

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 7
CAUSE NO: 49D07-0804-CC-018081

JASON BOND,)
DAVID LEAR, and)
LESLIE BRIDGES,)
individually and as)
class representatives of all those)
similarly situated,)

Plaintiffs,)

v.)

VEOLIA WATER NORTH AMERICA)
OPERATING SERVICE, LLC,)
VEOLIA WATER INDIANAPOLIS, LLC,)
and)
THE CITY OF INDIANAPOLIS,)
DEPARTMENT OF WATERWORKS,)

Defendants.)

FILED

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JUN 22 2009

Charolette A. White
CLERK OF THE MARION CIRCUIT COURT

**PLAINTIFFS' BRIEF IN REPLY TO
THE DEPARTMENT OF WATERWORKS' MOTION
TO DISMISS SECOND AMENDED COMPLAINT**

Plaintiffs Jason Bond, David Lear, and Leslie Bridges ("Plaintiffs"), by counsel, respectfully submit their Brief in Reply to the City of Indianapolis Department of Waterworks' ("Department") Motion to Dismiss Second Amended Complaint.

I. INTRODUCTION

In January 2009, this Court dismissed Plaintiffs' claims against Veolia in their entirety. For the most part, those claims sought to hold Veolia liable under a third party beneficiary theory. Plaintiffs then filed their Second Amended Complaint which, among other things, asserted claims against both Veolia and the Department of Water Works for the same conduct expressed in Plaintiffs' First Amended Complaint. There can be no dispute that either Veolia or

the Department (or both) are liable to the Plaintiffs and the rate payers of this water utility for the conduct described in the Complaint with respect to meter reading, over-estimating woker bills and the imposition of unjustified late fees.

Like Veolia did in its Motion to Dismiss, the Department's Motion to Dismiss essentially argues it has no responsibility to its customers for the failure to read customers' water meters at least once every other month as required by law. Moreover, it argues it has no responsibility to its customers for over-charging them due to inflated estimates on their water bill. Finally, the Department argues it has no responsibility for the excessive late charges which it has charged and kept. The Department's Motion to Dismiss should be denied for the reasons identified in this Brief. However, the Department's Motion to Dismiss should be denied for the additional reason that it must bear at least some of the responsibility for the wrongful conduct described in the Second Amended Complaint.

II. FACTUAL BACKGROUND

For over one hundred years, the Indianapolis Water Company ("IWC") was the sole provider of water for the City of Indianapolis ("City") pursuant to a franchise agreement entered into between IWC and the City. The City purchased the assets of IWC from IWC Resources Corporation on April 30, 2002, via a contract signed on November 26, 2001. As a result of the purchase, the City County Council created the Department.

The Department was established in 2001 and was created to receive and manage the water utility assets obtained, once the City's purchase of the water utility was completed. (*Revised Code of the Consolidated City and County, Indianapolis/Marion County, 273-101, 273-102, 273-103*). It is the Department's duty to provide for an adequate supply of water to customers within its jurisdiction. (*Revised Code of the Consolidated City and County, Indianapolis/Marion County, 273-104*).

In fulfillment of these duties and responsibilities, the Department, on March 21, 2002, entered into a twenty (20) year Management Agreement (“Management Agreement”) with U.S. Filter Operating Services, Inc., whereby U.S. Filter Operating Services, Inc. took over the operation, maintenance and management of the Department’s assets. U.S. Filter Operating Services, Inc. created U.S. Filter Indianapolis, LLC (“USFIW”), and the newly organized entity began managing and operating the Department’s assets. On January 29, 2004, a Certificate of Amendment was filed in Delaware to change the name of USFIW to Veolia Water Indianapolis, LLC (“VWI”), one of the Defendants in this case. The other Defendant is the parent company of VWI.

Defendant VWI, formerly USFIW, has operated and managed the day-to-day activities and operations of the local water utility and the Department’s assets since May 1, 2002. Pursuant to the Management Agreement, VWI oversees all of the day-to-day operation and management of the Water Works by managing, operating, repairing, and maintaining all water treatment facilities, pumping and distribution systems for the water utility. (*Management Agreement*, 4.01(a), pp. 15-28). VWI’s activities on behalf of the Department include providing water to the public and fire departments, and monitoring water quality and safety. VWI’s responsibilities under the Management Agreement encompass the totality of the tasks necessary and attendant to the water utility. The Department retains oversight functions.

