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Counsel of Record for Attorney JAMES B. HICKS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RATES TECHNOLOGY INC., Plaintiff,	X Case No. CV 05-2755 (JS) (AKT)
vs.	: **NOTICE OF APPEAL BY ATTORNEY JAMES B. HICKS; EXHIBITS**
MEDIATRIX TELECOM, INC. and MEDIA5 CORPORATION, Defendants.	: X

Attorney James B. Hicks, having previously appeared, hereby appeals to the United States Court of Appeals for the Federal Circuit from the Judgment in this matter dated April 1, 2011 (Exh. "A"); the Memorandum and Order in this matter dated March 31, 2011 (Exh. "B"); the Memorandum and Order in this matter dated January 5, 2010 (Exh. "C", previously filed under seal); and all related orders and rulings in this action.

Dated: April 29, 2011.

/s/ James B. Hicks
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Attorneys of Record for
Counsel JAMES B. HICKS

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
RATES TECHNOLOGY, INC.,

Plaintiff,

-against-

JUDGMENT
05-CV-2755 (JS)(AKT)

MEDIATRIX TELECOM, INC. and
MEDIA5 CORPORATION,

Defendants.
----------X

A Memorandum and Order of Honorable Joanna Seybert, United States District Judge, having been filed on January 15, 2010, adopting the Reports and Recommendations of Magistrate Judge A. Kathleen Tomlinson dated March 31, 2008 and September 2, 2008 in their entirety except that the award of attorneys' fees and costs shall run from September 12, 2006, granting Defendants' motion for sanctions, dismissing the complaint with prejudice, and granting attorneys' fees and costs in favor of Defendants in an amount to be determined by the Court in a subsequent Order; and a Memorandum and Order of Honorable Joanna Seybert having been filed on March 31, 2011, directing the Clerk of Court to enter judgment for Defendants and against Plaintiff and his attorney James B. Hicks in the amount of $86,965.81 with Plaintiff and Hicks each being responsible for 50% of the judgment, and further directing the Clerk of Court to mark this case closed, it is

ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiff in the amount of $86,965.81; that Plaintiff and Hicks are each responsible for 50% of the judgment; and that this case is hereby closed.

Dated: Central Islip, New York
March 31, 2011

ROBERT C. HEINEMANN
CLERK OF THE COURT

BY: /S/ CATHERINE VUKOVICH
DEPUTY CLERK

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EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
RATES TECHNOLOGY, INC.,

Plaintiff,

MEMORANDUM & ORDER
05-CV-2755(JS)(AKT)

-against-

MEDIATRIX TELECOM, INC. and
MEDIA5 CORPORATION,

Defendants.
----------X
APPEARANCES:
For Plaintiff: James B. Hicks, Esq.
Hicks Park Law, LLP
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Los Angeles, CA 90071

David Lazer, Esq.
Jennifer Marie Kurtz, Esq.
Zachary Murdock, Esq.
Lazer, Aptheker, Rosella & Yedid, P.C.
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For Defendant: Daniel Carl Miller, Esq.
Ethan Horwitz, Esq.
King & Spalding, LLP
1185 Avenue of the Americas
New York, NY 10036-4003

SEYBERT, District Judge:

In its January 5, 2010 Order (the "Sanctions Order"), the Court adopted in their entirety Magistrate Judge A. Kathleen Tomlinson's (1) Report and Recommendation, dated March 31, 2008 ("R&R") (Docket Entry 155), and (2) Supplemental Report and Recommendation dated September 2, 2009 ("Supplemental R&R") (Docket Entry 165) (collectively, the "R&Rs"). The R&Rs

recommend that the Court sanction, pursuant to Rule 37, Plaintiff Rates Technology, Inc. and Plaintiff's counsel, James B. Hicks, Esq. ("Hicks"), and dismiss Plaintiff's Amended Complaint in its entirety. Mistakenly, because the underlying motion contained sensitive information and was sealed, the Sanctions Order was also filed under seal. Defendants Mediatrix Telecom, Inc. and Media5 Corporation's (collectively, "Mediatrix") motion to unseal the Sanctions Order is GRANTED based on Defendants' representation that the Order contains no confidential information. (See Docket Entry 179 at 1.)

Also pending before the Court are (1) Hicks' motion for reconsideration; (2) Defendants' accounting of the legal fees and expenses it incurred in connection with this litigation (the "Fee Application"); (3) Plaintiff's motion for leave to file a sur-reply concerning the Fee Application; and (4) Hicks' motion to strike Defendants' reply brief regarding the Fee Application.

For the reasons that follow, Hicks' motion for reconsideration is granted only insofar as the Court acknowledges an incorrect reference to Federal Rule of Civil Procedure 11 in the Sanctions Order. It is DENIED in all other respects. Defendants are awarded $91,587.68 in reasonable legal

fees and expenses. Plaintiff's motion to file a sur-reply is DENIED AS MOOT, and Hicks' motion to strike Defendants' reply concerning the Fee Application is DENIED.

DISCUSSION

The Court assumes familiarity with the facts and posture of this litigation, which are discussed at length in the R&Rs and the Orders cited therein.

I. Plaintiff's Motion for Reconsideration

Hicks' motion to reconsider the January 2010 Order is granted insofar as it asks the Court to correct an erroneous reference to Federal Rule of Civil Procedure 11. As Hicks correctly points out, the Order awards fees pursuant to Federal Rule 37. Thus, the language on page five of the January 2010 Order that reads "Plaintiff's case should be dismissed as a Rule 11 sanction" was meant to refer instead to Rule 37. Hicks' reconsideration motion is DENIED in all other respects.

