IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OCEANIC EXPLORATION COMPANY et al., Plaintiffs, v. CONOCOPHILLIPS, INC. et al., Defendants.	Civil Action No. 4:07-cv-00815

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' RULE 12(c) MOTION

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I. OVERVIEW OF PLAINTIFFS' MOTION TO STRIKE.

Immediately upon the transfer of the action to this Court, Defendants filed "Defendants' Motion for Judgment on the Pleadings" (the "Rule 12(c) Motion")[1], a brief in support of that motion[2], a 327-page supporting affidavit[3], and a notebook of unreported authorities.[4] That Rule 12(c) Motion asks this Court to enter judgment on the pleadings as to "all claims asserted in this action."

It is clear, on the face of the motion and otherwise, that Defendants' Rule 12(c) Motion seeks to relitigate and reverse three years of litigation before the Hon. Emmet G. Sullivan of the United States District Court for the District of Columbia. The request that this Court reverse Judge Sullivan's rulings is not only an impermissible affront to the applicable law, but stands in stark contradiction to the representations that Defendants made to that Court to obtain the transfer to this District, *i.e.*, representations that they would not attempt to relitigate Judge Sullivan's decisions in the Southern District of Texas. For both reasons, this Court should strike the Defendants' motion from the record or – at the very least – deny it.

Even if the Defendants' "Rule 12(c)" motion papers were not so fundamentally flawed, they could not be addressed by this Court at this time. That is so because the Defendants' motion is premature, and because it is transparently a pre-discovery motion for summary judgment on

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[1] S.D. Tex. Docket No. 114.

[2] S.D. Tex. Docket No. 115.

[3] *Id.* The affiant is John F. Lynch, a lawyer from Wachtell Lipton Rosen & Katz, a New York law firm representing the Defendants. Notably, ConocoPhillips had previously submitted to Judge Sullivan in connection with prior motions to dismiss six of the fourteen exhibits attached to his declaration (Exhibits 5-7, 12-14).

[4] S.D. Tex. Docket No. 116. All of these "unreported authorities" were available to Defendants well before Judge Sullivan entered his orders declining to dismiss those claims, declining to reconsider his dismissal of their claims, and declining to permit an interlocutory appeal from his refusal to dismiss those claims. *See* S.D. Tex. Docket Nos. 91-92 (September (footnote continued)

one of the most complex fact issues that any court or jury encounters – the causation of injury and damages. Accordingly, at minimum, the motion should be denied without prejudice to being re-urged at the conclusion of discovery in this case, when motions for summary judgment will be properly before this Court.

II. JUDGE SULLIVAN TWICE REJECTED THE ARGUMENT CONOCOPHILLIPS' NEW COUNSEL PUTS TO THIS COURT; NAMELY, THAT CONOCOPHILLIPS' CONDUCT COULD NOT HAVE CAUSED OCEANIC'S INJURY.

Twice Defendants ConocoPhillips and ConocoPhillips Company (collectively "ConocoPhillips") asked Judge Sullivan to dismiss Petrotimor and Oceanic's (collectively "Oceanic") complaint because it failed to plead that ConocoPhillips' bribery and corruption injured Oceanic. Judge Sullivan rejected those arguments and ruled that "[t]aking all of the factual allegations in the complaint as true, plaintiffs have demonstrated that ConocoPhillips' alleged wrongdoing *caused plaintiffs' alleged injury*." *Oceanic Exploration Co. v. ConocoPhillips, Inc.*, 2006 WL 2711527, *11 (D.D.C. 2006) (emphasis added) (Opinion Denying Motion to Dismiss, September 21, 2006 ("September 21, 2006 Opinion") at 27).

Judge Sullivan also ruled that "plaintiffs have sufficiently alleged a legally cognizable injury at this juncture--that they were *harmed* when they were deprived of a valuable business opportunity to develop oil and natural gas from the Timor Sea and of a fair opportunity to compete to secure that business opportunity *due to the unlawful activities of ConocoPhillips." Id.* (emphasis added) (September 21, 2006 Opinion at 27-28). In fact, Judge Sullivan went further, finding that:

> The Court agrees that there was a *reasonable likelihood* … that plaintiffs would have received concession rights post East Timor's independence in 2002 [absent

21, 2006 Order and Opinion declining to dismiss the subject claims against Defendants) and 109 (November 17, 2006 order declining reconsideration and an interlocutory appeal).