VWI is also responsible for all customer service functions associated with the Water Works. Among these responsibilities are managing and operating all meter reading functions, managing and operating all billing and collection functions, responding to customer inquiries, correcting of billing errors, processing customer work orders, and being “responsive to customer needs and concerns in both standard and unusual operating situations.” (*Management*

Agreement, 4.01). Additionally, VWI is required to “provide customer service hours on a 24-hour a day, 7 day a week basis in compliance with the Customer Service Plan.” (*Management Agreement*, 4.01(11), p.22).

The three individual Plaintiffs are residential customers who receive their water from the Water Works. Their claims are based on the same operative allegations. First, they allege that Veolia is obligated to read their meters at least once every two months, and that Veolia has failed to do so. Second, they allege that Veolia, when it estimated their water usage, did so in a way that was not approved by the Indiana Utility Regulatory Commission (“IURC”) and which method tended to unreasonably overestimate the volume of water used, which in turn caused the Plaintiffs to pay for water they did not use. Finally, the Plaintiffs allege that the late charges imposed by Veolia were similarly inflated because the late charges are calculated as a percentage of the base water charge.

Plaintiffs’ First Amended Complaint expressed claims only against Veolia. Mainly, those claims were based on a third-party beneficiary argument relying on the terms of the Management Agreement to impose liability on Veolia for the acts and omissions described in the First Amended Complaint. Veolia filed its Motion to Dismiss in the fall of 2008. After oral arguments were heard by the Court, the Court granted Veolia’s Motion to Dismiss Plaintiffs’ First Amended Complaint in January 2009. The Plaintiffs filed their Second Amended Complaint adding, for the first time, the Department as a Co-Defendant. Recently, Veolia filed its Motion for Summary Judgment which, as of this date, is pending Plaintiffs’ reply and the completion of preliminary discovery. The Department filed the instant Motion to Dismiss on April 1, 2009. In their Motion to Dismiss, the Department seeks dismissal of Plaintiffs’ unjust enrichment, deceptive Consumer Sales Act, and breach of contract claims. For the reasons

described below, Plaintiffs respectfully request that the Court deny the Department's Motion to Dismiss in its entirety.

III. LEGAL ANALYSIS

A. Indiana Trial Rule 12(B)(6) Standard.

A 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim not the facts supporting it. *American Heritage Banco, Inc. v. McNaughton*, 879 N.E.2d 1110, 1114-1115 (Ind. Ct. App. 2008). Therefore, a trial court must view the complaint in a light most favourable to the non-moving party drawing every favourable inference in favour of that party. *Id.* Grant of a motion to dismiss is proper only if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. *Id.*

Motions to dismiss are not favoured in the law. *Mart v. Hess*, 703 N.E.2d 190, 193 (Ind. Ct. App. 1998). Moreover, a court must only look to the complaint and may not resort to any other evidence in the record. *American Heritage Banco, Inc.*, 879 N.E.2d at 1115. Under notice pleading a plaintiff need only plead the operative facts involved in the litigation. *Id.* The trial court should exclude materials outside the pleadings which are submitted with a 12(B)(6) motion, rather than convert the motion into one for summary judgment, because the external materials are irrelevant to the motion. *Dixon v. Siwy*, 661 N.E.2d 600, 603 (Ind. Ct. App. 1996) citing William F. Harvey, *Indiana Practice: Rules of Procedure Annotated*, s 12.9 (Supp. 1996).

B. Deceptive Consumer Sales Act

The Department moves to dismiss Plaintiffs' claims under the Deceptive Consumers Sales Act (the "Act") for three reasons: (1) Plaintiffs did not provide the Department with a Tort Claims Notice, (2) it improperly seeks punitive damages from a governmental agency, and (3) it

merely repackages the Plaintiffs' breach of contract claim.

