UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC. Plaintiff, v. AOL, INC., *et al.*, Defendants.	Civil Action No. 2:11-cv-512

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST, POST-JUDGMENT INTEREST, AND SUPPLEMENTAL DAMAGES

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I. INTRODUCTION

Plaintiff I/P Engine's motion is premature and lacks a substantive basis. First, Plaintiff is requesting supplemental damages and pre- and post-judgment interest before any of the significant post-trial motions on damages, invalidity, and non-infringement have been decided (or even briefed). As these motions may have a significant impact on the damage award, Plaintiff's motion should be deferred until the other post-trial motions are ruled upon. Second, from a substantive perspective, Plaintiff's request for prejudgment interest should be denied because the Court earlier granted Defendants' motion on laches and determined that Plaintiff unreasonably delayed in bringing suit. As the Supreme Court has held, unreasonable delay in filing suit is an exception to the general rule and precludes an award of pre-judgment interest in cases like this one. Further, even were prejudgment interest appropriate under the law, Plaintiff's calculation is overstated.[1]

Finally, the jury's damages verdict does not support Plaintiff's claim that it is entitled to an accounting from October 1, 2012, to the entry of judgment on November 20, 2012, amounting to a 3.5% royalty rate applied to a base of 20.9% of revenues for the accused products. The jury award already accounted for all pre-verdict damages. The jury also awarded a fraction of the damages that Plaintiff sought. To the extent there should be any accounting of supplemental damages, the jury verdict at most corresponds, at most, to an apportionment of approximately 2.8% of the revenues for the accused products, not the 20.9% Plaintiff is seeking.

[1] For the reasons set forth in this brief, Defendants also object to Plaintiff's Notice of Calculation of Prejudgment Interest. (D.N. 791.)

II. ARGUMENT

A. Plaintiff's Motion Is Premature

The Court entered judgment on November 20, 2012, pursuant to the jury's verdict awarding a running royalty. (D.N. 801.) As explained in Defendants' Rule 50(a) Motion for Judgment as a Matter of Law of No Damages, a running royalty is not appropriate in this case. (D.N. 752.) Further, because of errors concerning the verdict on damages, most of which stem from Plaintiff's actions or failure to act before bringing this lawsuit, Defendants intend to file post-trial motions directed to damages, as well as invalidity, and non-infringement. Until the Court resolves the fundamental issues in these upcoming post-trial motions , it would be premature and wasteful of judicial resources for the Court to decide Plaintiff's motion for interest and supplemental damages. Plaintiff will suffer no prejudice in allowing the Court to consider these significant issues before, if at all, reaching the issues raised by Plaintiff's present motion. For these reasons, the Court should either deny or hold in abeyance any decision on Plaintiff's motion until it has decided the threshold issues concerning damages and liability.

B. Plaintiff Is Not Entitled To Prejudgment Interest

1. Prejudgment Interest Should Be Denied Because of Plaintiff's Undue Delay in Bringing this Lawsuit

I/P Engine argues that it is entitled, as a matter of course, to prejudgment interest on the damages that were awarded for infringement. (D.N. 793, 7.) Contrary to I/P Engine's argument, the Supreme Court has explained that prejudgment interest should not be awarded in every case where infringement is found. *See Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656-57 (1983). Instead, the Supreme Court has found that prejudgment interest, although ordinarily awarded, may be denied altogether when a patent owner unduly delays in bringing its lawsuit:

> [I]t may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit.

Id. at 657. In its motion for prejudgment interest, I/P Engine omits this critical language from its citation to *General Motors*. Based on this portion of the holding, however, Plaintiff's request for prejudgment interest should be denied. Here, the Court already engaged in a careful analysis of I/P Engine's six-plus year delay in bringing this lawsuit and decided that the delay was unreasonable. (*See* D.N. 800.) As such, the Supreme Court's exception in *General Motors* for denying prejudgment interest as a result of undue delay squarely applies here.