> ConocoPhillips' bribery]. Plaintiffs have sufficiently shown that they had invested a significant amount of research and resources in analyzing and developing ways to explore for and produce petroleum and natural gas in the Timor Gap since the 1970s. Therefore, plaintiffs have demonstrated a reasonable likelihood or *probability* that, but for the alleged interference by ConocoPhillips, a contract would have resulted.

Id. at *20 (emphasis added) (September 21, 2006 Opinion at 52-53).

Having twice lost before Judge Sullivan, ConocoPhillips persuaded him to transfer the case to the Southern District of Texas by expressly representing that: (a) it would not seek to relitigate those rulings, and (b) it would be bound by them. But immediately upon this Court's receiving the case, ConocoPhillips has moved to dismiss once again, on the ground that a "total absence of the required direct, non-speculative, relationship between the claimed wrong and the purported injury" justifies dismissal. (Rule 12(c) Motion at 2). As set forth in further detail below, *infra* at 9, the Court should reject ConocoPhillips' efforts to overturn Judge Sullivan's rulings in this Court and hold ConocoPhillips to the representations it made to Judge Sullivan in coming to this Court.

A. Judge Sullivan Rejected ConocoPhillips' Motion to Dismiss on Causation Grounds.

In its Motion to Dismiss Oceanic's Second Amended Complaint ("Second Motion"),[5] ConocoPhillips asked Judge Sullivan to dismiss the case because Oceanic failed to plead that

[5] ConocoPhillips made the same lack-of-causation argument in its Motion to Dismiss Oceanic's First Amended Complaint. *See* ConocoPhillips' Motion to Dismiss Oceanic's First Amended Complaint, S.D. Tex. Docket No. 21 ("First Motion"). ConocoPhillips argued that "[Plaintiffs'] Robinson-Patman Act claim fails for the separate and independent reason that Petrotimor cannot establish causation as a matter of law." First Motion at 39. The reasons they offered were the exact same reasons offered today:

> ConocoPhillips concession was not granted unilaterally by either East Timor or Indonesia, but granted jointly by those nations and Australia through their treaty framework. In the absence of consent by Australia, Petrotimor would have been deprived of the [oil rights] regardless of the alleged bribes. And Petrotimor has not alleged that Australia would have recognized the [rights] but for the alleged

(footnote continued)

ConocoPhillips' bribery and corruption injured Oceanic. For example, ConocoPhillips claimed that:

> It simply makes no sense for [Oceanic] to assert that it was injured by the loss of the opportunity … to compete or bid for the right to explore for oil and gas in the Timor Sea after East Timor became independent in 2002. … Petrotimor is at most a company that wishes that East Timor had chosen to disavow the existing concessions and to establish a new bidding process upon independence in 2002.
>
> Petrotimor alleges no facts establishing that it had a substantial chance of winning any such hypothetical bid. Needless to say, a plaintiff cannot avoid dismissal … by simply alleging that it would have won a bid.
>
> [A] lost opportunity to obtain a future financial benefit is too speculative to constitute an injury to business or property in any event [and] the RICO claims must be dismissed.

Second Motion at 10-11, 15, 27. In a section of its Opposition, entitled "Oceanic Has Properly Alleged Causation," Oceanic responded:

> The [Complaint] exhaustively alleges that ConocoPhillips' acts of bribery and corruption in 2002-03 directly caused Oceanic to be deprived of the opportunity to compete fairly for oil exploration rights in the Timor Sea. ConocoPhillips has no response other than to imply that any such causal chain between its corruption and Oceanic's unfair exclusion from competition was broken because of intervening actions of the East Timorese government and TSDA acting on its behalf. Such an attempted defense is unavailing, for far from being independent intervening causes sufficient to break the causal chain, these government actions are alleged to be the result of ConocoPhillips' own actions, procured by ConocoPhillips' own bribery.
>
> To take but a few examples, Oceanic was instructed in 2002 by Jose Teixera, one of the East Timorese joint commissioners responsible for the TSDA, not to submit a bid for production sharing contracts in an area where ConocoPhillips owns a