A. Legal Standard

Motions for reconsideration may be brought pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure and Local Rule 6.3. See Wilson v. Pessah, No. 05-CV-3143, 2007 U.S. Dist. LEXIS 17820, at *4 (E.D.N.Y. March 14, 2007). Rule 59(e) permits a moving party to file a motion for

reconsideration when it believes the Court overlooked important "matters or controlling decisions" that would have influenced the prior decision. Shamis v. Ambassador Factors Corp., 187 F.R.D. 148, 151 (S.D.N.Y. 1999). Reconsideration is not a proper tool to repackage and relitigate arguments and issues already considered by the Court in deciding the original motion. See United States v. Gross, No. 98-CR-0159, 2002 WL 32096592, at *4 (E.D.N.Y. Dec. 5, 2002) ("A party may not use a motion to reconsider as an opportunity to reargue the same points raised previously."). Nor is it proper to raise new arguments and issues. See Lehmuller v. Inc. Vill. of Sag Harbor, 982 F. Supp. 132, 135 (E.D.N.Y. 1997). Reconsideration may only be granted when the Court did not evaluate decisions or data that might reasonably be expected to alter the conclusion reached by the Court. Wechsler v. Hunt Health Sys., 186 F. Supp. 2d 402, 410 (S.D.N.Y. 2002).

Rule 60(b) of the Federal Rules of Civil Procedure provides relief from a judgment for, inter alia, mistakes, inadvertence, excusable neglect, newly discovered evidence, and fraud. Fed. R. Civ. P. 60(b). Rule 60(b) provides "extraordinary judicial relief" that may "only be granted upon a showing of exceptional circumstances." Nemaizer v. Baker, 793

F.2d 58, 61 (2d Cir. 1986).

B. The Remainder of Hicks' Reconsideration Motion is Denied

Hicks asserts three principal reasons why the Sanctions Order should be reconsidered: (1) Plaintiff and Hicks could not provide an interrogatory answer because it did not have the information sought; (2) there is no evidence that Hicks was personally responsible for the discovery violation; and (3) the Court improperly denied Hicks the opportunity for oral argument on its decision to adopt the R&Rs. Plaintiffs' arguments fail under either Rule 59(e) or 60(b).

Hicks' first argument is simply an attempt to re-litigate an issue that the Court considered at length in the Sanctions Order. See Sanctions Order at 13-15. Similarly, the Court also considered and rejected Hicks' second argument when it found that Plaintiff and Hicks were both responsible for the sanctionable conduct. See id. at 17. In his current motion, Hicks offers nothing to change the Court's initial conclusion. Further, the Court notes that Hicks had ample notice that Judge Tomlinson was contemplating sanctions (see Sanctions Order at 16), and he could have advised his client to comply with Judge Tomlinson's discovery orders, asked to withdraw from the representation, or counseled his client to drop the underlying

infringement lawsuit. In light of Hicks' stance that his client was unable to articulate an element-by-element analysis of the claimed infringement, perhaps this would have been the most appropriate course. Hicks' third argument is unpersuasive because by denying a litigant who filed written briefs the opportunity for oral argument, the Court does not per se deny him an opportunity to be heard. See Schlaifer Nance & Co., Inc. v. Estate of Warhol, 194 F.3d 323, 336 (2d Cir. 1999). Hicks' request for oral argument on his reconsideration motion is also denied.

II. Defendants' Fee Application

In its Sanctions Order, the Court directed Defendants to submit an accounting of the legal fees and expenses it incurred due to the sanctioned conduct (the "Fee Application"). Defendants seek $203,916.17. For the reasons that follow, the Court awards defendants $91,587.68. In accordance with Judge Tomlinson's Supplemental R&R, which the Court adopted in its Sanctions Order, Plaintiff and Hicks are each to bear 50% of the award. (See Supplemental R&R at 18-19.)

A. Calculating Reasonable Legal Fees and Costs

The Second Circuit calculates attorneys' fees by a "presumptively reasonable fee" test. See Arbor Hill Concerned

Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 183 (2d Cir. 2008). Under this method, the "presumptively reasonable fee" is the product of: (1) the hours reasonably expended at (2) a reasonably hourly rate. Arbor Hill, 522 F.3d at 183. A reasonable hourly rate is determined by considering "all of the case specific variables that we and other courts have identified as relevant to the reasonableness of attorneys' fees . . . ." Id. at 190 (emphasis in original). Essentially, the inquiry is "what a reasonable, paying client would be willing to pay," keeping in mind that a party usually seeks "to spend the minimum necessary to litigate the case effectively." Simmons v. New York City Transit Auth., 575 F.3d 170, 174 (2d Cir. 2009) (quoting Arbor Hill, 522 F.3d at 190).

Courts will also consider (1) the complexity and difficulty involved in the case, (2) the available expertise and capacity of the client's other counsel (if any), (3) the resources required to prosecute the case effectively (taking account of the resources being marshaled on the other side but not endorsing scorched earth tactics), (4) the timing demands of the case, (5) whether an attorney might have initially acted pro bono (such that a client might be aware that the attorney expected low or non-existent remuneration), and (6) other

returns (such as reputation, etc.) that an attorney might expect from the representation.[1] Id. at 184. Perhaps the most important factor in the reasonableness inquiry is the nature of the litigation. See Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd., No. 07-CV-3208, 2010 WL 3925195, at *3 (E.D.N.Y. Sept. 9, 2010) (awarding attorneys' fees where attorneys submitted proof that their fees were in line with other intellectual property firms).

B. The Defendants' Legal Fees

1. A Reasonable Hourly Rate

Counsel's hourly rates are higher than what are typically awarded in the Eastern District. Generally, in determining whether an hourly rate is reasonable, courts compare the attorneys' usual billing rates with the prevailing market rates in the applicable district. See Brady v. Wal-Mart Stores,

[1] These considerations are quite similar to the Johnson factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal services properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorney's customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-719.