Since *General Motors*, numerous courts have denied prejudgment interest on the basis of delay in bringing suit. *See Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc.*, 246 F.3d 1336, 1361–62 (Fed. Cir. 2001) (affirming denial of prejudgment interest where patentee, while having notice of infringer's infringement, delayed for over two years in bringing suit); *Minemyer v. R-Boc Representatives, Inc.*, No. 07 C 1763, 2012 WL 2423102, *3-4 (N.D. Ill. June 26, 2012) (denying prejudgment interest due to patentee's delays that unduly prolonged the suit); *Saint-Gobain Autover USA, Inc. v. Xinyi Glass N. Am., Inc.*, 707 F. Supp. 2d 737, 766-67 (N.D. Ohio 2010) (denying prejudgment interest due to the patentee's four-year delay in bringing suit); *800 Adept, Inc. v. Murex Sec., Ltd.*, 505 F. Supp. 2d 1327, 1334-35 (M.D. Fla. 2007), *vacated on other grounds*, 539 F.3d 1354 (Fed. Cir. 2008) (denying prejudgment interest in view of three year and nine month delay in asserting infringement claim).

This Court has also relied on the exception in *General Motors* to deny a prevailing patentee's request for prejudgment interest. In *Humanscale Corp. v. CompX International, Inc.*, No. 3:09-CV-86, 2010 WL 3397455 (E.D. Va. Aug. 23, 2010), Chief Judge Spencer denied prejudgment interest where the prevailing party "delayed bringing th[e] lawsuit for nearly a decade." *Id.* at *2. In reaching his decision, Judge Spencer explicitly relied on the Supreme Court's holding that "prejudgment interest could be refused" where the patent owner was responsible for an undue delay in bringing suit. *Id.* Consequently, Judge Spencer ruled that because of the patentee's delay in bringing suit, it was not entitled to prejudgment interest. *Id.*

Finally, I/P Engine's reliance on *ActiveVideo Networks v. Verizon Communications, Inc.*, Civil Action No. 2:10cv248, 2011 WL 4899922 (E.D. Va., Oct. 14, 2011) does not support its claim for prejudgment interest. In that case, ActiveVideo moved for prejudgment interest as the prevailing party. Verizon opposed on the grounds that ActiveVideo had unreasonably delayed in bringing its lawsuit. The Court rejected Verizon's argument, tying its decision back to its earlier decision that laches did not apply:

> [T]his Court has already carefully considered and rejected Verizon's argument that ActiveVideo unreasonably delayed in bringing its lawsuit in this Court's Order denying Verizon's Motion for Judgment as a Matter of Law on Laches. . . . Thus, by denying Verizon's laches motion, this Court decided that Verizon was not materially prejudiced by any alleged delay on ActiveVideo's part in bringing this suit. . . . Therefore, the Court finds no adequate justification for denying ActiveVideo's entitlement to prejudgment interest and holds that ActiveVideo is entitled to such interest on its damages award pursuant to 35 U.S.C. § 284.

Id. at *5.

This case is the polar opposite of *ActiveVideo*. Here, the Court has already found that I/P Engine unreasonably delayed in filing this lawsuit. (*See* D.N. 800.) The Court also found that Defendants have been materially prejudiced by I/P Engine's undue delay. (*Id.*) Thus, unlike in *Active Video*, where the facts did not establish undue delay or prejudice, I/P Engine's request for prejudgment interest should be denied in this case under the Supreme Court's holding in *General Motors.*

2. Plaintiff's Prejudgment Interest Calculation Is Overstated

Even if Plaintiff were to avoid the rule that unreasonable delay negates entitlement to prejudgment interest, such interest should only accrue at the U.S. Treasury bill rate ("T-bill rate"), not the prime rate that Plaintiff requests. District courts have broad discretion in determining the "rate of prejudgment interest and whether it should be compounded or uncompounded." *Bio Rab Labs., Inc. v. Nicolet Instrument Corp.*, 807 F.2d 964, 969 (Fed. Cir. 1986). But courts are guided by the facts of the case at hand. *Id.* Here, Plaintiff has offered no evidence in support of its assertion that it is entitled to interest at the higher prime rate. This is because all evidence in this case supports an award of interest based only on the lower T-bill rate. *See Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 955 (Fed. Cir. 1997) (affirming use of T-bill rate compounded annually because "there was no evidence that [the patentee] borrowed money at a higher rate, what that rate was, or that there was a causal connection between any borrowing and the loss of the use of the money awarded as a result of [the] infringement.").

