

1 JOSEPH R. GANLEY (5643)
 jganley@hutchlegal.com
 2 CHRISTIAN M. ORME (10175)
 corme@hutchlegal.com
 3 HUTCHISON & STEFFEN, LLC
 10080 West Alta, Suite 200
 4 Las Vegas, NV 89145
 Telephone: (702) 385-2500
 5 Fax: (702) 385-2086

6 I. NEEL CHATTERJEE (admitted *Pro Hac Vice*)
 nchatterjee@orrick.com
 7 THERESA A. SUTTON (admitted *Pro Hac Vice*)
 tsutton@orrick.com
 8 ORRICK, HERRINGTON & SUTCLIFFE LLP
 1000 Marsh Road
 9 Menlo Park, CA 94025
 Telephone: +1-650-614-7400
 10 Facsimile: +1-650-614-7401

11 Attorneys for Defendant
 FACEBOOK, INC.

13 UNITED STATES DISTRICT COURT
 14 DISTRICT OF NEVADA

16 JONATHAN B. GOLDSMITH,

17 Plaintiff,

18 v.

19 JORDAN R. COOPER, an Individual;
 20 CHERYL COOPER DRISCOLL, an
 Individual; FACEBOOK, INC., a foreign
 corporation,

21 Defendants.
 22

Case No. 2:10-cv-01845-RLH-PAL

**FACEBOOK, INC.’S
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF ITS
 MOTION TO DISMISS AMENDED
 COMPLAINT PURSUANT TO FED.
 R. CIV. P. 12(B)(6) AND 12(B)(3)**

ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION**

2 Facebook hereby submits its Motion to Dismiss pursuant to Federal Rules of Civil
3 Procedure 12(b)(6) and 12(b)(3).

4 Goldsmith’s amended complaint fails to state a claim for which relief may be granted
5 against Facebook. With respect to Claims 1 through 4, Facebook did not “publish” the allegedly
6 defamatory statements about Goldsmith. Rather, as alleged in the amended complaint, the
7 individual defendants created and posted the comments about Goldsmith. Facebook, as an
8 interactive computer service, was merely the conduit that the individual defendants used to post
9 their comments. As such, the Communications Decency Act, 47 U.S.C. § 230, provides complete
10 immunity for Facebook for these state law claims. Thus, Claims 1 through 4 must be dismissed
11 pursuant to Rule 12(b)(6).

12 Goldsmith’s allegations that Facebook violated the wiretapping statute are equally
13 unavailing. Goldsmith does not allege, as he must, that Facebook “intercepted” any of
14 Goldsmith’s communications. Rather, he repeats, without any factual support, the same
15 conclusory allegation throughout his amended complaint that Facebook “facilitated, published or
16 neglected to mitigate the wiretapping violations” by the other defendants. This meager allegation
17 cannot support Goldsmith’s wiretapping claims against Facebook and, thus, they must be
18 dismissed.

19 Finally, this is the wrong venue to hear Goldsmith’s claims against Facebook. As a
20 Facebook user, Goldsmith agreed to litigate his disputes with Facebook in California. The
21 parties’ forum selection clause should be enforced, and this case dismissed pursuant to Rule
22 12(b)(3).

23 **II. BACKGROUND**

24 **A. Relevant Facts**

25 Facebook, Inc. operates the free and popular online network available at facebook.com,
26 and provides its service to over 500 million monthly active users. Among other features, the
27 Facebook website allows users to communicate among themselves through various messaging
28 tools, including functionality that allows users to post messages on their friends’ “Walls.” An

1 example of a “Wall” is depicted in Exhibit 2 to Goldsmith’s Motion for Preliminary Injunction
2 (*see* Dkt. No. 11).

3 Goldsmith alleges that Defendants Cooper and Cooper Driscoll posted “defamatory and
4 demeaning statements” on one or more Facebook users’ “Wall.” FAC ¶ 8. Based on this
5 allegation, he concludes that “Facebook facilitated, published or neglected to mitigate the
6 defamatory and harassing statements and comments published by Defendant Cooper and
7 Defendant Cooper Driscoll” (FAC ¶ 14) and that Facebook, thus, is liable for slander and libel.¹
8 FAC ¶¶ 26-57. Goldsmith does not allege that Facebook created or otherwise assisted in the
9 creation of the “statements and comments.”