Inc., No. 03-CV-3843, 2010 WL 4392566, at *2 (E.D.N.Y. Oct. 29, 2010). Indeed, there is a presumption that the prevailing rates in the Eastern District supply the benchmark against which the Fee Application should be measured. Simmons v. New York City Transit Auth., 575 F.3d 170, 175 (2d Cir. 2009). That presumption may be overcome, however, but only where the fee applicant makes a particularized showing that out-of-district rates should apply. Realsongs, Universal Music Corp. v. 3A North Park Ave. Rest Corp., __ F. Supp. 2d __, 2010 WL 4320404, at *7 (E.D.N.Y. Oct. 26, 2010). "In order to overcome that presumption, a litigant must persuasively establish that a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result. In determining whether a litigant has established such a likelihood, the district court must consider experience-based, objective factors." Simmons, 575 F.3d at 175. Defendants chiefly contend that the complexity of this case warrants an exception to the forum rule. (See Docket Entry 195 at 1.) This in itself does not justify departing from the prevailing Eastern District rates. In particular, there is no evidence that an Eastern District firm would have produced an inferior result. See Realsongs, 2010 WL

4320404, at *7. The Court thus evaluates the reasonableness of counsel's rates using Eastern District prevailing rates as a basis of comparison, remaining mindful that intellectual property cases generally justify higher-than-average hourly rates.[2] See id. To the extent that the Court departs upward from the rates awarded in recent intellectual property cases in this District, the discrepancy is partly due to the Court's recognition that patent law can often be more complex than copyright law, requiring advanced technical expertise.

The Court analyzes each attorney in turn. Partner Ethan Horwitz, Esq. seeks attorneys' fees at rates of $675, $700, $740 and $760 per hour at various points during the relevant period. In light of Simmons, the Court must instead award a rate equal to, "or slightly above, the recent rates approved in this district." Realsongs, 2010 WL 4320404, at *9. The Court finds that an appropriate hourly rate for Mr. Horwitz is $475. See id. (awarding $425 to a partner in an intellectual property case).

Senior associate Anastasia Fernands, Esq., billed at hourly rates of $485 and $520 at various points during this

[2] Plaintiff seeks leave to file a sur-reply addressing Defendants' argument that the Court should look at the prevailing rates outside the Eastern District. Inasmuch as the Court rejects Defendants' argument, Plaintiff's request (Docket Entry 194) is DENIED AS MOOT.

litigation. These rates, too, are higher than the prevailing Eastern District rates. See Entral Group Int'l, 2007 WL 2891419, at *10 (finding $340-360 reasonable for an associate); Entral Group Intern, LLC, 2006 WL 3694584, at *10 (awarding $365 an hour for an associate). The Court finds that an appropriate hourly rate for Ms. Fernands is $350. Realsongs, 2010 WL 4320404, at *9.

Four mid-level associates billed at the following hourly rates: Joseph Crystal, Esq., at $395, Bradley Micsky, Esq., at $280 and $350, Brent Bellows, Esq., at $450, and Daniel C. Miller at, Esq., $455 and $505. The Court finds that $225 per hour is a reasonable rate for these attorneys, who are described in the Fee Application as mid-level associates and for whom no professional background is given. (See generally Horowitz Declaration, Docket Entry 187.)

Three junior associates billed at the following hourly rates: Jordan Weiss, Esq., at $300; Marva R. Deskins, Esq., at $270; and Anu Gokhale, Esq., at $330. A reasonable hourly rate for these associates is $175. Realsongs, 2010 WL 4320404, at *10.

The paralegal staff billed at hourly rates ranging from $150 to $255. A reasonable hourly rate for these employees

is $150. See id.

2. Hours Reasonably Expended

Having established the reasonable hourly rates, the next step is to evaluate the quantity and nature of the time spent on this case. Parties seeking attorneys' fees bear the burden of demonstrating the reasonableness of both the hours expended and the type of work performed. They typically do this through contemporaneous time records, preferably those specifying the nature of the work performed, the hours spent, and the dates on which the work was done. New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147-48 (2d Cir. 1983). The level of detail need not be overly exhaustive, however. See Aiello v. Town of Brookhaven, No. 94-CV-2622, 2005 WL 1397202, at *2 (E.D.N.Y. June 13, 2005). "District courts have broad discretion to determine the reasonableness of hours claimed based on their general experience and 'familiarity with the case.'" Brady, 2010 WL 4392566, at *6 (quoting Murray v. Mills, 354 F. Supp. 2d 231, 238 (E.D.N.Y. 2005)). In determining whether an award is reasonable, the District court must review and eliminate hours that are found to be "excessive, redundant, or otherwise unnecessary." Hensley v. Eckhart, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

Plaintiff and Hicks principally argue that the Fee Application is deficient because it does not clearly indicate whether the fees claimed were incurred as a result of the sanctionable conduct. The Court largely rejects this argument because it agrees with Defendants that the discovery abuses were the driving force behind the protracted nature of this litigation. (See generally Docket Entry 191 at 8-11.) More specifically, the sanction in this case relates beyond fees and costs incurred in drafting the Rule 37 motion itself and instead encompasses all of the fees and expenses that grew out of Plaintiff's and Hicks' refusal to obey Judge Tomlinson's discovery orders.

To the extent that Plaintiff and Hicks argue, however, that the Fee Application is unclear because counsel's time entries are vague and repetitive, they make a valid point. The time records in this case are replete with entries such as "work on motions" (Fee App. Ex. A at 2), "work on filings," (id. at 3), and "work on status" (id. at 4). To give one expensive example, Mr. Horowitz once billed 6.6 hours in a single day for time spent "Work[ing] on filings." (Id. at 3.) These entries, and others like them, are unacceptably vague. See Levy v. Powell, 2005 WL 1719972, at *7 (E.D.N.Y. 2005). See Pyatt v.

Jean, 2010 WL 3322501, at *__ (E.D.N.Y. Aug. 17, 2010) (reducing award by lump sum for vague time entries and block billing).

The time records also suffer from "block billing," as "the practice of aggregating multiple tasks into one billing entry" is known. L.V. v. New York City Dept. of Educ., 700 F. Supp. 2d 510, 526 (S.D.N.Y. 2010) (quotations omitted). Examples of this practice can be found on just about every page of counsel's time records. Although not prohibited, block billing makes it "exceedingly difficult for courts to assess the reasonableness of the hours billed." Id. (quotations omitted). As with vague time entries, "courts have found it appropriate to cut hours across the board by some percentage." Id.; see also Stair v. Calhoun, 722 F. Supp. 2d 258, 271 (E.D.N.Y. 2010) (percentage deduction appropriate to remedy block billing).

