *Miles v. Raycom Media, Inc.*, 2010 WL 3419438, slip op. at **2-3 (S.D. Miss. Aug. 26, 2010) (citing *Collins*, 2010 WL 1250916 at *14). It obviously serves the public to immunize Lee Enterprise from liability for comments made on their website by third parties, since this was Congress' purpose behind § 230 of the CDA.

In balancing the equities, the scale should tip heavily in favor of Lee Enterprises, not Spreadbury, since granting the injunction would prevent Lee Enterprises from publishing privileged information and would be in direct contradiction to the purpose of § 230 of the CDA. Obviously, the public would not be served by such an order as they would be precluded from the information, which newspapers are privileged to publish. Accordingly, Spreadbury's request for injunctive relief should be denied.

CONCLUSION

Spreadbury is not entitled to injunctive relief. Spreadbury has not demonstrated a likelihood of success on the merits of his defamation claim. Spreadbury has actually failed to state a sufficient claim upon which relief can be

granted. Even if he had, Spreadbury is not likely to succeed on his defamation claim because the articles published by Lee Enterprises were privileged and the comments were made by third parties. Spreadbury has also not shown a likelihood of suffering irreparable harm in the absence of preliminary relief, and the balance of equities tips in favor of Lee Enterprises, not Spreadbury. As such, Spreadbury's request for injunctive relief should be denied.

DATED this 9th day of August, 2011.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this Defendant Lee Enterprises, Inc.'s Response Brief in Opposition to Plaintiff's First Request for Injunctive Relief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is 4,141 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

DATED this 9th day of August, 2011.

/s/ Jeffrey B. Smith
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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2011, a copy of the foregoing document was served on the following persons by the following means:

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