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> bribes to Timorese and Indonesian officials. To the contrary … Australia opposed [granting new oil rights] for its own reasons of state, long before and entirely apart from the alleged bribery. Accordingly, Petrotimor cannot establish that the alleged bribery caused its deprivation as a matter of law. First Motion at 38-39.

In its Reply, ConocoPhillips reiterated its point, "[i]n the absence of any allegations that the alleged bribery altered Australia's position on the allocation of concession rights [Plaintiffs] cannot establish causation as a matter of law." Reply to Opposition, Docket No. 41, at 21.

> significant portion. SAC ¶ 124. Teixera likewise is alleged to have told an Oceanic representative that Oceanic would not win its renewed efforts to help develop and transport oil and gas to East Timor "because doing so would be an 'action that might annoy the Sunrise Field Group,'" a ConocoPhillips' operation. SAC ¶¶ 125, 127. Far from … breaking the causal chain, such government actions are alleged to be the direct causal result of ConocoPhillips' acts of bribery. SAC ¶¶ 89-111.

(Opposition to Second Motion, S.D. Tex. Docket No. 86, at 12-13).

In the face of these arguments, Judge Sullivan ruled, unequivocally, that the Second Amended Complaint adequately pleaded that ConocoPhillips' pattern of bribery and corruption injured Oceanic. Indeed, His Honor devoted three pages of his opinion to rejecting ConocoPhillips' argument that "plaintiffs' claims rest on nothing more than their disappointment that East Timor and Australia did not disavow the concessions awarded in 1991 and establish a procedure to reallocate the concessions." *Oceanic Exploration Co.*, 2006 WL 2711527 at *10-11 (September 21, 2006 Opinion at 25-29).

In fact, Judge Sullivan went even further, and squarely held that: "Taking all of the factual allegations in the complaint as true, plaintiffs have demonstrated that ConocoPhillips' alleged wrongdoing *caused* plaintiffs' alleged injury." *Id*. at *11 (emphasis added) (September 21, 2006 Opinion at 27).[6] His Honor continued: "The Court concludes that the plaintiffs have sufficiently alleged a legally cognizable injury at this juncture. Namely, they were harmed when they were deprived of a valuable business opportunity to develop oil and natural gas from the Timor Sea and of a fair opportunity to compete to secure that business opportunity *due to the*

[6] ConocoPhillips may argue that the decision was that Oceanic's injury was "fairly traceable to the defendant's challenged conduct," not causation. Second Motion at 2. But, the "fairly traceable requirement" from the standing doctrine is a causation requirement. *Pederson v. Louisiana State University*, 213 F.3d 858, 869 (5th Cir. 2000) (to establish standing, "the plaintiff must establish causation - a fairly traceable connection between the plaintiffs' injury and the complained - of conduct of the defendant").

unlawful activities of ConocoPhillips." *Id.* at *11 (emphasis added) (September 21, 2006 Opinion at 28).

Judge Sullivan did not conclude that Oceanic's allegations of causation and injury were speculative, as ConocoPhillips' new motion suggests. To the contrary, "*[t]he Court agrees that there was a reasonable likelihood, as opposed to a mere hope or speculative expectation, that plaintiffs would have received concession rights from the TSDA post East Timor's independence in 2002*." *Id.* at *20 (emphasis added) (September 21, 2006 Opinion at 52-53). "[P]laintiffs have demonstrated a reasonable likelihood or probability that, but for the alleged interference by ConocoPhillips, a contract would have resulted." *Id*. (September 21, 2006 Opinion at 52-53).

