



## I. Cleveland's Inaccurate and Misleading Recitation of the Evidence

Cleveland argues that this Court need not go beyond the product manufacturer cases of *Georgia Pacific* and *Inwood* for the controlling standard of knowledge with which to review the evidence against this particular service provider because the jury was presented with “ample evidence” that Bright Builders “actively participated” in the creation of the infringing content of Prince’s site or knew “specifically” of Prince’s infringement of Cleveland’s mark. However, Cleveland’s recitation of the evidence is inaccurate, misleading, unsupported by the citations it provides, and unsupported by the record as a whole.

Cleveland argues that “[t]he record is replete with evidence that Bright Builders was fully aware that the website being used by Prince was named copycatclubs.com....” (Cleveland’s Response at 8). What is, of course, missing from Cleveland’s analysis is that Prince did not register this domain name until August 31, 2008, only weeks before his seven month coaching period ended. (Ex. H). Cleveland then argues that Bright Builders was “so intimately involved in the creation of copycatclubs.com,” that it must have known about the specific infringing content on the copycatclubs site. (Cleveland Response at 9, emphasis added). However, this “intimate involvement” Cleveland argues is belied by Prince’s testimony that he alone designed the layout of his golf site, on his own using the general layouts and sales interface, and general website coaching advice and software (applicable to *any* sales site) provided by Bright Builders and that

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in its Reply to Bright Builders’ Response to the Motion for Fees and Costs, Cleveland’s “Legal Standard” section in its Response to this motion again relies extensively upon unpublished opinions issued prior to 2007 in direct violation of the local rules of the 4<sup>th</sup> Circuit and the local rules of this District. All statements and material relying on the improper citation to unpublished cases prior to 2007 should, of course, be disregarded by this Court.

nobody else had involvement in the content. (Doc. 128 at 8:9-11, 70:10-16)<sup>2</sup>. Prince testified that all of the content and images for his golf clubs website came by him copying and pasting from wholesalers' websites and other third-party websites. (Doc. 128 at 53:14-54:18, 70:5-16).

Misstating the record, Cleveland states that “Bright Builders coached and mentored Prince in designing this website, that Bright Builders reviewed Prince’s text, and ...even suggested changes to the website and the written text of the website.” (Cleveland Response at 9, emphasis added). None of the citations support that Bright Builders ever saw any infringing text: *Compare* Doc. 128 at 8:9-10:4 (“Like – in the beginning, my home page, I [Prince] had no text whatsoever. They [Bright Builders] were like, ‘Well, you need to specify on your front page, and you know, in detail kind of what you are selling and what it’s about.’ And that’s what I did. ...I [Prince] found something and I [Prince] pasted it and copied it and put it right there – I [Prince] reworded it ....”) (emphasis added); Doc. 128 at 15:6-15 (to counsel’s question on direct: “Did anyone at Bright Builders ever, after reviewing your web site, tell you that copying someone else’s golf equipment, copying somebody else’s trademark or golf equipment could create a potential liability for you?” Prince answers “No, sir.”); Doc. 128 at 77:20-23 (to counsel’s question on direct: “And those coaches and mentors, it was your understanding had reviewed your web site and made suggestions on what needed to be on your web site?” Prince answers “Right”); *with* (Doc. 128 at 43:5-10 – Prince admits he merely “assumed” Bright Builders reviewed his site; Doc. 132 at 68:4-20 – printouts of Prince’s website that included infringing conduct were made on 6/23/2009, after coaching ended but before notification of

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<sup>2</sup> Bright Builders attaches the portions of the Jury Trial Testimony of Christopher Prince, Gregory Cole and Stephen Gingrich as Doc. 128, 132 and 133, respectively, and the trial motion hearings, jury charge and verdict form conferences as Doc. 129, as cited in its initial memorandum in support of the present motions and this reply.

infringements; Ex. C at 83:9-21; 88:17-89:4 – showing Prince had developed no particular content to view while coaching services were being provided to him).