Accordingly, the Court finds that a 25% percent reduction in counsel's legal fees is appropriate "as a practical means of trimming fat from a fee application." Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 173 (2d. Cir. 1998). Before the Court cuts this percentage off counsel's fees, it strikes in their entirety two block entries that Defendants concede include time spent on issues not related to the discovery sanction (paralegal Carol Splaine's October 10, 2007 and April 1, 2008

entries). (See Docket Entry 193 at 9.)[3]

Additionally, the Court strikes $15,570.00 in fees the Defendants' purportedly incurred in drafting the Fee Application. The Defendants have not supported this figure with contemporaneous time records, and the Court therefore has no way to evaluate its reasonableness. See Maher v. Alliance Mortgage Banking Corp., No. 06-CV-5073, 2010 WL 3516153, at *4 (E.D.N.Y. Aug. 9, 2010) (report and recommendation) ("To aid the court in determining the amount of reasonable attorney's fees, a [fee applicant] must offer evidence that provides a factual basis for the award. The Second Circuit has held that this evidence must be in the form of contemporaneous time records which specify for each attorney the date, number of hours worked and nature of the work done.") (citations omitted). Although Defendants indicate that these records would be supplied on request, (see Fee Application 26), the Court already requested these records,

[3] The parties dispute whether a small portion of counsel's hours reflects travel time that should be compensated at a lower hourly rate. Assuming arguendo that these disputed entries do reflect travel time, the Court nevertheless declines to reduce counsel's fees further. This is both a consequence of the lump sum deduction the Court has already taken from Defendants' fee award, and the steep mark downs that the Court has made to counsel's hourly rates. A 50% reduction in travel time may be customary, but it is not a bright-line rule. See Connor v. Ulrich, 153 F. Supp. 2d 199, 203 (E.D.N.Y. 2001) (noting that a court has discretion to compensate travel time at attorney's full hourly rate).

albeit tacitly, when it directed Defendants to submit its Fee Application. The Court is not in the practice of making individual requests for documentation that should have been provided months ago.

3. Calculating the Fee Award

Based on the foregoing discussion, the Court calculates the Defendants' fee award as follows: (the number of hours listed for each attorney in the Fee Application multiplied by that attorney's awarded hourly rate) less the 25% lump-sum reduction. The fees incurred in connection with the Fee Application, which were not listed in the Fee Application's hours tally and are not included in the formula, are stricken.

This formula works out as follows:

Mr. Horowitz	115.9 hours @ $475	=	$55,052.50
Ms. Ferndands	49.3 hours @ $350	=	17,255.00
Mr. Crystal	14.2 hours @ $225	=	3,195.00
Mr. Miscky	15.2 hours @ $225	=	3,420.00
Mr. Bellows	22.1 hours @ $225	=	4,972.50
Mr. Miller	97.9 hours @ $225	=	22,027.50
Mr. Weiss	4.3 hours @ $175	=	752.50
Ms. Deskins	9.1 hours @ $175	=	1,592.50
Ms. Gokhale	3.2 hours @ $175	=	560.00

Paralegals:			
Alexis Fernandez	0.4 hours @ $150	=	60.00
Nicholas Casolaro	0.5 hours @ $150	=	75.00
John McCullough	3.2 hours @ $150	=	480.00
Carol Splaine	13.8 hours @ $150	=	$ 2,070.00
TOTAL:			**$111,512.50**

As discussed earlier, Ms. Splaine's hours from October 10, 2007 and April 1, 2008 are not included in this calculation. These sums total $111,512.50. After a 25% reduction, Defendants are entitled to $83,634.38 in legal fees.

C. Costs

Defendants seek $3,675.17 in costs and disbursements. The Court strikes $343.74 of that figure, representing costs associated with a January 17, 2007 invoice, because no such invoice was provided in the Fee Application. The Court has reviewed the remaining disbursements, the bulk of which are for legal research, and finds them reasonable. Accordingly, Defendants are entitled to $3,331.43 in costs.

The Court has considered and rejected Plaintiff's and Hicks' remaining arguments concerning the Fee Application, including Hicks' evidentiary objections to the law firm invoices. Hicks' motion to strike Defendants' reply (Docket

Entry 201) is DENIED because Hicks has not demonstrated that such drastic relief is warranted. Defendants are entitled to an award of $86,965.81 in legal fees and costs.

CONCLUSION

For the foregoing reasons, Defendants' motion (Docket Entry 179) to unseal the January 2010 Order is GRANTED. Plaintiff's motion for leave to file a sur-reply (Docket Entry 194) is DENIED AS MOOT. Hicks' motion for reconsideration (Docket Entry 177) is granted to the extent that the Court acknowledges an incorrect reference to Rule 11 in the Sanctions Order and is DENIED in all other respects. Hicks' motion to strike Defendants' reply (Docket Entry 201) is DENIED.

The Clerk of the Court is directed to unseal the January 2010 Order, to enter Judgment for Defendants and against Plaintiff and Hicks in the amount of $86,965.81. Pursuant to Judge Tomlinson's Supplemental R&R, which this Court adopted by its Sanctions Order, Plaintiff and Hicks are each responsible for 50% of the judgment. The Clerk of the Court is further directed to mark this case CLOSED.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: March 31, 2011
Central Islip, New York

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
RATES TECHNOLOGY, INC.,

Plaintiff,

UNDER SEAL
MEMORANDUM & ORDER
05-CV-2755(JS)(AKT)

-against-

MEDIATRIX TELECOM, INC. and
MEDIA5 CORPORATION,

Defendants.
----------X
APPEARANCES:

For Plaintiff: James B. Hicks, Esq.
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Zachary Murdock, Esq.
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Melville, NY 11747

For Defendant: Daniel Carl Miller, Esq.
Ethan Horwitz, Esq.
King & Spalding, LLP
1185 Avenue of the Americas
New York, NY 10036-4003

SEYBERT, District Judge:

The Court is in receipt of Magistrate Judge A. Kathleen Tomlinson's (1) Report and Recommendation, dated March 31, 2008 ("R&R"), regarding Defendant Mediatrix's motion for sanctions against Plaintiff Rates Technology, Inc. (DE 155), and (2) Supplemental Report and Recommendation dated September 2, 2009

("Supplemental R&R") (DE 165) (collectively, "R&Rs").[1] The R&Rs recommend that the Court impose sanctions, pursuant to Rule 37, on Plaintiff and Plaintiff's counsel, Mr. Hicks, and dismiss Plaintiff's Amended Complaint in its entirety. For the reasons discussed herein, the Court ADOPTS the R&Rs in their entirety.