10 Goldsmith also alleges, albeit cryptically, that Defendant Cooper Driscoll created a false
11 Facebook account and “friended” Goldsmith “in order to gain access to Plaintiff’s personal and
12 private information.”² FAC ¶ 27; *see also* FAC. ¶ 28. Goldsmith does not allege that Facebook,
13 itself, retrieved his picture or disclosed it.

14 **B. Facebook’s Terms of Service**

15 Facebook’s business records show that Goldsmith was a Facebook member from
16 January 2, 2005 until October 7, 2010. Declaration of Theresa A. Sutton in Support of Motion to
17 Dismiss (“Sutton Decl.”), ¶ 2. Goldsmith, as a Facebook member, agreed to Facebook’s Terms
18 of Use, which contains clear forum-selection, choice of law, and personal jurisdiction clauses that
19 control the resolution of any claims by a registered Facebook user, including Goldsmith’s claims.
20 Specifically, the section entitled “Disputes” provides:

21 You will resolve any claim, cause of action or dispute (“claim”)
22 you have with us arising out of or relating to this Statement or
23 Facebook exclusively in a state or federal court located in Santa
24 Clara County. The laws of the State of California will govern this
Statement, as well as any claim that might arise between you and
us, without regard to conflict of law provisions.

25 ¹ Goldsmith’s claims for slander are a mystery. He apparently recognizes that actionable slander
requires an audible statement (*see* FAC ¶¶ 30, 39) yet nowhere in his papers does he reference
26 anything other than written content.

27 ² Goldsmith alleges that Ms. Driscoll “created a false profile on Defendant Facebook’s website
using a false name and false picture.” FAC ¶ 27. Based on this allegation, the most likely
28 scenario is that Goldsmith “friended” Ms. Driscoll and that is how she gained access to his
pictures. Alternatively, Goldsmith simply made the photos available to the general public. In
either event, Goldsmith voluntarily provided access to the photos.

1 Sutton Decl., ¶ 2, Ex. A at § 15. This clause survives account termination. *Id.* at § 14.

2 **III. ARGUMENT**

3 **A. Goldsmith Cannot State A Claim For Relief Against Facebook**

4 In his amended complaint, Goldsmith simply fails to state a claim against Facebook.
5 Courts routinely dismiss cases like this, where the complaint evinces either a lack of a cognizable
6 legal theory or the absence of sufficient facts supporting one. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
7 1954, 173 L. Ed. 2d 868 (2009); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
8 1988). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
9 statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949. Here, dismissal without leave to amend is
10 proper because no amendment could possibly cure Goldsmith’s pleading deficiencies. *Steckman*
11 *v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998).

12 **1. The Communications Decency Act Provides Full Immunity To**
13 **Facebook for Goldsmith’s State Law Claims**

14 The Federal Communications Decency Act (“CDA”) protects Facebook from the state tort
15 claims asserted by Goldsmith. *See* 47 U.S.C. § 230. The CDA provides that “[n]o provider or
16 user of an interactive computer service shall be treated as the publisher or speaker of any
17 information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The
18 CDA defines an “interactive computer service” as “any information service, system, or access
19 software provider that provides or enables computer access by multiple users to a computer server
20” 47 U.S.C. § 230(f)(2). “Through this provision, Congress granted most Internet services
21 immunity from liability for publishing false or defamatory material so long as the information
22 was provided by another party.” *Two Plus Two Publ’g, LLC v. Jacknames.com*, No. 2:09-CV-
23 002318-KJD-LRL, 2010 WL 4281791, * 3 (D. Nev. Sept. 30, 2010) quoting *Carafano v.*
24 *Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003). Facebook, as the operator of the
25 facebook.com website, is protected. *See* Sutton Decl., Ex. B at 3 (*Finkel v. Facebook, Inc., et al*,
26 No. 102578/09 (N.Y. Sup. Ct) September 16, 2009 Order); *see also, Batzel v. Smith*, 333 F.3d
27 1018, 1030 (9th Cir. 2003) (stating “a website is an ‘interactive computer service.’”); *Carafano*,
28 339 F.3d at 1123 (“online newsletter qualified as an “interactive computer service” under the