B. Judge Sullivan Also Rejected ConocoPhillips' Motion for Reconsideration on the Same Grounds.

Just four months ago, on November 17, 2006, Judge Sullivan denied ConocoPhillips' motion for reconsideration of his September 21, 2006 Order and had allowed this case to proceed to the merits.[7] ConocoPhillips' primary basis for reconsideration then was the argument it reurges now: that Judge Sullivan erred when he found that Oceanic had properly pleaded that ConocoPhillips' conduct caused Oceanic's injury.

ConocoPhillips had argued that Oceanic could not prove that its harm was caused by ConocoPhillips' wrongdoing, and thus had no injury because, "[i]n the absence of a right to a [bidding] process ... plaintiffs cannot claim to have suffered any legally cognizable injury, and

[7] Order Denying Motion for Reconsideration, November 17, 2006, S.D. Tex. Docket No. 109, ("November 17, 2006 Order").

hence lack standing."[8] Oceanic refuted that claim in its Opposition, showing that Judge Sullivan had already ruled that ConocoPhillips' conduct caused Oceanic's injury.[9]

Judge Sullivan denied the Motion for Reconsideration. He ruled—squarely and in contradiction to the position that ConocoPhillips now asks this Court to adopt—that plaintiffs "have alleged a legally cognizable injury."[10]

C. ConocoPhillips Had Ample Opportunity, but Failed to Bring the Purportedly "New" Authorities to the Attention of Judge Sullivan.

The pretext of ConocoPhillips' new motion for judgment on the pleadings is that "new" Supreme Court authority compels dismissal because Oceanic has not alleged that ConocoPhillips' alleged conduct harmed Oceanic. The cases that ConocoPhillips cites are not new. All were decided before Judge Sullivan denied ConocoPhillips' Second Motion to Dismiss and Motion for Reconsideration. *Anza v. Ideal Steel Supply Corp.*, ___ U.S. ___, 126 S. Ct. 1991 (2006) (decided June 5, 2006); *Holmes v. SIPC*, 503 U.S. 258 (1992); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983). ConocoPhillips simply elected not to cite them to Judge Sullivan.

To the extent ConocoPhillips' current motion may be characterized as a further motion for reconsideration, it is clearly improper. That is so because it offers nothing new for the Court to consider. It is a given that reconsideration is not simply an opportunity to reargue facts and theories upon which a Court has already ruled, let alone ruled twice.

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[8] Motion for Reconsideration, S.D. Tex. Docket No. 93, at 9.

[9] November 17, 2006 Order at 1.

[10] November 17, 2006 Order at 1.

III. TO INDUCE JUDGE SULLIVAN TO TRANSFER THIS ACTION TO TEXAS, CONOCOPHILLIPS REPRESENTED THAT THE COURT'S ORDER DENYING THE MOTION TO DISMISS WAS "LAW OF THE CASE" WHICH CONOCOPHILLIPS WOULD NOT RELITIGATE IN TEXAS.

Following Judge Sullivan's denial of its Second Motion to Dismiss, ConocoPhillips moved to transfer this action to the Southern District of Texas claiming, among other things, that judicial efficiency would be served thereby. To that end, ConocoPhillips represented to Judge Sullivan that "[t]he work undertaken by this Court in deciding the motions to dismiss will not be wasted, but will travel with the case under the 'law of the case' doctrine. *See, e.g., NPR, Inc. v. American Int'l Ins. Co. of Puerto Rico*, 242 F. Supp. 2d 121, 126 (D.P.R. 2003); *Clarendon Nat'l Ins. Co. v. Lan*, 152 F. Supp. 2d 506, 524 (S.D.N.Y. 2001)."[11]

Concerned that ConocoPhillips' motion to transfer was an exercise in forum shopping by which Defendants sought a forum which they believed to be more amenable to their dismissal and stay arguments, Oceanic opposed the transfer motion. On Reply, ConocoPhillips repeated its representations to Judge Sullivan (and cited additional authority). It wrote: "The work undertaken by this Court in deciding the motions to dismiss will travel with the case subject to the ordinary constraints of the 'law of the case' doctrine. *See, e.g., MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 1034-35 (D. Utah 2005); *Dunbar v. County of Saratoga*, 358 F. Supp. 2d 115, 128 (N.D.N.Y. 2005); *NPR, Inc.* [*supra*]."[12]

In fact, the cases cited by ConocoPhillips are textbook examples of transferee courts abiding by the pre-transfer rulings of a transferor court. In *NPR, Inc*, *supra*, the tranferee court abided by the law of the case regarding a ruling on a motion to amend. In granting the motion to transfer, the *NPR* transferor court had held that the law of Puerto Rico applied to the dispute. *Id.*

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[11] Motion to Transfer, S.D. Tex Docket No. 106, at 14.