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[1] The Court has also reviewed the numerous correspondences from both parties, including: (1) Defendants' April 16, 2008 letter to the Court attaching a proposed order adopting the Report and Recommendation, dismissing the Complaint, and awarding reasonable expenses, including attorney's fees, against "the plaintiff and its attorneys of record," (DE 158); (2) Plaintiff's April 18, 2008 letter to the Court, filed as an "Objection to the Report and Recommendation," (DE 159); (3) Plaintiff's Counsel's April 21, 2008 letter to the Court, (DE 160); (4) Defendants' April 23, 2008 letter to the Court responding to Plaintiff's April 18, 2008 letter, (DE 161); (5) Defendants' April 24, 2008 letter to the Court responding to the April 21, 2008 letter of Plaintiff's local counsel, (DE 162); (6) Plaintiff's April 25, 2008 letter to the Court responding to Defendants' April 24, 2008 letter (DE 163); (7) Plaintiff's April 29, 2008 letter to the Court "in support of the objections set forth in [the] April 18 letter," (DE 164); (8) Plaintiff's letter to the Court, filed as an "Objection to Supplemental Report and Recommendations," (DE 166); (9) Plaintiff's Appeal of Magistrate Judge Decision (DE 167); (10) Defendants' October 3, 2008 response to Plaintiff's and Plaintiff's Counsel's Appeal and Objections to the Supplemental Report and Recommendations, (DE 168); (11) Defendants' Response to Plaintiff's and Plaintiff's Counsel's Appeal and Objections to the Supplemental Report and Recommendations, (DE 169); (12) Declaration of Ethan Horwitz in Support of Defendants' Response to Plaintiff's and Plaintiff's Counsel's Appeal and Objections to the Supplemental Report and Recommendations, (DE 170); (13) Plaintiff's October 6, 2008 letter to the Court, responding to Defendants' September 19, 2008 letter, (DE 171); and (14) Plaintiff's Reply Brief Supporting Appeal and Objections to Supplemental Report and Recommendation; Request for Oral Argument, (DE 172). This firestorm of submissions, for something as relatively-minor as a motion for attorneys' fees and costs, is unsurprising in light of this case's drawn-out nature. In short, the submissions, like the discovery process in this case, rehash the same points over and over again, and provide the Court with very little useful information.

BACKGROUND

The R&Rs, as well as the prior Orders listed therein, thoroughly set forth the facts and extensive procedural history of this contentious patent infringement case; therefore, the Court will not recite them at length. In short, then-assigned Magistrate Judge James L. Orenstein issued two orders and Judge Tomlinson issued one order directing Plaintiff to answer Defendants' Interrogatory No. 3 by furnishing an element-by-element analysis of the infringement claims. (DE 14); (DE 19); (DE 60 at 3.)[2] The fourth order on this issue, Judge Tomlinson's Order, dated September 5, 2007, was the last straw. (DE 140.) Judge Tomlinson conditionally granted Defendants' September 12, 2006 motion for sanctions provided that Plaintiff did not fully and adequately respond to Interrogatory No. 3 by September 27, 2007. (DE 140.) As part of this order, she issued a final warning: "I am giving Plaintiff one final opportunity to respond to Defendants' Interrogatory No. 3 . . . . I am cautioning Plaintiff . . . that this is indeed its last opportunity to comply with the directives of this Court and Plaintiff proceeds at its own peril." (DE 140 at 8-9.) Thereafter, during the October 24, 2007 hearing, Judge Tomlinson concluded that Plaintiff still had not adequately

[2] "It should be noted that this is Plaintiff's final opportunity to comply with this Court's orders and the rules of discovery. Should Plaintiff fail to do so, the Court will fashion an appropriate remedy." (DE 60 at 4) (emphasis in original).

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responded to the interrogatory. (Tr. Oct. 25, 2007 at 2.) The R&R explicitly concluded that sanctions against Plaintiffs, in the form of dismissal of the Complaint, was appropriate. It did not explicitly recommend an assessment of attorneys' fees and costs.

Subsequently, in a letter dated April 16, 2008, Defendants submitted a proposed order to the Court. Contained in the proposed order was a provision assessing attorneys' fees and costs against Plaintiff and Plaintiffs' attorneys.[3] On April 18, 2008, Plaintiffs objected to Defendants' proposed order, and its interpretation of the R&R. Specifically, Plaintiffs asserted that the R&R did not recommend the assessment of attorneys' fees and costs; therefore, according to Plaintiffs, and for a whole host of reasons, imposition of such fees and costs would be improper. Five further submissions by counsel led to Judge Tomlinson's issuance of the Supplemental R&R. In the Supplemental R&R, Judge Tomlinson outlined that Rule 37 of the Federal Rules specifically delineates situations in which attorneys' fees and costs should be imposed. Based on the Rule's provisions, Judge Tomlinson recommended that Plaintiff and Plaintiff's counsel should split the cost of attorneys' fees and costs 50-50. Undeterred, the parties submitted additional objections, which only rehash the arguments of the prior

[3] In its April 24, 2008 submission [DE 162], Defendants withdrew their application for attorneys' fees and costs against Plaintiff's local counsel, Lazer, Aptheker, Rosella & Yedid, P.C. Therefore, the assessment of attorneys' fees and costs in this Order does not apply to local counsel.