In support of its request to apply the prime rate, Plaintiff merely cited cases in which other courts, confronted with different facts, permitted the use of the prime rate to calculate interest.[2] (D.N. 793, 8-9.) This is not sufficient to establish an entitlement to a high rate of interest. Without facts on which to base the award of interest at a rate higher than the T-bill rate, the Court should award any prejudgment interest at the lower rate. *See Metso Minerals, Inc. v. Powerscreen Int'l Distribution Ltd.*, 833 F. Supp. 2d 333, 344-45 (E.D.N.Y. 2011) (awarding

[2] In *ActiveVideo Networks, Inc. v. Verizon Communications, Inc.*, Civil Action No. 2:10cv248, 2011 WL 4899922 (E.D. Va. Oct. 14, 2011), the Court noted that the issue of which interest rate should apply was uncontested. *Id.* at *6. Therefore, the Court did not analyze when the prime rate, rather than the T-bill rate, was appropriate. Here, Defendants clearly do dispute whether the prime rate or T-bill rate should apply.

prejudgment interest at the T-bill rate compounded annually because the patentee presented no evidence to show why the prime rate was proper).

Plaintiff's failure to identify facts supporting the application of a high interest rate stems from the fact that “the patents-in-suit were purchased by I/P Engine, a non-practicing entity, for the sole purpose of bringing this litigation.” (D.N. 800, 14.) Plaintiff’s “business plan is to acquire intellectual property and to either license it” or enforce it. (Trial Tr., 198:14-16.) A hedge fund provided the money to purchase the patents-in-suit as a means of investing in the company. (*Id.*, 201:4-13.) There is no evidence in the record that during the course of this litigation, Plaintiff borrowed money to support its operations, and there is no evidence that it borrowed money at or above the prime rate. Accordingly, Plaintiff is not entitled to earn that rate of interest on any royalty awarded for alleged infringement. Plaintiff’s claim for a greater return through higher interest would be a windfall, contrary to the compensatory nature of a pre-judgment award.[3] *See Itron, Inc. v. Benghiat,* No. 99 Civ. 501, 2003 U.S. Dist. LEXIS 15039, at *54 (D. Minn. Aug. 29, 2003) ("Although Benghiat's proposal for using the short-term prime rate would certainly give him a greater return, Benghiat has presented no evidence that the Treasury Bill rate will not sufficiently compensate him.").[4]

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[3] Plaintiff’s windfall would be compounded by the fact that Dr. Becker’s calculations are overstated. Dr. Becker appears to have assumed that royalty payments would be made in the middle of each quarterly period. (Ugone Dec. ¶ 6; *see also* D.N. 794 (Becker Dec.) ¶4, Exh. A.) But companies usually make royalty payments at a time after the end of each quarter. (Ugone Dec. ¶ 6.) The payments made after the end of the quarter may occur, for example, 30 or 45 days after the end of each period. (*Id.*) In fact, the Marchex, eXact, and Interchange licensing agreements upon which Dr. Becker relied in his expert report each require quarterly payments, paid within 30 days after the end of each quarter. (*See* PX184, PX185, PX424.) Thus, Dr. Becker’s interest calculations overstate the amount due, even accepting his use of the prime rate. (Ugone Dec. ¶ 6.)

[4] *See also Baum Research & Dev. Co. v. Univ. of Mass. at Lowell*, No. 1:02-cv-674, 2009 WL 2095982, at *11 (W.D. Mich. July 14, 2009) (awarding prejudgment interest at the T-bill rate where patentee failed to show it borrowed money it otherwise would not have borrowed

Plaintiff has also requested that the Court compound interest quarterly. (D.N. 793, 8-9.) Just as it provided no justification for an award of interest based on the prime rate, Plaintiff provides no justification for compounding prejudgment interest quarterly. (*Id.*) Courts have broad discretion regarding compound interest. *See* 7-20 Chisum on Patents § 20.03(4)(a)(vi) (collecting cases regarding the compounding of interest). Here, Plaintiff is a non-practicing entity . It has made no showing why it should benefit from quarterly compounding. Thus, any interest that the Court awards should be compounded annually.