1 statutory definition”); *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-50 (D.D.C. 1998) (“AOL is a
2 ‘provider . . . of an interactive computer service’”). The statute explicitly immunizes covered
3 entities, such as Facebook, against state tort claims by mandating that “[n]o cause of action may
4 be brought and no liability may be imposed under any State or local law that is inconsistent with
5 this section.” 47 U.S.C. § 230(e)(3). Simply put, Facebook did not create the statements and
6 cannot be liable for them.

7 For nearly 15 years, state and federal courts have straightforwardly applied this law to
8 shield providers of interactive computer services against “publisher” tort liability for content
9 posted by the users of their services and websites. *See e.g.*, *Two Plus Two Publ’g*, 2010 WL
10 4281791, * 3; *Raggi v. Las Vegas Metro. Police Dep’t*, No. 2:08CV943 JCM (PAL), 2009 WL
11 653000, *1 (D. Nev. Mar. 10, 2009) citing *Carafano*, 339 F.3d at 1123-25 and *Batzel*, 333 F.3d at
12 1031; *see also Barrett v. Rosenthal*, 40 Cal. 4th 33, 62 (2006); *Ben Ezra, Weinstein, and Co., Inc.*
13 *v. Am. Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

14 Goldsmith’s sole allegation as to Facebook is that Facebook somehow “facilitated,
15 published, or neglected to mitigate the defamatory and harassing statements and comments
16 published by Defendant Cooper and Defendant Cooper Driscoll.” FAC ¶ 14. According to the
17 amended complaint, Defendants Cooper and Cooper Driscoll “published statements about
18 Plaintiff, including that Plaintiff is a ‘faggot’ and a ‘pedophile.’” FAC ¶ 12. Based on these
19 allegations, Defendants Cooper and Cooper Driscoll, not Facebook, created the allegedly
20 defamatory statements. FAC. ¶ 12. Thus, the CDA provides complete immunity to Facebook for
21 Claims 1 through 4.

22 *Batzel* is instructive here and should be followed. In *Batzel*, defendant Smith sent an
23 email to the operator of an electronic bulletin board service (“BBS”), Mosler, which contained
24 allegedly defamatory statements about the plaintiff. The BBS operator posted the email, after
25 making minor edits, and hundreds of BBS viewers had access to and viewed the defamatory
26 email. The Ninth Circuit Court of Appeals found that the BBS was immunized under the CDA as
27 an interactive computer service, with respect to defamatory content provided by a third party.
28 *Batzel*, 333 F.3d at 1026, 1031. Courts faced with similar facts have consistently reached the

1 same conclusion. See *Two Plus Two Publ'g*, 2010 WL 4281791 at *3; *Raggi*, 2009 WL 653000
2 at *1; *Carafano*, 339 F.3d at 1124; *Blumenthal*, 992 F. Supp. at 51 quoting *Zeran v. Am. Online,*
3 *Inc.*, 129 F.3d 327, 330-331 (4th Cir. 1997); *Doe v. SexSearch*, 502 F. Supp. 2d 719, 725 (N.D.
4 Ohio 2007) (“[n]ear-unanimous case law holds that Section 230(c) affords immunity to
5 [interactive computer services (ICSs)] against suits that seek to hold an ICS liable for third-party
6 content”) quoting *Eckert v. Microsoft*, Case No. 06-11888, 2007 U.S. Dist. LEXIS 15295, at *6
7 (E.D. Mich. Jan. 8, 2007) and *Chi. Lawyers’ Comm. for Civ. Rights Under the Law, Inc. v.*
8 *Craigslist, Inc.*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006).