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submissions.

In essence, both parties do not object to the recommendation in the R&Rs that Plaintiff's case should be dismissed as a Rule 11 sanction. Indeed, Plaintiff's own proposed order, attached to its April 18, 2008 submission, includes a provision that would dismiss the case with prejudice. Thus, the parties only object to two portions of the R&Rs: (1) those dealing with the time for filing objections to a magistrate's report and recommendation, and (2) those assessing attorneys' fees and costs. Defendants argue that Plaintiff's objections to the original R&R were untimely. Plaintiff maintains that its objections were timely and that (1) monetary sanctions are inappropriate because Plaintiff has provided all the information that it has available, (2) Defendants did not fulfill their meet-and-confer obligation related to monetary sanctions, and (3) sanctioning Plaintiff's counsel violates their due process rights.

DISCUSSION

I. Standard of Review

A party may serve and file specific, written objections to a magistrate's report and recommendation within ten days of receiving the recommended disposition. See FED. R. CIV. P. 72(b). Upon receiving any timely objections to the magistrate's recommendation, the district "court may accept, reject, or modify, in whole or in part, the findings and recommendations made by the

magistrate judge." 28 U.S.C. §636(b)(1)(C); see also FED. R. CIV. P. 72(b). If no party objects to the magistrate's recommendation, "the district court may adopt those portions of the report to which no objections have been made and which are not facially erroneous." Walker v. Vaughan, 216 F. Supp. 2d 290, 291 (S.D.N.Y. 2002) (citation omitted). If a party chooses to object, it must point out the specific portions of the report and recommendation to which they object. See Barratt v. Joie, No. 96-CV-0324, 2002 U.S. Dist. LEXIS 3453, at *2 (S.D.N.Y. Mar. 4, 2002) (citations omitted). When a party raises an objection to a magistrate judge's report, the Court must conduct a de novo review of any contested sections of the report. See Pizarro v. Bartlett, 776 F. Supp. 815, 817 (S.D.N.Y. 1991). Under the de novo standard, the Court will make an independent determination of the issue, giving no deference to any previous resolution. See Nomura Sec. Int'l, Inc. v. E*Trade Sec., Inc., 280 F. Supp. 2d 184, 198 (S.D.N.Y. 2003). The Court is not limited to consideration of evidence presented to the magistrate judge, but may review the entirety of the record. See FED. R. CIV. P. 72(b). However, "[w]hen a party makes only conclusory or general objections, or simply reiterates his original arguments, the Court reviews the Report and Recommendation only for clear error." Barratt, 2002 U.S. Dist. LEXIS 3453, at *2 (citations omitted).

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II. Dismissal of the Case is an Appropriate Rule 37 Sanction

In light of the parties' failure to object to the portions of the R&Rs that recommend dismissal of this case, this Court reviews those portions for clear error. After careful review of the R&Rs, the Court finds that Judge Tomlinson's recommendations that the case be dismissed are not clearly erroneous. Accordingly, the Court hereby adopts the R&Rs in this regard. The Complaint is hereby DISMISSED, with prejudice.

III. Plaintiff's Objections to the R&Rs

A. Timeliness of Plaintiff's Objections

Defendant filed an objection to the R&R based on Judge Tomlinson's determination that Plaintiff's objections to the R&R were timely-filed. Accordingly, this Court examines this issue de novo.

The R&R, dated March 31, 2008, was served on Plaintiff's counsel through the Court's Electronic Case Filing system ("ECF") on April 1, 2008. The R&R stated that "[t]raditionally, any objection to a Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of service and failure to file objections within this period waives the right to appeal." (R&R at 36.) Plaintiff filed its objection on April 18, 2008. Defendants argue that any objections to the R&R were due April 16, 2008, ten days after it was filed and served via ECF; as a result, Plaintiff's April 18, 2008 letter objections are untimely. (DE

161.) "Plaintiff is well aware that this court's local rules do not provide for a three day mailing provision for documents filed through ECF". (Id.) In response, Plaintiff asserts that "RTI ha[d] ten court days under FED. R. CIV. P. 72 to object, plus an extra three days for the e-mail service pursuant to FED. R. CIV. P. 6(e)," and so objections were timely through April 18, 2008 [DE 163].

As Judge Tomlinson noted in the Supplemental R&R, case law is scarce addressing the impact of ECF on the report and recommendation objection period under 28 U.S.C. ¶ 636(b)(1)(C) and Rule 72(b)(2). Thus, the Court will follow the recent precedent set forth in Sembler v. Advanta Bank Corp., No. 07-CV-2493, 2008 WL 2965661, at *1 (E.D.N.Y. Aug. 1, 2008). In Sembler, Judge Raymond Dearie initially issued an Order holding that plaintiff's objections to the magistrate judge's report and recommendation were untimely, because they had been filed eleven days after entry of the report.[4] Id. On a motion for reconsideration, however, Judge Dearie determined that the objections were, in fact, timely. Citing Rule 6(d), Judge Dearie found that "'[w]hen a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).'" Id. (quoting

[4] Like the time-period here, that calculation excluded weekends and federal holidays.

Rule 6(d)). Plaintiff in that case was served notice of the Report by email via the Court's Electronic Case Filing System, and Rule 5(b)(2)(E) "contemplates service by 'electronic means,' which undoubtedly includes email."[5] Id. Thus, the filing deadline in Sembler must include the additional three days, and the objections in that case were timely-filed.

Accordingly, in this case, the Court finds that the filing deadline for objections must include the additional three days. Because Plaintiff's objections were filed before the filing deadline, as calculated to include the additional three days, the Court finds that the objections were timely-filed.

B. Award of Attorneys' Fees and Costs

1. Standard Under Rule 37

Plaintiff filed several objections to the R&R and, subsequently, the Supplemental R&R, based on Judge Tomlinson's

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[5] Examining the reasoning behind the Rule, and its application to technology that should effectuate instantaneous notification, Judge Dearie referred to the Advisory Committee Notes to the 2001 amendments to Rule 5 address the provision of extra time under then Rule 6(e)--now 6(d)--and explained that:

> [e]lectronic transmission is not always instantaneous, and may fail for any of a number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent.

