Rosetta Stone LTD v. Google Inc. Doc. 136

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROSETTA STONE LTD.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civ. Action No. 1:09-cv-00736(GBL/TCB)**
	)	
GOOGLE INC.,	)	
	)	
Defendant.	)	
	)	

ROSETTA STONE LTD.'S OPPOSITION TO
GOOGLE'S MOTION TO DISMISS COUNT SEVEN

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Plaintiff Rosetta Stone Ltd. ("Rosetta Stone") respectfully submits this Opposition to Defendant Google Inc.'s ("Google") Motion to Dismiss Count VII of the First Amended Complaint. For the reasons that follow, Google's motion should be denied.

INTRODUCTION

Google made a strategic business decision in 2004 when it determined that it could dramatically enhance its profits by auctioning branded search terms, including trademarks, to be used as keyword triggers for third-party advertising through its AdWords program. With full knowledge and acceptance of the legal risks inherent in this business decision, Google has generated billions of dollars in additional revenue through the auction of third parties' trademarks, including the trademarks of Rosetta Stone that are at issue in this litigation (the "Rosetta Stone Marks"). In 2009, Google reassessed its business practices and determined that even greater profits could be generated by permitting certain third parties to display in their ad text the trademarks owned by others, including the Rosetta Stone Marks. The additional significant profits associated with Google's strategic business decisions have been gleaned from the strength of the trademarks being offered at auction. However, the trademark owners, like Rosetta Stone, who have expended millions of dollars in building the brand equity and goodwill in their marks, are being exploited by Google without compensation. Rosetta Stone's unjust enrichment claim is designed to address and correct this inequity.

Google's attempt to avoid liability for unjust enrichment must fail for the following reasons:

- The Communications Decency Act provides no shelter for Google because the unjust enrichment claim is not dependent upon the content of any advertisement posted to Google's website. Rather, the unjust enrichment claim arises from Google's own business practices in auctioning, without authorization, the Rosetta Stone Marks.

- Rosetta Stone's unjust enrichment claim is not barred by the statute of limitations because Google's improper conduct is continuing in nature, with each new auction inflicting a new injury and creating a separate cause of action.

- The Amended Complaint states a cause of action for unjust enrichment and there is no express contract between Google and Rosetta Stone governing the conduct at issue.

For these reasons and those explained in detail below, Google's Motion to Dismiss should be denied.

ARGUMENT

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (citing 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (1990)). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to Rosetta Stone, read the complaint as a whole, and take the facts asserted therein as true. *See Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993).

I. THE COMMUNICATIONS DECENCY ACT HAS NO APPLICATION TO ROSETTA STONE'S UNJUST ENRICHMENT CLAIM

Google cannot stretch the limited immunity granted to interactive computer service providers by the Communications Decency Act ("CDA") to preclude liability for Rosetta Stone's unjust enrichment claim. In order to promote the free flow of information on the Internet, the CDA limits the liability of interactive computer service providers for state law causes of action arising from the *content* of communications created and posted on the Internet by third parties. *Universal Commc'ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544, 548 (E.D. Va. 2008). The

CDA may not be asserted, however, as the basis to avoid liability for the interactive computer service provider's own tortious conduct. *See, e.g., 800-JR Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273, 295 (D. N.J. 2006) ("Immunity does not seem to fit here because the alleged fraud is the use of the trademark name in the bidding process, and not solely the information from third parties that appears on the search results page. It is not the purpose of the Act to shield entities from claims of fraud and abuse arising from their own pay-for-priority advertising business, rather than from the actions of third parties."); *Mazur v. eBay Inc.*, No. C 07-03967 MHP, 2008 WL 618988, at *9, 12 (N.D. Cal. Mar. 4, 2008) ("The CDA does not immunize [a content provider] for its own fraudulent misconduct. . . . eBay's statement regarding safety affects and creates an expectation regarding the procedures and manner in which the auction is conducted and consequently goes beyond traditional editorial discretion."). Here, because Rosetta Stone's unjust enrichment claim does not depend upon the content of any posting on Google's website and therefore does not treat Google as the publisher or speaker of any information giving rise to such liability, the CDA is inapplicable.[1]