9 Goldsmith also contends, without any support, that Facebook “neglected to mitigate the
10 defamatory and harassing statements and comments.” FAC ¶ 14. Under the CDA, however,
11 Facebook is not required to “mitigate” any such postings. See *Zeran*, 129 F.3d at 330 (rejecting
12 contention that defendant AOL “had a duty to remove [a] defamatory posting,” holding that
13 “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional
14 editorial functions - such as deciding whether to publish, withdraw, postpone or alter content - are
15 barred”); see also, *Green v. Am. Online (AOL)*, 318 F.3d 465, 468 (3rd Cir. 2003). Goldsmith’s
16 state law claims against Facebook should be dismissed.

17 **2. Goldsmith Fails To State A Claim Against Facebook Under The**
18 **Wiretap Act**

19 In Claims 10 and 11, Goldsmith alleges that Facebook violated Sections 2511(a) and (c)
20 of the Wiretap Act. But Goldsmith fails to allege sufficient facts to support either claim against
21 Facebook, and both should be dismissed.

22 **a. Goldsmith Fails To Allege Facts Establishing Interceptor**
23 **Liability Under Section 2511(a)**

24 Section 2511(a) makes it illegal to “intentionally intercept, endeavor to intercept, or
25 procure another person to intercept” a communication. “Intercept” is defined in the Wiretap Act
26 as the “aural or other acquisition of the contents of any wire, electronic, or oral communication
27 through the use of any electronic, mechanical, or other device.” 18 U.S.C. § 2510(4).
28 “Interception” requires “acquisition contemporaneous with transmission.” *Konop v. Hawaiian*
Airlines, Inc., 302 F.3d 868 (9th Cir. 2002); see *U.S. v. Steiger*, 318 F.3d 1039, 1047 (11th Cir.

1 2003).

2 *Steiger* is instructive. In *Steiger*, an anonymous source accessed Steiger’s computer hard
3 drive through a computer virus (which the source uploaded to an online news group) and “stole”
4 Steiger’s pictures. The source transmitted the photos to law enforcement, which then used the
5 “stolen” photographs to indict Steiger for violating a series of federal statutes. In denying
6 Steiger’s motion to suppress the evidence, the court held

7 there is nothing to suggest that any of the information provided in
8 the source's emails to [law enforcement] was obtained through
9 contemporaneous acquisition of electronic communications while
10 in flight. Rather, the evidence shows that the source used a Trojan
11 Horse virus that enabled him to access and download information
12 stored on Steiger’s personal computer. This conduct, while
13 possibly tortious, does not constitute an interception of electronic
14 communications in violation of the Wiretap Act.

15 *Steiger*, 318 F.3d at 1050.

16 Like Steiger, Goldsmith has failed to state a plausible claim for violation of Section
17 2511(a) against Facebook, or anyone for that matter, by failing to allege the threshold fact – that
18 someone “intercepted” his pictures while they were being transmitted. At best, the amended
19 complaint alleges that Ms. Driscoll, not Facebook, retrieved stored photos that Goldsmith
20 uploaded to his Facebook account or elsewhere on the Internet, after Goldsmith, himself,
21 provided her access to his Facebook photo album or made them available on the Web. FAC
22 ¶¶ 10, 27. This same theory was rejected in *Steiger*.

23 Furthermore, Goldsmith’s sole basis for asserting this claim against Facebook is that it
24 purportedly “facilitated, published or neglected to mitigate the wiretapping violations by
25 Defendant Cooper and Defendant Cooper Driscoll via Defendant Facebook’s internet servers.”³
26 FAC ¶ 102. Goldsmith’s “naked assertions devoid of further factual enhancement” are precisely
27 the types of claims rejected by the Supreme Court in *Iqbal*. 129 S. Ct. at 1949. Goldsmith’s
28 2511(a) claim must be dismissed.

3 Goldsmith repeats this allegation throughout his complaint. In the context of Section 2511,
however, it is nonsensical. Nothing in the Wiretap Act prohibits facilitating, publishing or
neglecting to mitigate another’s “wiretapping violations.” Goldsmith’s use of this allegation
highlights the frivolity of his case against Facebook and demonstrates that Goldsmith has no
factual basis for his claims against Facebook.