Cleveland goes on to argue that evidence demonstrated Bright Builders’ awareness that the website’s name “copycatclubs” referred to counterfeit Cleveland golf clubs because the website contained pictures of Cleveland golf clubs and stated that they were “copied clubs.” (Cleveland Response at 8-9). Again, what is missing from Cleveland’s recitation of the evidence is the fact that the exhibit relied upon, consisting of print outs of Prince’s website, were content that existed only as of the date of printing -- June 23, 2009 – well after all coaching services from Bright Builders ended. (Exhibit G at 5-6; Reply Exhibit 1) Cleveland provided no evidence that Bright Builders ever saw this content or was alerted to the fact that Prince had posted this infringing content as of June 23, 2009. Cleveland produced no evidence of when this content was first placed on Prince’s website or how long it remained on Prince’s website. Bright Builders did, however, produce evidence that no content, infringing or otherwise, existed at the time the lawsuit against Bright Builders was filed in March of 2010, and had been taken down even prior to the point at which Bright Builders was sued by Cleveland. (Doc. 128 at 71:17-72:9; Doc. 132 at 67:24-68:3, 68:14-20).

Cleveland further argues that the record is replete with evidence that Bright Builders “taught Prince how to use drop shippers *from China*.” (Cleveland Response at 9, emphasis added). This is a clear misstatement of the evidence. On direct examination by Cleveland, Prince testified that Bright Builders representatives “helped us out as far as sending us to different types of wholesalers and that type thing, trying to find products that would strike your interest.” (Doc. 128 at 4:4-6). Prince testified that he used drop shippers from China, and when asked merely if “Bright Builders [was] aware that you were using drop shippers,” Prince

responded: “They suggest you use drop shippers.” (Doc. 128 at 16:23-25). Moreover, Prince testified that Bright Builders had “some that they recommended that [he] use” (Doc. 128 at 17:3-4). However, while Bright Builders recommended certain drop-shippers, Prince testified that he did not use the drop shippers recommended because he would not be able to make the amount of money he wanted. (Doc. 128 at 4:4-6, 38:3-9). Instead, Prince used various drop shipping “companies in China” to obtain the products he sold. (Doc. 128 at 16:8-17). Prince also admitted that he may have sold golf clubs on eBay prior to his ever finding or utilizing Bright Builders in 2008. (Doc. 128 at 49:15-50:12). Prince said he would go on eBay during the use of his eBay account and look at where he could find the cheapest clubs to sell in order to reap the largest profit margin, and he found them at the Chinese drop shipper websites he eventually used to supply his copycatclubs site (Doc. 128 at 50:17-25). Moreover, Prince’s prior testimony confirmed that he would have both bought and sold golf clubs on eBay during this earlier time (prior to his involvement with Bright Builders). (Doc. 128 at 49:15-50:12). Prince also admitted that he could not recall telling Bright Builders about the Chinese web sites he was using to supply his sale of golf clubs or the fact that the clubs he was selling were counterfeit. (Doc. 128 at 52:1-6, 68:11-14). Hence, the evidence showed that Bright Builders taught Prince to use “drop shippers” generally, and even suggested certain drop shippers, but *not drop shippers from China, let alone those from which Prince obtained his infringing products!*

Finally, Cleveland argues that the evidence showed Bright Builders had specific knowledge that Prince was infringing because Prince told a Bright Builders coach that he was “selling copied golf clubs” (Cleveland Response at 9). Cleveland actually argues that while it was not “common sense” to Prince that copied clubs were necessarily illegal or “counterfeit” at the time he was discussing his plan with Bright Builders (Doc 128 at 52:1-9, 68:11-14),

nevertheless, this discussion should somehow require Bright Builders' to assume "copied" meant "counterfeit" – rather than what Bright Builders actually thought it meant ("generic" golf clubs, Ex. C at 111:18-23, 112:2-5; or "things like when you go to the store and buy generic Advil, you know, it's a kind of a copy of the Advil brand, or ibuprofen; acetaminophen, Tylenol, Doc. 132 at 66:7-14).<sup>3</sup> And, there is no particular trademark, Cleveland's, or anyone else's, mentioned in any of the evidence of discussions Prince had with Bright Builders or in the domain name itself. Nevertheless, despite absolutely no evidence that Bright Builders knew or even could have known that any particular trademark was infringed or would be infringed by Prince, that somehow Bright Builders can be charged, as a matter of law, with knowledge that Prince had utilized "a *non-genuine*, copy of *the plaintiff's* [Cleveland's] trademark." (Ex. J, Instruction 9.1, emphasis added; Cleveland Response at 8). There can be no such conclusion from the evidence.