A. Rosetta Stone's Unjust Enrichment Claim Is Based Upon Google's Business Practices – Not the Content of Any Advertisement Appearing on Its Website

Rosetta Stone's unjust enrichment claim pertains solely to Google's business practice of auctioning branded terms – including proprietary trademarks of third parties – as keywords to trigger the display of advertisements. Specifically, the cause of action arises from

[1] Rosetta Stone recognizes that this Court previously granted a motion to dismiss certain state law claims based on the CDA, but maintains that immunity under the CDA is an affirmative defense and not properly considered in the Rule 12(b)(6) context. *See, e.g., Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM, 2008 WL 4217837, at *8 (C.D. Cal. July 18, 2008) (whether Google qualifies for CDA protection is "fact intensive" and therefore not properly resolved through a Rule 12(b)(6) motion); *Curran v. Amazon.com, Inc.*, No. 2:07-0354, 2008 WL 472433, at *12 (S.D. W.Va. Feb. 19, 2008); *Doctor's Assocs., Inc. v. QIP Holders, LLC*, 82 U.S.P.Q.2d 1603, 1605 (D. Conn. 2007).

Google's business practice of auctioning Rosetta Stone's trademarks to the bidders most favorable to Google, thereby seizing the benefit associated with the goodwill established in Rosetta Stone's trademarks to generate profits contrary to the express wishes of Rosetta Stone and without compensating Rosetta Stone for such use. (Am. Compl. ¶¶ 122-124.) The content of the advertisements posted by the third parties bidding on the Rosetta Stone trademarks is irrelevant to the unjust enrichment claim and therefore falls outside the purview of the CDA. Said more plainly, it is Google's business strategy to enhance its profits through the auction of trademarks that it does not own or have permission to sell – the goodwill for which is created solely by the equity invested in the trademarks by their owners – that gives rise to this cause of action.

In an effort to invoke the protections afforded by the CDA, Google artfully, but unsuccessfully, attempts to tie the unjust enrichment claim to the content posted by third parties. Google first argues "that third-party advertisers, not Google, select the keywords that trigger and the content posted in the Sponsored Links." (Google's Mem. at 3.) Google then asserts that "Google receives no money from the mere act of a third-party advertiser selecting Rosetta Stone's trademarks as a keyword. . . . Google only earns revenue once a search engine user chooses to click on an advertisement. . . ." (*Id.*) These arguments miss the mark. Although it is true that a third party selects the trademarks offered by Google upon which it wishes to bid, the selection process does not relate in any way to the content of the advertisement that is posted on the Sponsored Link. Similarly, although it is true that Google does not profit until a user "clicks on" a Sponsored Link, the unjust enrichment claim does not depend upon the content of that advertisement. Rather, it is the business practice of auctioning trademarks for profit, *that occurs prior to and independent of the posting of any information on the Internet*, that serves as the

basis for the unjust enrichment claim. Indeed, irrespective of whether the Sponsored Link makes reference to the trademark term, Google has been unjustly enriched.

That Google fully appreciated the benefits to be gleaned from auctioning the intellectual property owned by others is plain from the facts alleged in the Amended Complaint. Prior to 2004, Google did not offer branded terms to be used as keywords for its AdWords auction. (Am. Compl. ¶ 42.) In 2004, however, Google elected to expand its AdWords program to include branded terms, recognizing that there would be greater demand (and greater profits) to be gained by permitting third parties to bid on trademarks owned by others. (*Id.* ¶ 44.) In so doing, Google expressly recognized that it could achieve greater profits by usurping the goodwill associated with such famous marks. The stronger the mark, the greater the demand; the greater the demand, the higher the auction price. The strategy has proven to be very lucrative. Google realizes billions of dollars annually on the strength of trademarks owned by third parties, but does not compensate the trademark owners in any respect. (*Id.* ¶¶ 33, 62 & 124.) In fact, its strategy to offer the trademarks of third parties was made without authorization from the trademark owners and, in the case of Rosetta Stone, against its express direction to the contrary. (*Id.* ¶ 124.) These facts demonstrate that it is Google's business practice to reap profits from the strength and goodwill of the Rosetta Stone Marks that gives rise to the unjust enrichment claim – not the content of any advertisement that appears on the Internet.