1 **Goldsmith Fails To Allege Facts Establishing Facebook**
2 **Disclosed Intercepted Communications Pursuant To Section**
3 **2511(c)**

4 Goldsmith also alleges that the disclosure of his photograph on Facebook violates Section
5 2511(1)(c). FAC ¶ 107 (“Defendant intentionally disclosed, or endeavored to disclose, to other
6 persons the contents of electronic communication [sic]”).⁴ Section 2511(1)(c) prohibits:

7 intentionally disclos[ing] or endeavor[ing] to disclose to any other
8 person the contents of any wire, oral, or electronic communication,
9 knowing or having reason to know that the information was
10 obtained through the interception of a wire, oral, or electronic
11 communication in violation of this subsection

12 18 U.S.C. § 2511(1)(c). Goldsmith fails to allege any of the elements requisite to stating a claim
13 under this Section. As set forth above, Goldsmith has not alleged that anyone “intercepted” his
14 electronic communication. In addition, Goldsmith does not allege any facts establishing that
15 *Facebook* disclosed any of Goldsmith’s supposedly intercepted information. And, the amended
16 complaint does not allege that Facebook was aware of Ms. Driscoll’s activities at all. These
17 failings are fatal. *See U.S. v. Wulinger*, 981 F.2d 1497, 1501 (6th Cir. 1992) (knowledge or
18 reason to know that the interception itself violated the Wiretap Act in essential element of
19 § 2511(1)(d) criminal offense). Claim 11 must be dismissed.

20 **3. Facebook Cannot Be Secondarily Liable Under The Act**

21 Because Goldsmith has failed to allege a direct violation of the Wiretap Act by anyone, he
22 cannot state a claim for secondary liability and, thus, his allegations that Facebook “facilitated” or
23 “neglected to mitigate [the other defendants’] wiretapping violations,” are irrelevant. FAC ¶¶
24 102, 108. Furthermore, the Wiretap Act does not provide for secondary liability for statutory
25 violations. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1005 (9th Cir. 2006) (declining to
26 expand civil liability under §§ 2702 and 2707 of the ECPA to include conspirators as well as
27 aiders and abettors); *Doe v. GTE Corp.*, 347 F.3d 655, 658-59 (7th Cir. 2003) (Easterbrook, J.)
28 (*citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114

⁴ Goldsmith’s attempt to circumvent the CDA immunity for the publication of his picture is transparent and improper. The amended complaint establishes that Goldsmith has no factual basis to assert a claim under the Wiretap Act for the disclosure of his photo. His claims should be dismissed. *Iqbal*, 129 S. Ct. at 1949.

1 S.Ct. 1439, 128 L.Ed.2d 119 (1994)); *Motise v. Am. Online, Inc.*, No. 04-1494, 2005 WL
2 1667658, *4 (E.D. Va. 2005). Goldsmith’s wiretap claims against Facebook must be dismissed.

3 **B. Goldsmith Agreed To The Exclusive Jurisdiction of California Courts**

4 This Court has the discretion to dismiss a case pursuant to Rule 12(b)(3) when a forum
5 selection clause provides the exclusive venue for disputes, and a plaintiff, like Goldsmith, files its
6 suit in the incorrect forum. *Levesque v. Trans Union, LLC*, No. 2:09-cv-01393-RLH-LRL, 2010
7 WL 3522264, *2 (D. Nev. Sept. 1, 2010) (“Forum selection clauses with mandatory forum
8 selection language are routinely enforced in the Ninth Circuit”) citing *Docksider, Ltd. v. Sea*
9 *Technology, Ltd.*, 875 F.2d 762, 763 (9th Cir. 1989).