Defendants' calculation of prejudgment interest based upon the total compensatory damages award set forth in the Verdict Form is $27,329. (Ugone Dec. ¶ 5 & Exh. 1.) As outlined in Dr. Ugone's declaration, this calculation is based on the T-bill rate, compounding interest annually, for damages from September 15, 2011, to November 6, 2012. (*Id.*) Defendants respectfully submit that if the Court awards any prejudgment interest, this is the appropriate amount.

during the infringement period); *Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp.*, Civil Action No. H-03-2910, 2006 WL 3227315, at *5-6 (S.D. TExh. Nov. 6, 2006) (finding that interest should be awarded at the T-bill rate despite evidence by the patentee that it had outstanding debt with higher interest rates, a higher internal rate of return for its products, and higher rates in its contracts with customers for late payment because the patentee "fail[ed] to demonstrate that these interest rates or rates of return are necessary to fully compensate it for [the defendant's] infringement"); *Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905 RMW, 2006 WL 2522506, at *1-2 (N.D. Cal. Aug. 30, 2006) (awarding interest at the T-bill rate because the other rates proposed by the patentee based on its weighted average cost of capital and interest rate charged to licensees for late payment were speculative and punitive, respectively); *Nat'l Presto Indus., Inc. v. Black & Decker Inc.*, No. 89 C 8978 1992 WL 125559, at *8 (N.D. Ill. May 27, 1992) (ruling that patentee "will be fully compensated by being given the [prejudgment] interest rate it could have earned if it had had the money to invest, the interest rate that is statutorily established for post-judgment interest: the Treasury Bill rate").

C. Plaintiff Is Not Entitled to Supplemental Damages

Plaintiff is seeking supplemental damages despite the fact that the jury accounted for all pre-verdict damages in its damages award[5] and despite the fact that the jury's verdict in no way supports Plaintiff's proposed calculation for such supplemental damages.[6] In response to an interrogatory on the verdict form, the jury found that the appropriate form for damages was a running royalty and set the royalty rate at 3.5%.[7] (D.N. 789, 11.) The jury awarded total damages of $30,496,155, as follows: Google - $15,800,000, AOL- $7,943,000, IAC - $6,650,000, Target - $98,833, and Gannett - $4,322. (*Id.*) Plaintiff now seeks a supplemental damages amount for the period from October 1, 2012, to the entry of judgment that exceeds the jury's award and that ignores the jury's findings with regard to the pre-verdict period.

1. The Verdict Already Covered The Pre-Verdict Period for Which Plaintiff Seeks Supplemental Damages

As plaintiff acknowledges, supplemental damages are only appropriate "for any periods of infringement not covered by the jury verdict." (D.N. 793, 6 (citing *ActiveVideo Networks*, 2011 WL 4899922, at *2, *4.).) Because the jury's verdict fully compensated Plaintiff for any pre-verdict damages, it is not entitled to supplemental pre-verdict damages.

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[5] Specifically, Plaintiff seeks supplemental damages for the time period October 1, 2012, until the verdict on November 6, 2012.

[6] In its motion, Plaintiff suggests that Defendants refused to meet and confer on the issue of supplemental damages and Plaintiff's request for the production of additional financial information. (D.N. 793, 4). Contrary to the argument in Plaintiff's motion, Defendants asked Plaintiff to explain how it intended to use the requested information and offered to meet and confer the next business day. (D.N. 795, Rudenko Dec., Exs. 3,5.) Rather than responding to Defendants' question and offer to meet and confer, Plaintiff filed its Motion that evening without notice to Defendants.

[7] The Court, after receiving submissions from both parties, prepared the verdict form provided to the jury. The verdict form asked targeted questions about the jury's damage findings. (D.N. 789.) Plaintiff did not object to the verdict form.