1. **Claims under the Act do not require a Tort Claims Notice because these claims are not torts and do not involve the injury to or death of a person or damages to property.**

The Department argues that the Plaintiffs were required to give the Department the requisite notice 180 days after the alleged loss pursuant to Ind. Code §34-13-3-8. Because the Plaintiffs did not provide such notice, the claim is barred. The Department's argument glosses over the fundamental consideration of whether the Act is even a claim for which notice is required. As is explained below, Plaintiffs are not required to provide notice under the Tort Claims Act because the Tort Claims Act does not apply to claims under the Act. Therefore, Plaintiffs' claim is not barred.

The Tort Claims Act applies "only to a claim or suit in tort". Ind. Code §34-13-3-1. However, more specifically, the Act applies to "losses" which is defined by Ind. Code 34-6-2-75 as "injury to or death of a person or damages to property". *See also, Cantrell v. Morris*, 849 N.E.2d 488, 495 (Ind. 2006), n.4. There are no Indiana cases which directly consider whether a claim under the Act involves an "injury to or death of a person or damages to property". However, examining the substance of the claim leaves no doubt that the Tort Claims Act does not apply to the claims of Plaintiffs under the Act.

In *Underwood v. City of Jasper*, the Indiana Court of Appeals considered whether a mobile home parks claims against a municipally owned sewage utility based on misrepresentations, representations, and assurances the utility board had given the mobile home park on the sewer rate it would be charged. 678 N.E.2d 1280, 1283 (Ind.Ct.App. 1997), *reh den, trans den*. The issues before the Court of Appeals were whether the Tort Claims Act required the mobile home park to give the city utility board notice of the claim, and whether the Tort

Claims Act immunized the city utility board from a challenge to its sewer rates. *Id.* In finding that notice under the Tort Claims Act was *not* required the Court of Appeals held:

In the present case, Sunrise Village seeks compensation for amounts it claims the Utility Board improperly charged and for damages from alleged misrepresentations. Sunrise Village also seeks an order which requires the Utility Board to bill it by the method previously agreed upon and seeks an order that the Utility Board charge a just and equitable rate. None of Sunrise Village's claims qualify as an "injury to or death of a person or damage to property". Therefore, none of the claims qualify as a "loss" within the meaning contemplated in the Indiana Tort Claims Act.

Id.

The holding in *Underwood* is applicable here. The allegations in the Second Amended Complaint are substantively indistinguishable from those in *Underwood*. The fundamental allegation of the Complaint is that the Department misrepresented that the Plaintiffs' water bills complied with the applicable tariff and/or law. Plaintiffs seek damages resulting from such misrepresentations. Likewise, in *Underwood*, there were similar allegations involving the amounts billed to the ratepayer. The outcome in this case should be no different than in *Underwood*. At its heart this case involves contract/sales law, not tort law. The Act itself, on its face, applies to consumer *sales* not torts or injuries to or death of a person or damage to property. See, Ind. Code §24-5-0.5-1(b). The Department's Motion to Dismiss should be denied.

2. Plaintiffs' claims under the Act for statutory damages are valid.

The Department argues the Plaintiffs' claims under the Act are punitive in nature which punitive damages are barred by Ind. Code §34-13-3-4(b) which states a "governmental entity is not liable for punitive damages." The Department's argument is wrong because the legislature clearly meant it to apply specifically to political subdivisions and because the Act, as a statute of specific application, governs this dispute.

The Act itself applies to "acts or representations as to the subject matter of a consumer

transaction, made orally or in writing by a *supplier* . . .” Ind. Code §24-5-0.5-3(a). Supplier is a defined term in the Act and means “a seller, lessor assignor or other *person* who regularly engages in or solicits consumer transactions. . .” Ind. Code §24-5-0.5-2(a)(3)(A) (Emphasis Added). Person is also a defined term under the Act and means “an individual, corporation, the state of Indiana *or its subdivisions or agencies* . . .” (Emphasis Added). Therefore, it is clearly the intent of the Legislature that “suppliers” potentially liable under the Act for deceptive conduct include political subdivisions of the state of Indiana, which as the Department points out abundantly in its Brief, includes the Department. Ind. Code §34-6-2-110.