10 This Court recently echoed the well-established principle that “forum selection clauses are
11 presumptively valid.” *Levesque*, 2010 WL 3522264 at *2 quoting *Bremen v. Zapata Off-Shore*
12 *Co.*, 407 U.S. 1, 10-12 (1972). Absent a strong showing by Goldsmith that the clause: (1) “is the
13 product of fraud or overreaching”; (2) “would deprive [Goldsmith] of his day in court”; or (3)
14 “would contravene a strong public policy” of Nevada, Facebook’s forum selection clause should
15 be enforced. *Levesque*, 2010 WL 3522264 at *2. Goldsmith cannot make any such showing for
16 disregarding the forum selection clause. Indeed, Facebook’s forum selection clause recently
17 withstood scrutiny in the District of Georgia. *See* Sutton Decl., Ex. C (*Miller v. Facebook, Inc.,*
18 *et al*, Case No. 1:09-CV-2810-RLV (D. Ga.), Docket No. 17). The *Miller* court’s decision is
19 consistent with holdings in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991); and
20 *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004), finding that “public policy
21 favors such clauses, because the nature of the . . . business necessarily opened the company to the
22 possibility of litigation in several fora and [the company] had a justifiable ‘interest in limiting the
23 fora in which it potentially could be subject to suit’”). Sutton Decl., Ex. C at 2-3.

24 Goldsmith entered into a contract with Facebook and agreed to “resolve any claim, cause
25 of action or dispute . . . exclusively in a state or federal court located in Santa Clara County”
26 California. Sutton Decl., Ex. A. Nothing in Goldsmith’s amended complaint suggests that the
27 forum selection clause should not be enforced here. His complaint should be dismissed.

1 **C. Facebook Is Entitled To Its Attorneys' Fees And Costs**

2 Goldsmith's claims against Facebook are frivolous. This Court has broad inherent power
3 to police litigants and manage its docket through monetary sanctions (including costs and
4 attorneys' fees) "for willful abuse of the judicial process or bad faith conduct." *Mark Indus., Ltd.*
5 *v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 732 (9th Cir. 1995) citing *In re Intel Securities*
6 *Litigation*, 791 F.2d 672, 675 (9th Cir. 1986) (where court exercised its inherent powers to
7 sanction attorney for bad faith conduct in seeking to "exact fee concession").

8 Sanctions under the Court's inherent powers are appropriate here, because Goldsmith has
9 willfully abused the judicial process and acted in bad faith. Prior to preparing this motion and
10 engaging local counsel, Facebook contacted Goldsmith and requested that he dismiss Facebook in
11 light of the CDA immunity. Sutton Decl., Ex. D. Facebook's counsel forwarded a copy of
12 several relevant CDA immunity cases, and encouraged Goldsmith to consider them. *Id.* Before
13 even reading the cases, Goldsmith, an unlawful detainer and bankruptcy attorney (who has been
14 licensed to practice in Nevada for five months), noted that he "disagreed" with the cases cited
15 above and then demanded \$25,000. *Id.*

16 Goldsmith's refusal to even consider the CDA and binding precedent along with his
17 unsupported demand for "go away" money demonstrate his lack of good faith. To make matters
18 worse, Goldsmith decided to improperly allege additional, unsupportable Wiretap Act claims
19 against Facebook. Goldsmith's abuses are further demonstrated in his effort to surreptitiously
20 obtain a preliminary injunction on an *ex parte* basis (*see* Dkt. No. 5) and file a third motion for
21 preliminary injunction based on his meritless claims (*see* Dkt. No. 11). Goldsmith should not be
22 rewarded for his behavior. Facebook respectfully seeks an award of the fees and costs
23 necessitated in this case.

24 **IV. CONCLUSION**

25 Facebook respectfully requests that the Court dismiss Facebook from this action and
26 award Facebook its fees and costs for the reasons set forth above.

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Dated: November 15, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Theresa A. Sutton

THERESA A. SUTTON
Attorneys for Defendant
FACEBOOK, INC.

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CERTIFICATE OF SERVICE

On the 15th day of November 2010, I electronically submitted the foregoing document with the Clerk of the Court for the U.S. District Court, District of Nevada, using the electronic case filing system of the Court. I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Theresa A. Sutton

THERESA A. SUTTON