None of the cases cited by Google support its position here. In each of those cases, the plaintiff sought to hold the defendant liable solely as a result of the defendant's dissemination of statements made by others, or the dissemination of information regarding actions taken by others. *See, e.g., Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119 (9th Cir. 2003) (holding that a dating service, Matchmaker.com, was not liable for the actions of third

parties posting information on its website); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (holding that the website owner posting consumer reviews drafted by third parties was not liable for false statements contained therein). Unlike these cases, Rosetta Stone's unjust enrichment claim does not seek to hold Google liable for the content of any advertisement or posting appearing on its website.

Moreover, Google's reliance on this Court's prior ruling dismissing Rosetta Stone's claim under the Virginia Business Conspiracy Act is misplaced. (Google's Mem. at 2-4.) That state law claim sought to hold Google liable for information appearing on its website whereas, as explained above, Rosetta Stone's unjust enrichment claim does not. Indeed, in granting Google's motion to dismiss the conspiracy claim, the Court expressly recognized that a distinction must be drawn between the auction bidding process itself and the advertisement that appears on the Internet as a result of that process. (09/18/2009 Hearing Tr. at 30-31 ("And similarly the *800-JR Cigar* case is distinguishable in at least two ways. . . . [T]he court held that immunity was inapplicable because the alleged fraud is use of the plaintiff's trademark in the advertiser's bidding process, not necessarily [ad] information from the third party that may appear on the search results page.").) Because Rosetta Stone's unjust enrichment claim is based on the auction bidding process itself, under the Court's prior reasoning, CDA immunity is inapplicable.

B. Rosetta Stone's Unjust Enrichment Claim Does Not Treat Google as the Publisher or Speaker of Any Information

Google's CDA immunity argument fails for yet another reason – Rosetta Stone's unjust enrichment claim does not seek to "treat[] [Google] as the publisher or speaker" of any information. Rather, in an unjust enrichment case, the duty the defendant violated springs from an implied contract – an enforceable promise – not from any non-contractual conduct or capacity

of the defendant.[2] In this regard, Rosetta Stone seeks to hold Google liable as the counter-party to an implied contract, as a promisor who has breached. *See Barnes v. Yahoo!*, 570 F.3d 1096, 1107 (9th Cir. 2009) (denying CDA immunity for a promissory estoppel claim, and stating when a party engages in conduct giving rise to an independent and enforceable contractual obligation, that party may be "h[eld]...liable [not] as a publisher or speaker of third-party content, but rather as a counterparty to a contract, as a promisor who has breached"). Liability for the unjust enrichment claim is not premised on anything related to Google's status as a "publisher" or to actually editing or publicizing anything, but rather to its implied promise to pay when it elected to auction Rosetta Stone's trademarks without authorization and without compensating Rosetta Stone for the value it received. *See* Part III.A., *infra.*

* * *

In sum, Google may not invoke the CDA to avoid liability for the unjust enrichment claim asserted by Rosetta Stone.[3]

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[2] "Unjust enrichment is a quasi-contract claim based upon the equitable remedy available when a recipient of a benefit obtains it under conditions where the receipt amounts to unjust enrichment." *Wright v. Cangiano*, Chancery No. 15084, 1993 WL 946172, at *1 (Va. Cir. Ct. July 20, 1993) (citation omitted). It is a common-law doctrine that provides restitution in the situation where "one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss." Restatement of Restitution at 1 (1937). To avoid unjust enrichment, equity will effect a "contract implied in law," requiring one who accepts and receives the services of another to make reasonable compensation for those services. *See Marine Dev. Corp. v. Rodak*, 225 Va. 137, 142-44 (1983).