It is only by adding into the actual evidence new evidence Cleveland now wishes it *could have presented* that Cleveland claims, seemingly regardless of the standard of knowledge applied, that there was sufficient evidence that Bright Builders was either "actively involved" in creating Prince's infringing content, or "specifically" knew of Prince's infringement of Cleveland's mark. As demonstrated above, this conclusion simply cannot be reached on the evidence Cleveland presented at trial.

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<sup>3</sup> While Cleveland would have the Court believe that there are simply no such things as legitimate "copied" golf clubs – there is an entire legal industry built, much like generic drugs, around what are known as "cloned" or reverse-engineered golf clubs, slightly different than their name-brand counterparts but advertised and marketed as *performing very close to* name-brand golf clubs – just like generic versions of name-brand drugs. This is perhaps why Cleveland did not produce any evidence as to the meaning of the term "copy" in relation to golf clubs generally, because an expert opining that it would only be understood to mean "counterfeit" would be hard to acquire. Nevertheless, as the *Tiffany* court noted, it is not for the service providers to bear the burden of acquiring such expertise in particular products in order to ferret out counterfeits – it is the trademark owner's burden to do so.

## **II. From Its Inaccurate and Misleading Recitation of the Evidence, Cleveland Asks This Court To Adopt A Standard of Knowledge For Service Providers Differing from All Other Courts Addressing the Question**

In an interesting twist, Cleveland argues that the standard of liability for Bright Builders, unquestionably an internet service provider, should be determined by the allegedly “ample” evidence it claims it presented that Bright Builders was *not just any* service provider, but was akin to the product manufacturers in *Georgia Pacific Consumer Products, LP v Von Drehle Corp.*, 618 F.3d 441 (4th Cir. 2010) and *Inwood Labs., Inc. v. Ives Lab., Inc.*, 456 U.S. 844 (1982). However, *no court* has held that *any* service provider, particularly internet service providers, can be held under the same standard of contributory liability as product manufacturers for good reason – where users can add and delete website content and conduct potentially infringing transactions thousands of times per day (let alone over the course of a year), a ridiculously huge burden would be placed on internet service providers to police websites continually and in perpetuity for infringing content. *See Tiffany v. eBay*, 76 F.Supp.2d 463, 475 (S.D.N.Y. 2008), affirmed in part and remanded in part, 600 F.3d 93 (2d Cir. 2010) (observing that “more than six million new listings are posted on eBay daily, and at any given time, some 100 million listings appear on the website.”).

The courts have specifically distinguished the liability faced by product manufacturers from that faced by service providers. While *Inwood* clearly applies to manufactures who have a hands-on involvement in making the particular product that is then “passed off” under another’s trademark, *Inwood*, 456 U.S. at 853-54 (drug manufacturer sold generic versions of brand-name drug in identically colored pill capsules with the knowledge that pharmacists would place the pills in brand-name packaging), *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1381-1382 (9th Cir. 1984) (manufacturer of foundations with identical fabric covering or “ticking” of Sealy

mattresses that bore no identifying labels but which it knew would be sold as a set with Sealy mattresses), all courts addressing non-product manufacturing or distributing defendants have faced a harder question. In *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992), the court acknowledged that

it is not clear how the doctrine applies to people who do not actually manufacture or distribute the good that is ultimately palmed off as made by someone else. A temporary help service, for example, might not be liable if it furnished [the infringing seller] the workers he employed to erect his [flea market] stand, even if the help service knew that [the infringing seller] would sell counterfeit goods. Thus we must ask whether the operator of a flea market is more like the manufacturer of a mislabeled good or more like a temporary help service supplying the purveyor of goods.