Having established the applicability of the Act to the Department, the next question is whether the Department is subject to the damages provisions of the Act in light of the punitive damages prohibition found in the Tort Claims Act at Ind. Code §34-13-3-4(b). This is significant, because the Act provides for recovery of actual damages¹ or \$500, whichever is greater per violation. Ind. Code §24-5-0.5-4(a). Moreover, in the case of a willful deceptive act, a person may recover the greater of three times actual damages or \$1,000. *Id.* A court may also award reasonable attorneys fees. *Id.* Treble damages and awards of attorneys’ fees have previously been found to constitute punitive damages. Because some of the types of damages allowed under the Act, and prayed for by Plaintiffs, include punitive damages, and because the Act clearly applies to the Department, the question is how the apparent inconsistency between Ind. Code §34-13-3-4(b) and the Act is resolved.

The resolution of this apparent inconsistency is clear under Indiana law. The Tort Claims Statute, of which Ind. Code 34-13-3-4(b) is a part, is a statute of general application. *Harvey v.*

¹ The Department claims in its Brief that Plaintiffs “only” seek punitive damages under the Act. The Act clearly permits the recovery of actual damages as well, which actual damages are requested in Plaintiffs’ general prayer for relief. Even if the Court dismisses the claim for punitive damages, Plaintiffs’ claim for actual damages under the Act should remain.

Bd. of Commissioners of Wabash County, 416 N.E.2d 1296, 1300 (Ind.Ct.App. 1981), n.2. General statutes do not override or supersede specific provisions in other statutes or rules unless there is a clearly expressed intent to do so. *Id.*, citing *State ex rel. Dedelow v. Lake County Court*, 383 N.E.2d 284 (Ind. 1978). In *Harvey*, the Court of Appeals considered whether the Tort Claims Act relieved a political subdivision from liability under the Sign Statute which set a specific set of guidelines for the placement of road signs applicable to municipalities. *Id.* The Court of Appeals found that there was no language in the Tort Claims Act that the legislature intended to implicitly repeal the Sign Statute, or that the specific mandatory language of the Sign Statute should not control. *Id.*

The same result should obtain here. The Act specifically applies to political subdivisions and so does its provisions providing for statutory damages. There is no language in the Tort Claims Act or the Act exempting the application of punitive damages to political subdivisions if a deceptive act is proven. Without this express intent to exempt the application of punitive damages as contained in the Act, it applies.

3. Plaintiffs' breach of contract and claims under the Act should both stand.

The Department seeks dismissal of Plaintiffs' claim under the Act for the additional reason that Plaintiffs have simply applied different labels to the same facts that allegedly support their breach of contract claims. The Department alleges that Indiana law does not allow Plaintiffs to transform their breach of contract claim into claims arising under the Act simply by changing labels. As is explained below, the Department's argument is misplaced.

It is simply not enough to argue, as the Department does, that the alternative theories of breach of contract on the one hand, and claims under the Act on the other, apply to the same

facts and, therefore, should be dismissed. Trial Rule 8(E)(2) allows a party to plead alternative and even inconsistent theories of recovery: “A pleading may . . . state as many separate claims or defenses as the pleader has, regardless of consistency and whether based on legal or equitable grounds.” Under this Rule, a party is not required to adopt a theory of the case at the outset. *Cahoon v. Cummings*, 734 N.E.2d 535, 542 (Ind. 2000). Rather, it is sufficient to plead the operative facts of the case so a defendant is put on notice as to the evidence that will be presented at trial. *Id.* The Second Amended Complaint merely offers alternative theories against the Department. Alternative theories, one sounding in contract, and the other relying on the Act, are entirely permissible at this stage of the case. *See also, Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88 (Ind. Ct. App. 1987)(jury verdict in favor of Appellee Homeowners on their claims for breach of contract and violation of the Deceptive Consumer Sales Practices Act).

C. There is no Mandatory Dispute Resolution Procedure which is a Condition Precedent to Asserting a Breach of Contract Claim.