Here, the verdict form asked the jury to specify "what sum of money, if any, **if paid now in cash**, would reasonably compensate I/P Engine **for any of defendants['] past infringement**?" (D.N. 789, 11 (emphasis added).) In response, the jury awarded a specific monetary amount, in dollars and cents, for each defendant. (*Id.*). Plaintiff did not object to this aspect of the verdict form. Because the jury awarded what it believed was the total sum of money "paid now in cash" that "would reasonably compensate I/P Engine for any of defendants['] past infringement," I/P Engine is not entitled to any supplemental pre-verdict damages – i.e., additional damages from October 1, 2012, to the verdict on November 6, 2012. The verdict form asked the jury to determine damages for the full pre-verdict period. Accordingly, additional pre-verdict damages would be an unwarranted windfall, rather than compensatory in nature.

2. Plaintiff's Demand for Pre-Judgment Damages Is Inconsistent with the Jury's Verdict

To the extent the Court decides to award supplemental damages to Plaintiff, I/P Engine is not entitled to the royalty amount it seeks. First, for all the reasons set forth in Defendants Rule 50(a) Motion for Judgment as Matter of Law of No Damages (D.N. 752.) and those that will be set forth in Defendants' post-judgment motions, Plaintiff is not entitled to any damages, including a running royalty, from any defendant.

Assuming, however, that the Court determines that Plaintiff's request for a running royalty is appropriate, Plaintiff's calculation that a royalty rate of 3.5% should be applied to a royalty base of 20.9% of revenues for the accused products is not supported by the jury's findings. Based on the jury's response to the interrogatories in the verdict form, the maximum I/P Engine could be awarded as supplemental damages would be a running royalty rate of 3.5%

applied to an apportioned royalty base of 2.8% of Defendants' revenues from the accused systems.

Plaintiff's request vastly overstates the apportionment percentage and is completely divorced from the jury's damages award. Plaintiff asserts that 20.9% of the revenues for the accused products is the appropriate royalty base to which the 3.5% royalty should be applied. (D.N. 793, 11.) Plaintiff ignores that the amounts the jury awarded do not equate to a royalty base apportioned at 20.9% of revenue of the accused products.

Based upon its own trial tactics, Plaintiff failed to provide the jury with any meaningful information upon which to base its damages calculation as to any Defendant.[8] The only information Plaintiff provided the jury for the relevant damages period was a single demonstrative slide that Dr. Becker discussed in relation to a damage period barred by laches. (Agudo Dec. ¶ 3 & Exh. B (PDX-441).) He described the original slide as being a quarterly breakdown of the $493.1 million in overall damages sought by Plaintiff. (Trial Tr., 848:14-849:6; Agudo Dec. ¶ 5 & Exh. D.)

In closing argument, Plaintiff argued the slide to displayed a royalty amount for Google in the recoverable period that was derived from its 20.9 % apportionment of revenue multiplied by its 3.5% royalty. The bars from fourth quarter 2011 through third quarter 2012, the allowable damage period after the Court's ruling on laches, each reached approximately between $25

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[8] Plaintiff presented only cumulative revenue and damages evidence for the entire damages period; plaintiff chose not to provide a year-by-year breakdown of revenue or damages per defendant. When the Court struck all of the damages period except for the period after the filing of the lawsuit, the jury was left with no evidence to determine how to reach their damages figures other than the lump sum amount provided by Defendants. Aggravating the confusion, Plaintiff wrongly argued to the Court that its laches ruling did not apply to the other defendants—a ruling that the Court correctly reversed, but only after the Plaintiff had already put misleading figures up for the jury in its closing argument. It is no wonder that the jury asked several questions concerning the confusion on damages caused by the Plaintiff's acts. (Trial Tr. 2141:25-2142:3,2149:7.)

million and $30 million as according to a rough scale on the left hand side of the chart. This slide was not introduced into evidence and was shown to the jury only briefly. (*See* Trial Tr., 2005:13-2008:24; Agudo Dec. ¶ 3 & Exh. B (PDX-441).) Plaintiff failed to introduce any evidence of its contention on the royalty base for the appropriate time period, an issue that Defendants will address in more detail in its post-trial motions.