FED. R. CIV. P. 6(d).

determination that Defendants were entitled to a judgment for attorneys' fees and costs against Plaintiff and Plaintiff's attorney. Accordingly, this Court examines this issue de novo.

The 2006 version of Rule 37(b) required the imposition of monetary sanctions, in the form of reasonable expenses and attorney's fees, when a court determines that a party has failed to obey a court order without justification. The 2006 version contained a "non-exhaustive list of permissible sanctions, including dismissal with prejudice, against a party that fails to obey a discovery order." Novak v. Wolpoff & Abramson LLP, No. 07-CV-0166, 2008 WL 2890382, at *1 (2d Cir. July 29, 2008). At the time Defendants' motion for sanctions was fully briefed, Rule 37(b)(2) read in pertinent part as follows:

> (b) Failure to Comply With Order. . . .
>
> > (2) Sanctions by Court in Which Action is Pending.
> >
> > If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> >
> > . . . .
> >
> > (C) An order striking out pleadings or parts thereof . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . .

Rule 37 went on to state that "[i]n lieu of" or "in addition" to these sanctions, "the court shall require the party failing to obey the order, or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." FED. R. CIV. P. 37(b)(2) (amended 2007) (emphasis supplied).

In 2007, Rule 37 was amended. The new Rule 37(b)(2)(C) reads as follows:

> (b) Failure to Comply With a Court Order
> . . . .
>
> (2) Sanctions in the District Where the Action is Pending.
>
> (A) For Not Obeying a Discovery Order. If a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35 or 37(a), the court where the action is pending may issue further just orders. They may include the following:
>
> . . . .
>
> (iii) striking pleadings in whole or in part;
>
> . . . .
>
> (v) dismissing the action or proceeding in whole or in part . . .
>
> (C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney

> advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(Emphasis supplied).

In objecting to Judge Tomlinson's R&Rs, Plaintiff first fixates on the language in Rule 37 stating that "the court where the action is pending may issue further just orders." Focusing on "may," Plaintiff maintains that the imposition of attorneys' fees and costs is not mandatory. Therefore, Plaintiff argues, the imposition of attorneys' fees and costs was not an implicit part of Judge Tomlinson's R&R. Moreover, Plaintiff states that even if the imposition of these fees and costs was implicit, such imposition was improper for a whole host of reasons: (1) Plaintiff cannot produce an element-by-element claim analysis in response to Interrogatory 3 because the Court is asking for information which Plaintiff does not have. (DE 99); (Tr. Oct. 24, 2007 at 22-23); (DE 149); (DE 159); (DE 167); (2) Defendants did not fulfill their meet and confer obligations with regard to the fees and cost; and (3) Imposition of these costs and fees violates Plaintiff's counsel's due process rights, because they were not given notice that the fees and costs could be imposed; therefore, counsel was unable to be heard on this issue. All of Plaintiff's arguments fail to persuade the Court.

As Judge Tomlinson explains in her Supplemental R&R, the

imposition of attorneys' fees and costs is implicit in the language of the decision to sanction a disobedient party. From this Court's reading of the Rule, the Court may either order the disobedient party to pay the costs and fees by themselves, or it may impose the costs, fees, and other sanctions. Thus, in this case, there is a strong presumption that attorneys' fees and costs should be imposed, unless Plaintiff has met its burden to establish the failure was substantially justified or other circumstances make an award of expenses unjust. The Court holds that Plaintiff has failed to meet its burden.

2. Plaintiff's Failure to Cooperate as Justification

In order to sue for patent infringement, the party bringing the claim must spell out a proper basis for charging infringement. This requires a Plaintiff to "compare an accused product to its patents on a claim by claim, element-by-element basis for at least one of each of defendant's products." New York Univ. v. E.piphany, Inc., No. 05-CV-1929, 2006 U.S. Dist. WL 559573, at *2 (S.D.N.Y. Mar. 6, 2006) (citing Network Caching Techn. v. Novell, Inc., No. 01-CV-2079, 2002 U.S. Dist WL 32126128, at *5 (N.D. Cal. 2002)). Here, Defendants have produced substantial discovery for Plaintiff, (DE 60), yet Plaintiff has refused to provide Defendants with an adequate basis for their

claim.[6] After over four years of litigation, whether Plaintiff cannot or simply will not provide a proper response to the Interrogatory is irrelevant: "These [interrogatory] answers lacking, the claims have not been clearly articulated or substantiated. Despite numerous attempts by the defendant and the Court, plaintiff still is not forthcoming with crucial information. . . . The persistent uncooperative posture of the plaintiff evidences to the Court willful neglect and/or bad faith". Indus. Elect. Private, Ltd. v. Bendix Corp., No. 85-CV-2433, 1989 WL 76004, at *2 (S.D.N.Y. July 6, 1989). Instead of fulfilling its own obligations, Plaintiff improperly instructed Defendants to answer in interrogatories why their products did not violate Plaintiff's patent. (DE 94). This burden shift is entirely inappropriate because "the burden always is on the patentee to show infringement." Under Sea Indus., Inc. v. Dacor Corp., 833 F.2d 1551, 1557 (Fed Cir. 1987).

Plaintiff's first objection is merely a rehashing of an argument that Plaintiff has asserted for almost four years.

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[6] At a hearing before Judge Tomlinson, Defendants' counsel stated it best: "For two years we have basically asked one question of them. That question is what is the infringement all about? Tell me what it is you think I am doing? They cannot answer that basic question. We've asked it. There have been four orders . . . . Whichever way you look at it, these interrogatory answers fail. . . . The interrogatory says for each product give us an element by element analysis of why you think it's infringed. There is no direct infringement analysis in the claim analysis that they've given us." (Tr. Oct. 27, 2007 at 12-13, 16-17).