The Department characterizes an optional consumer complaint filing contained in its tariff procedure as a mandatory arbitration or dispute resolution clause. The complaint procedure contained in its tariff is not a condition precedent to bringing the present action. A party seeking to dismiss an action in favor of an alternative dispute resolution mechanism must satisfy a two-prong test: (1) a party must demonstrate the existence of an enforceable agreement to alternatively resolve the dispute, and (2) a party must prove that the disputed matter is the type of claim that the parties agreed to resolve alternatively. *TWH, Inc. v. Benford*, 2008 WL 5404215 (Ind. Ct. App. 2008). “To be enforceable, an agreement to [alternatively resolve a matter] must . . . evidence an intention to resolve some controversy through [alternative means].” *Novotny v. Renewal by Anderson Corp.*, 861 N.E.2d 15 (Ind. Ct. App. 2007). The purpose of arbitration,

and any alternate dispute resolution mechanism, is to afford parties the opportunity to reach a final disposition of differences in an easier, more expeditious manner than by litigation. *North Miami Education Assn. v. North Miami Comm. Schls.*, 736 N.E.2d 749 (Ind. Ct. App. 2000), decision clarified on rehearing, 746 N.E.2d 380 (Ind. Ct. App. 2001); *Shahan v. Brinegar*, 181 Ind.App. 39, 390 N.E.2d 1036 (1st Dist. 1979).

The validity of an alternate dispute resolution mechanism is based on mutuality of obligation. *Scaffidi v. Fiserv, Inc.*, 218 Fed. Appx. 519 (7th Cir. 2007)(an agreement to arbitrate an employment dispute was found valid on contract law because the employer was equally bound to arbitrate any of its claims that were covered by the agreement); *Perry Fashions, Ltd. v. Ultracashmere House, Ltd.*, 462 N.E.2d 252 (Ind. Ct. App. 4th Dist. 1984)(New York law requires arbitration agreements to be mutually binding to be enforceable); *Covenant Health Rehab of Picyune, LP v. Brown*, 949 S.2d 732 (Miss. 2007)(a grievance resolution process in an agreement for admission to nursing home providing that an event of claim, dispute or controversy other than one regarding payment for services rendered or refunds due, parties would participate in a grievance resolution process was found unconscionable as to the resident because the nursing home was allowed to bring a suit in court on issues of payment while the resident was prohibited from bringing suit in court on any grounds).

The complaint procedure described in the Department's tariff is not a valid mandatory dispute resolution procedure in that it contains no mutuality of obligation. There is no language which requires the Department to submit its complaints against customers to this process. The language at issue relating to the complaint procedure reads as follows:

(A) Complaint. A customer may complain to the Department at any time about

any bill which is not then delinquent, a security deposit, a disconnection notice, or any other matter relating to the Department's service and may also request a conference about such matters. The complaints may be made in person, in writing, or by completing a form available from either the Commission or from the Department at its business office. A complaint shall be considered filed upon receipt by the Department, except mailed complaints shall be considered filed as of the postmark date. In making a complaint or requesting a conference (hereinafter "complaint"), the customer shall state his name, service address and the general nature of his complaint.

(B) Investigation of Complaint and Notification of Proposed Disposition. Upon receiving each such complaint, the Department will investigate the matter, confer with the customer when requested and notify him, in writing, of its proposed disposition of the matter. Such written notification will advise the customer that he may, within seven days following the date on which such notification is mailed, request a review of the Department's proposed disposition by the Commission. If the customer requests a special meter reading, the first reading of the customer's meter by the Department during its investigation shall not be subject to the charge for a special meter reading prescribed in the Department's rate schedules. Subsequent readings, however, if requested by the customer, will be subject to the charge.

The dispute resolution procedure is optional because it says: "a customer *may* complain to the Department at any time about any bill which is not then delinquent. . ." In *Showboat*

Marina v. Tonn & Blank Construction, 790 N.E.2d 595 (Ind.Ct.App. 2003) the Court of Appeals considered similar language in the context of an arbitration clause. Interpretation of agreements to submit disputes to mandatory dispute resolution procedures are governed by ordinary contract principles. *Id.* at 597-598. The Court of Appeals refused to enforce the arbitration clause in that case because it found that the agreement expressly stated that either side “may” institute arbitration. *Id.* at 598. Likewise, the Department’s so-called mandatory dispute resolution clause does not expressly require adherence to its procedures as a condition precedent to filing a lawsuit, but rather states that customers “may” do so. There is simply no requirement that any customer follow this procedure before resort to the courts.