The jury awarded total damages from Google of $15,800,000. (D.N. 789, 11.) Using the information from the slide that Plaintiff represented covered the allowable damages period, and accounting for the 3.5% royalty rate, the apparent effective apportionment of the revenue base for Google is approximately 2.8%. (Ugone Dec. ¶ 8 & Exh. 2.) Specifically, the demonstrative exhibit that Plaintiff displayed for the allowable damages period as to Google appeared to show a royalty amount of approximately $118 million for the relevant damages period. (Trial Tr., 2005:13-2008:24; Agudo Dec. ¶ 3 & Exh. B (PDX-441).) The jury's award of $15,800,000 is roughly 13.4% of that $118 million. (Ugone Dec. ¶8 & Exh. 2.) This appears to amount to an approximate 2.8% apportionment, not the 20.9% apportionment that Plaintiff claims. (*Id.* at Dec. ¶ 7 & 8.) Because the jury's verdict awarded at most an apportionment percentage of about 2.8% for Google, that is the maximum apportionment percentage for the accused royalty base that should be used to calculate any supplemental damages.

As for the non-Google Defendants there are no separate supplemental damages to award <u>at all</u> under the damages theory Plaintiff presented. Again, During closing arguments, Plaintiff's counsel first showed PDX-441 and stated that Google's damages should be based upon that the figures underlying that bar chart. (*See, e.g.,* Trial Tr., 2008:19-24.) This is despite the fact that Dr. Becker previously had testified, however, that the figures in the chart were based on *all* revenues Google received, which would include those he referred to as attributable to the non-Google Defendants. (Trial Tr. 848:14-849:6.)

Immediately thereafter, Plaintiff's counsel showed the jury a chart with specific damage demands for the non-Google Defendants totaling $42,416,561. (Trial Tr., 2008:35-2009-2; Agudo Dec. ¶ 4 & Exh. C (PDX-443).) Although the chart concerning the non-Google Defendants that was used in closing included damages figures only for the non-Google Defendants, it was derived from a chart shown during Dr. Becker's testimony that also included the damage demand for Google broken out separately. (Agudo Dec. ¶ 2 Exh. A (PDX-055).) Plaintiff's counsel asserted that the jury should award damages separate and apart from Google even though counsel previously had presented the bar chart demonstrative slide with damages figures that Plaintiff said should apply to Google, but that actually would have also included any damages from the non-Google Defendants as well. Thus, any damages from the non-Google Defendants already would have been included in the damages awarded against Google and no further supplemental damages are appropriate at all.

Even putting aside the issue of double counting damages, the jury's damage award as to the non-Google Defendants is completely out of proportion when considered against Plaintiff's damage demands. While Plaintiff presented no evidence at all as to what its asserted revenue base was for the non-Google Defendants in the appropriate time period, it was clear all along that the damages Plaintiff sought from the non-Google Defendants were much smaller than those sought from Google. For example, in Dr. Becker's demonstrative (which was based on a much larger time period than the relevant damages period,) he attributed approximately $451 million in damages to Google and then a total of approximately $42 million to the non-Google Defendants – a mere 8.5%. (*See* Agudo Dec. ¶ 2 & Exh. A.) But the jury returned a verdict of $30,496,155 that allocated to the non-Google Defendants $14,696,155 – **<u>48%</u>** of the total damages. (D.N. 789, 11.) No reasonable jury would award an amount of damages on a proportion far greater than what I/P Engine's own expert testified about at trial. That is incorrect as a matter of law. And as Defendants intend to argue in more detail in their post-trial motions, the jury's verdict with respect to the non-Google Defendants should be set aside for at least this reason, among others. Likewise, the jury's errors with respect to these Defendants cannot serve as a basis for calculating supplemental damages.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for an Award of Prejudgment Interest, Post-Judgment Interest, and Supplemental Damages.

DATED: November 29, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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