[3] Even if the Court were to conclude that the unjust enrichment claim somehow depends upon the content of the Sponsored Link appearing on the Google website – and it should not – the claim still would not be barred by the CDA. A provider of an interactive computer service, such as Google, may claim CDA immunity only with respect to "information content provided by another information content provider." 47 U.S.C. § 230(c). "[A]n interactive computer service that also is an 'information content provider' is not immune from liability arising from publication of that content." *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009) (citations omitted). Here, discovery has established that Google actively encourages advertisers to bid on branded keywords and to use branded keywords in their *(cont'd)*

II. ROSETTA STONE'S UNJUST ENRICHMENT CLAIM IS NOT TIME-BARRED

Google also contends that Rosetta Stone's unjust enrichment claim is time-barred, asserting that its continuing auctions of Rosetta Stone trademarks should be treated as a one-time event dating to its first auction in 2004. (Google's Mem. at 4-5.) Applying this rationale, Google asserts that Rosetta Stone must have initiated an action within three years of Google's first auction and, since it did not, Rosetta Stone is forever barred from asserting this cause of action. (*Id.* at 5.) Google's position is directly contradicted by established Virginia legal precedent.

The three-year limitation period associated with unjust enrichment claims begins to run when the defendant is required to pay the expected compensation. *Primrose Dev. Corp. v. Benchmark Acquisition Fund Ltd. P'ship*, 47 Va. Cir. 296, 298 (Va. Cir. Ct. 1998). When a defendant's wrongful acts occur at intervals, each occurrence inflicts a new injury and a separate cause of action arises. *See Hampton Rds. Sanitation Dist. v. McDonnell*, 234 Va. 235, 239 (1987); *Norfolk & W. Ry. Co. v. Allen*, 118 Va. 428, 432-33 (1915).[4] A plaintiff may demand

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advertisements. *See* Rosetta Stone's Mem. of Law in Supp. of its Mot. for Partial Summ. J. as to Liability [Docket No. 104] at p. 10-11, ¶¶ 30-33. Google thus is responsible for the content of the advertisements appearing on its website and is subject to state law liability for that content. *See Accusearch*, 570 F.3d at 1199-1201 (holding that the service provider was "responsible for the development of the offensive content" by "specifically encourag[ing] development of what is offensive about the content").

[4] The same is true in the breach of contract context. The statute of limitations begins to run on a breach of contract claim when the breach occurs. Va. Code Ann. § 8.01-230. "Virginia recognizes that multiple breaches or occurrences can give rise to separate causes of action." *Park v. Alcon Surgical, Inc.*, No. 92-1179, 1993 WL 114820, at *3 (4th Cir. Apr. 15, 1993) (citation omitted). The Supreme Court of Virginia recently explained the application of the statute of limitations to situations involving multiple breaches of contract: "[i]f the wrongful act is of a permanent nature and one that produces all the damage which can ever result from it, [then] the entire damages must be recovered in one action, and the statute of limitations begins to run from the date of the wrongful act, but if the wrongful acts are not continuous

(cont'd)

money due by filing a complaint to recover all sums due which accrued three years prior to filing suit. *Davis v. Davis,* 190 Va. 468, 478 (1950) (holding that defendant's statute of limitations defense to plaintiff's implied contract claim did not apply to "such sums as accrued within three years prior to the institution of this suit"). Here, each time Google, without authorization, auctions Rosetta Stone's trademarks, it inflicts a new injury on Rosetta Stone and a separate cause of action arises.