Plaintiff offers no evidence showing that its failure to comply with Orders is "substantially justified." Additionally, it is impossible to imagine how Plaintiff's repeated failure to comply with court orders could serve as a basis to establish that an award of expenses would be unjust.

3. Defendants' Alleged Failure to Meet-and-Confer as Justification

Plaintiff's objection that Mediatrix did not fulfill its meet-and-confer obligation with respect to any money sanctions request is without merit. Rule 37 of the Federal Rules of Civil Procedure and Local Rule 37.3 require the parties to meet and confer or attempt in good faith to meet and confer to resolve pretrial disputes. "The purpose of the meet and confer requirement is to resolve discovery matters without the court's intervention to the greatest extent possible." Excess Ins. Co. Ltd. v. Rochdale Ins. Co., No. 05-CV-10174, 2007 WL 2900217, at *1 (S.D.N.Y. Oct. 4, 2007). Reviewing this objection de novo, the Court finds that the Defendants met their obligations.

Judge Tomlinson conditionally granted Defendants' motion for sanctions provided that Plaintiff inadequately responded to Interrogatory No. 3. (DE 140). She further ordered that if Defendants believed Plaintiff inadequately responded to Interrogatory No. 3., that the parties meet and confer (DE 142). Defendants declare that they did meet and confer with Plaintiff's counsel via a phone conference on October 3, 2007, and that

Plaintiff's counsel declared its response to Interrogatory No. 3 to be proper. (DE 153-2). During the October 24, 2007 hearing, Plaintiff and its counsel acknowledged that they met and conferred with the Defendants regarding the motion. (Tr. Oct. 24, 2007 at 27). Thus, both parties did meet and confer, and Plaintiff's objection is without merit.

4. Alleged Due Process Violation does not Make an Award of Attorneys' Fees and Costs Unjust

Plaintiff and Plaintiff's counsel were put on notice that sanctions could be imposed, and they had the opportunity to present arguments against the imposition of sanctions. As discussed earlier, Rule 37 explicitly provides for sanctions against the attorney and the party failing to obey court orders. Plaintiff and its counsel have had countless opportunities to be heard on the issues. Neither Defendants' counsel, nor this Court, can be held responsible for Plaintiff's failure to read or understand the Federal Rules, or their decision not to oppose the imposition of costs and fees until it filed its objection to the R&R.

In short, imposing monetary sanctions against Plaintiff and its counsel does not violate their due process rights; therefore, they have failed to establish their burden that imposition of monetary sanctions here would be unjust.

IV. Joint and Several Liability for Attorneys' Fees and Costs Awarded Between Plaintiff and Plaintiff's Counsel

Judge Tomlinson recommended awarding attorney's fees and

costs to Defendants to be split 50-50 by Plaintiff and its counsel, and Defendants request that this award be imposed jointly and severally. (DE 166).

Courts have made sanction awards joint and several when the judge determines that a party and its counsel were equally responsible for the failure to obey orders. See e.g., Thomas E. Hoar, Inc. v. Sara Lee Corp., 900 F.2d 522, 527 (2d Cir. 1990); Selby v. Arms, No. 93-CV-6481, 1995 U.S. Dist. WL 753894, at *9 (S.D.N.Y. Dec. 20, 1995). Here, the conduct of Plaintiff and its counsel in failing to comply with Orders and provide an adequate basis for infringement was egregious enough to warrant an equal split in costs, with both Plaintiff and Plaintiff's counsel being jointly and severally liable.

V. Defendants' Request that the Attorney's Fees and Costs Accrue from September 12, 2006

Judge Tomlinson has awarded attorney's fees beginning on September 5, 2007, but Defendants object to that time-frame, and argue that the start date for accrual of these costs and fees should be September 12, 2006. (DE 166). The Court agrees. Although Plaintiff's and Plaintiff's counsel's failures did not appear to be willful back in 2006, this is one case where the Court has the benefit of hindsight. In view of Plaintiff's and Plaintiff's counsel's refusal to comply with this Court's Orders for over four years, it would seem appropriate to award fees and costs for the longer duration.

CONCLUSION

Judge Tomlinson, in her thorough and well-reasoned opinion, recommended that the Court grant Defendants' motion for sanctions. Having conducted a de novo review of the issues to which Plaintiffs object, the Court agrees with Judge Tomlinson's conclusions. For the reasons set forth above, the Court hereby ADOPTS Magistrate Judge Tomlinson's R&Rs in their entirety, except that the award of attorneys fees and costs shall run from September 12, 2006.

Accordingly, Defendants' motion for sanctions is GRANTED. The Complaint is DISMISSED with prejudice. The Court grants attorneys' fees and costs in favor of Defendants in an amount to be determined by the Court in a subsequent order, running from September 12, 2006. Defendants are directed to submit, within 30 days of the filing of this Order, an accounting setting forth the time records, expenses, and other pertinent information in support of their application for fees and costs; at that time, the Court will enter a judgment in favor of Defendants and this matter will be CLOSED.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: January 5, 2009
Central Islip, New York

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Certificate of Service

I, James B. Hicks, declare as follows:

On April 29, 2011, I caused a copy of the attached document to be served upon Ethan Horwitz, Esq., at King & Spalding, 1185 Avenue of the Americas, New York, NY 10036; David Lazer, Esq., at Lazer, Aptheker, Rosella & Yedid, P.C., Melville Law Center, 225 Old Country Road, Melville, NY 11747-2712; George M. Lindahl, Esq., at Lindahl Beck, LLP, 600 South Figueroa Street, Suite 1500, Los Angeles, California 90017-3457; and Arianna Frankl, Esq., at Cole, Schotz, Meisel, Forman & Leonard, P.A., 900 Third Avenue, 16th Floor, New York, NY 10022, all by ECF.

On April 29, 2011, I also caused a copy of the attached document to be served upon Vincent J. Syracuse, Esq., at Tannenbaum Helpern Syaracus & Hirschfeld, LLP, 900 Third Avenue, New York, NY 10022, by first-class mail, prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate, and that this declaration was executed at Los Angeles, California on April 29, 2011.

/s/ James B. Hicks
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