[12] Reply to Motion to Transfer, S.D. Tex Docket No. 111, at 15.

at 125. The *NPR* transferee court held that the prior choice of law decision constituted binding law of the case because there had been no showing that the prior decision was clearly erroneous or manifestly unjust. *Id.* at 126.

In *Dunbar, supra,* the court held that Second Circuit law permits reconsideration of a prior decision only under limited circumstances (including the need to prevent manifest injustice), *Id.* at 128 (citing *Virgin Atlantic Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)), but went no further because the issue at hand had not been previously decided by the transferor court. *Id.* at 128.

In sum, ConocoPhillips' citation of these cases to Judge Sullivan explicitly and implicitly represented that, if this action were transferred to this District, it would not seek yet another reconsideration of the Court's rulings. Having secured the requested transfer away from Judge Sullivan and to this Court, and having done so in the name of judicial efficiency, ConocoPhillips and its new counsel promptly reneged on those representations to Judge Sullivan. Instead, they have immediately asked this Court to reconsider, and reverse, Judge Sullivan's rulings.

In the few months since Judge Sullivan last ruled on the issues of causation and injury, no discovery has been taken, and no new law has been presented that would permit the Court to revisit the law of the case or find it manifestly unjust. In that same time period, the pleadings found adequate by Judge Sullivan have not changed or become manifestly unjust. The law of the case doctrine discourages a transferee court from sitting in judgment of the decisions of a transferor court. As the United States Supreme Court held:

> The law-of-the-case doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions, and the policies supporting the doctrine apply with even greater force to transfer decisions.

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 802 (1988).

Courts in this Circuit abide by this teaching, recognizing that "when a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision." *Loumar, Inc. v. Smith,* 698 F.2d 759, 762 (5th Cir. 1983) (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 788, 794-95 (1981)); *see Greener v. Cadle Co.*, 298 B.R. 82, 94-95 (N.D. Tex. 2003) (declining to revisit issue of whether plaintiff had standing, and holding that while a transferee court "has the power to revisit prior decisions of a coordinate court . . . as a rule, courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice").

Oceanic respectfully submits that, having asked Judge Sullivan to transfer the action by representing that his rulings would be law of the case and not relitigated, ConocoPhillips should be held to its representations.

IV. DISCOVERY MUST BE COMPLETED BEFORE THE COURT COULD RULE ON CONOCOPHILLIPS' MOTION FOR JUDGMENT ON THE PLEADINGS.

ConocoPhillips' third motion attacking the pleadings will require the Court to do something Rule 12(c) prohibits: resolve factual disputes to rule on the motion. *See Fed. R. Civ. P.* 12(c) (precluding the consideration of "matters outside the pleadings" without converting the Rule 12(c) motion to a motion for summary judgment). Indeed, ConocoPhillips' Motion presents to the Court and is predicated upon key disputed factual issues as to which Oceanic has had no opportunity to take discovery. These include:

- The assertion that Oceanic would not have qualified to bid for such rights, had ConocoPhillips bribery not prevented open bidding.
- The assertion that notwithstanding the pattern of bribery, Oceanic would not have won any bid for such rights.

The Court cannot accept any of these false factual premises as true, given that Oceanic's Second Amended Complaint specifically alleges that Oceanic would have bid, would have qualified to bid, and would have won any such bid. Second Amended Complaint ¶¶ 1, 6, 52, 54, 79, 112, 118, 124, 190; *see Oceanic Exploration Co.*, 2006 WL 2711527 at *11, 20 (September 21, 2006 Opinion at 26-28, 52-53). Moreover, ConocoPhillips has expressly denied those facts in its answer -- the very hallmark of a disputed issue of material fact.