The two cases relied upon by Google for the contrary position – *Tao of Systems Integration, Inc. v. Analytical Services & Materials, Inc.*, 299 F. Supp. 2d 565, 576-77 (E.D. Va. 2004) and *GIV, LLC v. IBM Corp.*, No. 3:07cv067-HEH, 2007 WL 1231443, at *3 (E.D. Va. April 24, 2007) – involved claims of a single misrepresentation regarding the ownership of trade secrets and a single misappropriation of patented technology, respectively. Because the actions giving rise to the unjust enrichment claims in those cases occurred on a date certain (or within a specified date range), the statute of limitations began to run from that time period. Unlike the *Tao* and *GIV* cases, however, here there is continuing conduct – Google's daily auctions of Rosetta Stone's marks – giving rise to the unjust enrichment claim. Accordingly, Rosetta Stone's unjust enrichment claim entitles it to compensation for the benefits taken by Google without Rosetta Stone's authorization during the three-year period leading up to the filing of the complaint, and up to and including the date of judgment.

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and occur only at intervals, each occurrence inflicts a new injury and gives rise to a new and separate cause of action." *Am. Physical Therapy Ass 'n v. Fed'n of State Bds. of Physical Therapy*, 271 Va. 481, 484 (2006) (citation and internal quotations omitted).

III. THE AMENDED COMPLAINT STATES A CLAIM FOR UNJUST ENRICHMENT

Rosetta Stone's unjust enrichment claim is adequately pled. Under Virginia law, a plaintiff seeking recovery for unjust enrichment must show (1) that it "conferred" a benefit on the defendant, (2) that the defendant knew of the benefit and should reasonably have expected to repay the plaintiff, and (3) that the defendant accepted or retained the benefit without paying for its value. *Nossen v. Hoy*, 750 F. Supp. 740, 744-45 (E.D. Va. 1990). Judge Davis of the Norfolk Division of the Eastern District of Virginia recently explained that the word "conferred" in this context includes situations in which the defendant, without authorization, takes a benefit from the plaintiff even when the plaintiff has not voluntarily bestowed the benefit on the defendant. *See In re Bay Vista of Va., Inc.*, No. 2:09cv46, 2009 WL 2900040, at *5 (E.D. Va. June 2, 2009). Paragraphs 13 through 69 of the Amended Complaint allege that Google has used the Rosetta Stone Marks without Rosetta Stone's authorization, has sold those marks as keyword triggers for third-party advertising, and has retained these profits without paying for the value that Rosetta Stone has created in its intellectual property. Thus, the Amended Complaint states a claim for unjust enrichment under Virginia law.

In asserting that Rosetta Stone has failed to properly allege the elements of a claim for unjust enrichment, Google argues that (1) "Rosetta Stone does not expressly identify what benefit it supposedly conferred on Google," (2) "Rosetta Stone may not maintain an unjust enrichment claim without pleading sufficient facts to raise the implication that Google promised to pay for the benefit Rosetta Stone provided," and (3) a contract governs the claims and therefore an unjust enrichment claim cannot be maintained. (Google Mem. at 6.) None of these arguments can withstand scrutiny.

A. Rosetta Stone Has Properly Pled a Claim for Unjust Enrichment

The first element of an unjust enrichment claim requires that Rosetta Stone plead and establish that it "conferred" a benefit on Google. *Nossen*, 750 F. Supp. at 744-45. As noted above, the word "conferred" in this context, includes situations in which the defendant, without authorization, takes a benefit from the plaintiff even when the plaintiff has not voluntarily bestowed the benefit on the defendant. *See In re Bay Vista of Va., Inc.*, 2009 WL 2900040, at *5 ("The fact that Defendants are alleged to have intentionally acted to improperly seize and retain such benefit, rather than such benefit being voluntarily *conferred* by Debtor, is inconsequential.") (citation omitted). Rosetta Stone specifically alleges in the Amended Complaint that

> Rosetta Stone requested that Google not auction its trademarks to third parties, including resellers and affiliates, but Google has refused to alter its trademark policy or practices. Rosetta Stone thus has conferred involuntarily a benefit on Google, which is knowingly using the goodwill established in the Rosetta Stone trademarks to derive additional advertising revenue.