*Id.* at 1148.<sup>4</sup>

Cases specifically addressing service providers have not failed to account for the level of involvement the providers at issue had with the service transactions at issue. Neither did the courts in *Tiffany v. eBay*, 600 F.3d 93 (2d Cir. 2010) and *Rosetta Stone Ltd. v. Google Inc.*, 730 F.Supp.2d 531 (E.D. Va 2010), find that eBay and Google were merely “passive” providers – far from it. The Tiffany court spent a considerable portion of the opinion addressing the plaintiffs’ evidence that eBay actively promoted and advertised the sale of Tiffany items on its site, “advised its sellers to take advantage of the demand for Tiffany merchandise as part of a broader effort to grow the Jewelry & Watches category, and purchased sponsored-link advertisements on various search engines to promote the “Tiffany” items sellers were posting *Tiffany*, 600 F.3d at 100-101. Moreover, eBay generated revenue by charging sellers individual “insertion fees”

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<sup>4</sup> At various places in its Response, Cleveland inserts language that Bright Builders provides both “products and services” – however, the only “product” Bright Builders provides is its various coaching and hosting services – there is no question that Bright Builders did not supply the counterfeit golf clubs Prince palmed off, such as to fit this into a product manufacturer or distributor case.



based on the starting price of the particular good listed and for any completed sale charges a “final value fee” based on the final sale. *Id.* at 97. Finally, eBay also generated revenue through ownership of PayPal which it allows sellers to use to process purchases and gains a fee per transaction – giving “eBay an added incentive to increase both the volume and the price of the goods sold on its website.” *Id.*

Nevertheless, the *Tiffany* court was “not persuaded by Tiffany’s proposed interpretation of *Inwood*. Tiffany understands the ‘lesson of *Inwood*’ to be that an action for contributory trademark infringement lies where ‘the evidence [of infringing activity] – direct or circumstantial, taken as a whole --...provide[s] a basis for finding that the defendant knew or should have known that its product or service was being used to further illegal counterfeiting activity.’” *Id.* at 107. The *Tiffany* court rejected this reading of *Inwood* – almost identical to the reading proposed by Cleveland now – as “too broad[]” as applied to service providers. *Tiffany*, 600 F.3d at 107-108. Rather, the court in *Tiffany* required that, to satisfy the knowledge prong of *Inwood*, Tiffany was required to “demonstrate that eBay was supplying its service to individuals who it knew or had reason to know were selling counterfeit Tiffany goods.” *Id.* at 109.

*Rosetta Stone* also specifically stated that “[a]lthough facially applicable to manufacturers and distributors of goods, courts have applied *Inwood*’s test for contributory trademark infringement ‘to a service provider *if* he or she exercises sufficient control over the infringing conduct.’” *Rosetta Stone*, 730 F.Supp.2d at 547, quoting *Tiffany*, 600 F.3d at 104. In discussing the proof required to show sufficient control for service providers, the court held that *Rosetta Stone* was required to show that Google “had specific contemporary knowledge of *which particular listings were infringing* or would infringe in the future,” which *Rosetta Stone* failed to do. *Rosetta Stone*, 730 F.Supp.2d at 548 (emphasis added). The Court addressed that Google

was providing a tool “that assists advertisers in optimizing their advertisements” that “operates by searching or indexing the particular website identified by an advertiser and returning a limited number of keyword ideas for websites not affiliated with the URL.” *Id.* at 547. However, before providing these “keyword ideas,” or assistance, just like Bright Builders, “Google informs [users] that they are responsible for the keywords selected and for ensuring that their use of the keywords does not violate any applicable laws.” *Id.* at 547-548. Moreover, “like eBay’s inability to detect which vendors were genuine, Google ha[d] no mechanism for detecting which advertisers sold counterfeit Rosetta Stone products.” *Id.* at 548. Absent such a showing that Google knew of particular instances of infringement by particular sellers, no liability for contributory infringement could be found in this service provider context. *Id.*

Hence, despite their less-than-passive involvement in providing a service, neither the *Tiffany* nor *Rosetta Stone* court found that such involvement and profit therefrom was sufficient evidence to sustain liability against these service providers for contributory trademark infringement absent knowledge that a particular individual user was infringing a specific product.