Many of the cases cited by both the Department and Plaintiffs for and against the argument that the language above requires, as a condition precedent to a lawsuit, compliance with a dispute resolution procedure, involve arbitration clauses. Arbitration, by its nature, involves an adjudication which results in a decision, usually by a neutral third person. Rules for Alt.Dispute Resolution, Rule 1.3(B). The dispute resolution process incorporated in the Department’s tariff does not even pretend to conform to what is commonly known as an arbitration. There is no “decision”, only a proposal that may or may not result in a resolution. There is no “neutral” to render a decision after an adjudication, only a process by which the Department reviews the complaint made. Indeed, conformity with the Department’s informal dispute resolution would not guarantee any particular result or outcome or decision at all. To make it mandatory, would require all customers to a process, which in many cases, would bring them no closer to a resolution than when they started and would require them to undertake a useless act. The recognized value of mandatory dispute resolution is expeditious resolution without resort to the courts. No such benefit would accrue from the Department’s dispute

resolution process if it is held to be mandatory.

D. Unjust Enrichment

To prevail on an unjust enrichment claim, a plaintiff must establish that it conferred a measurable benefit on the defendant under the circumstances in which the defendant's retention of the benefit without payment would be unjust. *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991); *Pond v. McNellis*, 845 N.E.2d 1043 (Ind. Ct. App. 2006), transfer denied, 860 N.E.2d 590 (Ind. 2006); *Fowler v. Perry*, 830 N.E.2d 97 (Ind. Ct. App. 2005).

The premise of the Plaintiffs' unjust enrichment claim is simple and clear. The Plaintiffs allege that they gave the Department the benefit of their money, and the benefit of collecting over-charged late fees. This benefit can be measured through examination of the numerous bills and late fees, as well as interest on the Department's unjust retention of the Plaintiffs' money. Allowing the Department to retain the benefit from its interest free loan from its rate payers would confer an unjust benefit on the Department. Under the theory of quasi-contracts, the court may impose liability, though the parties have not mutually assented to a contract, to prevent one party's unjust enrichment at the expense of the other. *Encore Hotels of Columbus, LLC v. Preferred Fire Protection*, 765 N.E.2d 658, 662 (Ind. Ct. App. 2002).

The Department's Motion to Dismiss Plaintiffs' unjust enrichment claim is premature. Pursuant to Trial Rule 8(E)(2), a pleading may set forth claims regardless of inconsistency and whether based on legal or equitable grounds. At this juncture, there has been no specific finding that the contract between the Department and the Plaintiffs is a valid and existing contract. As such, Plaintiffs' unjust enrichment claim against the Department should stand. Unjust

enrichment refers to the situation in which the obligations are imposed by law, without regard to the assent of the parties bound to permit a contractual remedy where no contract exists in fact, but where justice nevertheless warrants a recovery under the circumstances as though there had been a promise. *E & L Rental Equipment, Inc. v. Wade Construction, Inc.*, 752 N.E.2d 655, 660 (Ind. Ct. App. 2001). The existence of a valid express contract precludes implication of a contract covering the same subject matter. *Kincaid v. Lazar*, 405 N.E.2d 615, 619 (Ind. Ct. App. 1980).


In their Motion to Dismiss, the Department does not allege that the facts asserted in the Second Amended Complaint do not conform to a claim for unjust enrichment. Instead, the Department argues that the existence of Plaintiffs' breach of contract claim excludes a claim for unjust enrichment based on the same facts. While Plaintiffs' agree that a claim for unjust enrichment cannot be maintained when there is an express written contract between the same parties, based on the same facts, it is too early to grant the Department's Motion to Dismiss because the existence of a valid, enforceable written contract between the parties covering the same subject matter has not yet been established. Plaintiffs, therefore, request that the Department's Motion to Dismiss its unjust enrichment claim be denied.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request the Court deny the City of Indianapolis, Department of Water Works' Motion to Dismiss, and for all other appropriate relief.

Respectfully submitted,

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By  _____

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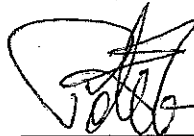
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record, via first class mail, postage prepaid, on the 22nd day of June, 2009:

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