(Am. Compl. ¶ 124.) Thus, Rosetta Stone has properly alleged it conferred, albeit involuntarily, a benefit on Google and that Google has improperly seized a benefit from Rosetta Stone.

Google also contends that Rosetta Stone has not properly pled a promise to pay by Google for the use of Rosetta Stone's trademarks. (Google Mem. at 6.) The promise to pay, however, "is implied from the consideration received." *Appleton v. Bondurant & Appleton, P.C.*, 67 Va. Cir. 95, 2005 WL 517491, at *6 (Va. Cir. Ct. 2005) (citing *Marine Dev. Corp.*, 225 Va. at 142 & *Hendrickson v. Meredeith*, 161 Va. 193, 200-01 (1933)); *see also Po River Water and Sewer Co. v. Indian Acres Club of Thornburg, Inc.*, 255 Va. 108, 114-15 (1998). Here, it is properly pled that Google accepted, or took without authorization, Rosetta Stone's trademarks and made them available to third parties at auctions hosted by Google. (Am. Compl. ¶¶ 122-124.) It is also pled that Google derived considerable profits from the unauthorized auction of the

Rosetta Stone Marks. (*Id.* ¶¶ 33 & 62.) The promise to pay for this benefit is implied in law from the unauthorized taking and subsequent sale of Rosetta Stone's trademarks to third parties.[5]

B. No Express Contract Governs the Subject Matter at Issue

Although Google relies on the proposition that one cannot maintain an unjust enrichment claim when there is an express contract governing the parties contractual relationship, Google fails to point out that the express contract must govern the "same subject matter" that gives rise to the unjust enrichment claim. *Appleton*, 2005 WL 517491 at *6 (quoting *S. Biscuit Co. v. Lloyd*, 174 Va. 299, 311 (1940) ("an express contract defining the rights of the parties necessarily precludes the existence of an implied contract of a different nature *containing the same subject matter*")) (emphasis added). For this reason, Google's reliance on its Terms of Use is misplaced.[6] First, there is no contract between Google and Rosetta Stone that governs or even addresses Google's right to auction Rosetta Stone's trademarks to third parties. Second, to the extent Google's Terms of Use merely delineate *what Rosetta Stone agreed to pay to* Google for Rosetta Stone's advertisements appearing on the Google website, such cannot be construed as an express contract between Google and Rosetta Stone governing Google's rights and obligations

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[5] Rosetta Stone included its unjust enrichment claim in the Amended Complaint without adding a single factual averment. It did so because the facts alleged provide Google with adequate notice under Fed. R. Civ. P. 8(a) and properly state a cause of action for unjust enrichment. The alleged infirmities cited by Google are based upon purportedly inadequate factual averments to draw the legal implications to support an unjust enrichment claim. However, with fact discovery now closed and summary judgment briefing having been filed, including cross-motions for summary judgment on the unjust enrichment claim, it is unnecessary to resolve this issue on the pleadings. In the event the Court nevertheless concludes that the pleading is somehow deficient, Rosetta Stone should be permitted an opportunity to allege additional detail.

[6] Google's Terms of Use are not referenced or cited in the Amended Complaint and therefore may not properly be considered by the Court in the context of Google's motion to dismiss. *See Nemet Chevrolet*, 564 F. Supp. 2d at 549 ("On a Rule 12(b)(6) motion, the Court's analysis is limited to the four corners of the Complaint.")

vis-à-vis third parties and its AdWords auctions. This is the very logic employed by the Court in refusing to apply the contractual venue provision that would have required transfer of this action to California. (09/18/2009 Hearing Tr. at 27-28.)

CONCLUSION

For the foregoing reasons, Rosetta Stone respectfully requests that this Court deny Google's Motion to Dismiss Count VII of the First Amended Complaint.

Respectfully submitted,

March 30, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2010 I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system which will then send a notification of such filing (NEF) to the following:

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