Ignoring this very distinction, Cleveland goes so far as to argue without *any* support that *Georgia Pacific* applies to defendants that “continued to provide products *and services*” (Cleveland Response at 4 and again at 5, emphasis added). *Georgia Pacific* did not extend its holding to service providers, nor indeed *even mentions* “services” in the opinion. A review of the citations provided by Cleveland merely reveals that the court quoted the language of *Inwood* at 853-54 precisely (“if a *manufacturer or distributor* ...continues to *supply its product* to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit”)

(emphasis added), *Georgia Pacific*, 618 F.3d at 450, and then asked, “apply[ing] the teachings of *Inwood* to the facts of the present case” whether the defendant “continued to supply *its product* to distributors knowing that such infringement was taking place.” *Id.* at 451. Indeed, *Georgia Pacific*, even more so than *Inwood* itself, is so far afield from having to reach any question regarding the knowledge prong for contributory liability, because the defendant in *Georgia Pacific* was clearly a *product manufacturer* who “candidly admit[ted]” that it intended its product to be “passed off” in that “it developed its 810-B Toweling for the specific purpose of end-user customers stuffing [GP’s] [enMotion] Dispensers, which dispensers were the only ones on the market at the time to accept ten-inch wide toweling.” *Id.* at 451.

There is simply no support in the case law, and perhaps this is why Cleveland provides no citation to the case law, to justify Cleveland’s argument that this Court should depart from the standard of knowledge for contributory trademark infringement by service providers set forth and followed by courts across the country, and by at least one court in this jurisdiction.

### **III. While Instructions Were Adequate for Product Manufacturers, The Instructions Were Insufficient for Service Provider Liability**

Again, in arguing that the jury instructions in this case were “adequate,” Cleveland misstates *Georgia Pacific* as applying to those providing “products *and services*” (Cleveland Response at 12, emphasis added) – as noted in section II above, *Georgia Pacific* does not once mention “services” or “service providers” in the language of the case. Cleveland then goes on to say that under *Georgia Pacific* and *Inwood*, the instructions are “adequate” because the jury need not be instructed that they must find Bright Builders’ knowledge of an individual infringer’s (clearly, in this case, Prince’s) specifically infringing listings (listings infringing Cleveland’s mark). There is no question that this issue was the subject of a specific objection. For the reasons set forth in Bright Builders’ initial memorandum in support of its motions, the jury

instructions were not “adequate” *precisely because they simply articulated the Inwood standard* without particularized instruction on the knowledge element as applied to *service providers* – (1) requiring the jury to find knowledge that *Prince* was infringing *Cleveland’s* specific mark in *particular* listings or (2) notice that *particular listings* are infringing *and failure to investigate such noticed listings*.

Nor can these defects in allowing the jury to find liability on a lesser standard be somehow cured simply by a generic “willfulness” instruction given later in the charge in the context of a damage enhancing instruction or even in a different claim.

It is because the instruction incorrectly allowed the jury to find Bright Builders, as a service provider, liable even in the absence of its knowledge of the particular listings of the particular mark that the statement “Ignorance is no defense” is so damaging. It implies that ignorance of specific infringing listings is somehow “okay” – which it is not – rather than ignorance of the law (aka “the Lanham Act” or “trademark law”). Finally, and again without citation, Cleveland argues that where a specific objection was not raised to the jury instructions at issue, those issues are “waived” and need not be reached. This is not correct. Again, even when Fed. R. Civ. P. 51 (to make a contemporaneous objection) is not followed, an appellate court can nevertheless reverse when the error is “plain” or “fundamental” in that the instructions “must necessarily have caused the jury to act in complete ignorance of, or to have misapplied, fundamentally controlling legal principles to the inevitable prejudice of an aggrieved party.” *Spell v. McDaniel*, 824 F.2d 1380, 1398-99 (4th Cir. 1987).

#### **IV. Cleveland’s Wandering SCUTPA Claims**

Finally, in no more than a footnote, Cleveland again changes its theory of its South Carolina Unfair Trade Practices Act (“SCUTPA”) claim. First, in its complaint, Cleveland

alleged only that “Defendants' infringement of Plaintiff's trademarks with the intent to deceive and defraud the public into believing that counterfeit golf clubs were manufactured by, approved by, sponsored by or affiliated with Cleveland Golf, constitute unfair and deceptive acts or practices in the conduct of trade or commerce in violation of S.C. Code Ann. § 39-5-10 et seq. (the South Carolina Unfair Trade Practices Act).” (Complaint at 17, ¶ 73, Reply Exhibit 2). Then, after all evidence at the trial was presented, and after Bright Builder’s counsel specifically objected to allowing a verdict against Bright Builders under the South Carolina Unfair Trade Practices Act Claim unless there was a finding of liability under the Lanham Act, (Doc. 129 at 54:10-55:20), Cleveland then turned down another path and argued that Bright Builders could in fact be liable under the Unfair Trade Practices Act claim on both infringement of Plaintiff’s mark and failing to monitor twenty thousand websites for illegal activity. (Doc. 129 at 55:21-57:2; 58:10-15).