At best, the Defendants' Rule 12(c) motion is a motion for summary judgment. The Court cannot rule on this motion without providing Oceanic the opportunity for discovery, something the parties acknowledged in the October 25, 2006 Conference Report and Discovery Plan filed with Judge Sullivan.[13] In that Plan, the parties were required to state whether the case could be resolved by summary judgment or motion to dismiss. ConocoPhillips made no mention of any further motions to dismiss, instead stating that it believed "dismissal of plaintiffs' claims will likely be the result of a summary judgment motion *after discovery* of liability related discovery [sic] is completed." ConocoPhillips further proposed that this liability-related discovery should proceed for eight to ten months before any determination of factual issues may be made on motion.[14] Here again, Oceanic respectfully submits that this Court should hold ConocoPhillips and its new counsel to their prior representations.

[13] Joint Conference Report and Discovery Plan, October 25, 2006, S.D. Tex. Docket No. 103, at 8-9.

[14] *Id.*

V. THIS COURT SHOULD DEFER DECISION ON DEFENDANTS' RULE 12(C) MOTION, AND ANY OBLIGATION ON OCEANIC'S PART TO RESPOND ON THE MERITS, UNTIL AFTER THE APRIL 5TH STATUS CONFERENCE AND FURTHER ORDER OF THIS COURT.

Defendants' Rule 12(c) Motion was filed on March 13, 2007. In the ordinary course of events, that opposition would be submitted to the Court on April 2, 2007. *See* S.D. Tex L.R. 7.3. Responses to the motion would therefore be due by that submission date, or at least by the April 5, 2007 status conference set by this Court.[15]

Defendants' Rule 12(c) motion is improper and, at the very least, premature – given the applicable law and the factual circumstances of this case. Accordingly, plaintiffs should not be required to respond to the merits of the Rule 12(c) motion before the close of discovery in these proceedings.

If, however, the Court disagrees with the Plaintiffs' analysis on these points, then this Court should order a response on the merits at some future date that is consistent with the Federal Rules of Civil Procedure, and particularly with Rule 12(c) itself. Any other course of action, *i.e.*, requiring Oceanic to respond to the merits of the Rule 12(c) motion now, before this Cross-Motion to Strike is adjudicated, would effectively deprive the Oceanic of its ability to assert and enjoy the very protections against pre-discovery and otherwise premature summary judgment motions that Rule 12(c) itself expressly provides. *See Fed. R. Civ. P.* 12(c).

VI. CONCLUSION.

For all of the reasons noted above, the Defendants' Rule 12(c) Motion for Judgment on the Pleadings is barred by the law of the case, principles of judicial efficiency, the legal principles restricting the ability of a transferee district court to review and reverse the rulings of a

transferor district court, and the language of Rule 12(c) itself. Thus, the Defendants' motion should be stricken in its entirety.

If Defendants' Rule 12(c) Motion is not stricken in its entirety, however, then this Court should consider Defendants' Motion to be a premature Rule 56 motion for summary judgment, and deny the motion without prejudice to its being re-submitted after the date on which this Court authorizes the first use of summary judgment motions in these proceedings.

Respectfully submitted,

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[15] S.D. Tex. Docket No. 122. That Order, in stating that "the Court will decide motions", suggests that the Court has *sua sponte* moved the submission date for the Defendants' Rule 12(c) motion, as well as for this motion, to April 5th.

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CERTIFICATE OF CONFERENCE

This is to certify that James Webster, representing the Plaintiffs, conferred with David Pluchinsky, representing the Defendants, regarding the above and foregoing Motion to Strike Defendants' Rule 12(c) Motion on this, the 30th day of March, 2007. The Defendants are opposed to this motion.

By */s/ James J. Webster*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served upon the following list via electronic court filing or deposited in the United States Mail, first class delivery on this, the 30th day of March, 2007.

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