To this new and belated adjustment, Bright Builders argued during the verdict form conference and again in its initial memorandum in support of the present motions that plaintiff neither plead any cause of action alleging violation of the Unfair Trade Practices Act for failing to monitor other websites other than Prince, (Doc. 129 at 60:2-17; 60:6-13), nor could testimony regarding other websites be found as a basis for liability for the claim as this would require a showing that failing to monitor sites other than Prince’s cause some damage to Cleveland in order to prevail – a fact neither proved or supported by any evidence. (Doc. 128 at 11:11-12:4, 62:19-63:21). Moreover, Bright Builders argued in its initial memorandum that a remand of the South Carolina Unfair Trade Practices Act Claim would be justified and necessary under this new argument as the verdict form did not require and we have no way of ascertaining whether or not the jury found separate independent actions of Bright Builders in violation of SCUTPA.

Ignoring the latter argument entirely, Cleveland has found yet another fork in the road on which its SCUPTA claim seems to be traveling. For now, Cleveland argues that there was an “abundance of evidence presented to the jury of Bright Builders unfair trade practices, ....For example, the evidence that Bright Builders told Prince to take images from Cleveland’s website to put them on his own website is sufficient evidence to support the jury’s finding of liability under the SCUTPA.” (Cleveland Response at 7, n.3). All of the same arguments Bright Builders made at the verdict form conference, as well as in its initial memorandum on these motions with regard to SCUTPA claims based on alleged “independent actions” apply with equal severity to this newest claim and are hereby proffered.

Moreover, Cleveland again plays very “fast and loose” with the evidence to support this apparent basis for its SCUTPA claim. Prince’s testimony could not support such an allegation that Bright Builders “told Prince to take images from Cleveland’s website.” *Compare*: Doc. 128 at 10:5-10 (“Q: Did they tell you anything with regard to pictures on your web site? A: Find a picture, and if you like it copy and paste it. Q: And when they say find a picture, where did they tell you you are supposed to find these pictures? A: No specific area.”); Doc. 128 at 43:22-24 (Prince was told to copy and paste “from wherever”); Doc. 128 at 54:21-22 (“I was told to copy and paste, so that’s what I did.”); Doc. 128 at 75:20-23 (Bright Builder never told Prince to “go and copy and paste trademark images onto [his] web site”). The evidence simply does not support that Bright Builders directed Prince or anyone else to “copy and paste” Cleveland’s or any other trademarked images. Moreover, the evidence does not support, again, that Cleveland could have suffered any harm from Prince trying to copy and paste from its website, even without Bright Builders’ direction. Prince testified that when he alone went to Cleveland’s

website, he was unable to copy and paste images because they were encrypted. (Doc. 128 at 53:22-54:20).

Regardless of the ever-changing path that Cleveland takes in trying to support (without evidence) differing bases for its SCUTPA claims, the bottom line in this case is that, because Bright Builders did not itself create the infringing content of Prince's site or itself sell the infringing products, Cleveland's claims against Bright Builders "must be analyzed under the judicially created doctrine of contributory trademark infringement, derived from the common law of torts." *Georgia Pacific* at 449 (citations omitted). "Accordingly," all SCUTPA claims "rise or fall, ... upon whether [Cleveland] has proffered sufficient evidence for a reasonable jury to find that [Bright Builders] is liable for contributory trademark infringement" where both claims must be "based upon the same intentional conduct by [Bright Builders]." *Id.* at 449.

## **V. Conclusion**

Cleveland proffers no facts or law that support why Bright Builders' motions should not be granted reversing the verdict and judgment against it. Accordingly, Bright Builders asks that this court grant Bright Builders' present motions.

Respectfully submitted,

s/ Paul J. Doolittle

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