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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

PARAMOUNT PICTURES CORPORATION *et al.*,

Plaintiffs,

v.

REPLAYTV, INC. *et al.*,

Defendants.

AND CONSOLIDATED ACTIONS.

CASE NO. CV 01-9358 FMC (Ex)

Hon. Florence-Marie Cooper

THE COPYRIGHT OWNER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR REVIEW AND RECONSIDERATION OF MAGISTRATE JUDGE'S DISCOVERY ORDER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: November 25, 2002
Time: 10:00 a.m.
Ctrm: Room 750

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on Monday, November 25, 2002, at 10:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Florence-Marie Cooper, United States District Court Judge, in Courtroom 750, located at 255 East Temple Street, Los Angeles, California 90012, Plaintiffs Metro-Goldwyn-Mayer Studios Inc., Orion Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios Productions LLLP (formerly Universal City Studios Productions, Inc.), Fox Broadcasting Company, Paramount Pictures Corporation, Disney Enterprises, Inc., National Broadcasting Company, Inc., NBC Studios, Inc., Showtime Networks Inc., UPN (formerly the United Paramount Network), ABC, Inc., Viacom International Inc., CBS Worldwide Inc., and CBS Broadcasting Inc., Time Warner Entertainment Company, L.P. Home Box Office, Warner Bros., Warner Bros. Television, Time Warner Inc., Turner Broadcasting System, Inc., New Line Cinema Corporation, Castle Rock Entertainment, and The WB Television Network Partners L.P., Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc., Columbia TriStar Television, Inc., and TriStar Television, Inc. (collectively, the "Copyright Owner Plaintiffs") will and hereby do object to and move for review and reconsideration of the portion of the ruling of the Honorable Charles F. Eick, Magistrate Judge, denying the Copyright Owner Plaintiffs' Motion for Protective Order to restrict attorneys for the Electronic Frontier Foundation ("EFF") from gaining access to the Copyright Owner Plaintiffs' so-called "lobbying documents," business plans and financial documents and information from 2000 to the present.

For the reasons stated in the Motion, the Magistrate Judge's order was clearly erroneous, contrary to law and an abuse of discretion.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the pleadings and papers on file herein,

and upon such other matters as may be presented to the Court at the time of the hearing.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, and the filing of a Joint Stipulation, supplemental memoranda, and the hearing before the Magistrate Judge on October 15, 2002. This Motion is timely filed pursuant to Federal Rules of Civil Procedure 72(a) and Central District Local Magistrate Rule 3.3.1.

DATED: October 31, 2002

By: Scott P. Cooper /AG
SCOTT P. COOPER

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

This is a motion for reconsideration of that portion of the Magistrate Judge's denial of the Copyright Owner Plaintiffs' limited motion for a protective order to prevent EFF attorneys from gaining access to the Copyright Owner Plaintiffs' most sensitive proprietary information -- highly sensitive internal documents and information relating to lobbying efforts, and current business planning and financial documents. In issuing his October 17, 2002 Order,[1] the Magistrate Judge has rendered a ruling that will result in severe prejudice to the Copyright Owner Plaintiffs. In contrast, an order granting the Motion would result in little or no prejudice to the Newmark Plaintiffs, who also are represented by the Rothken Law Firm, and whose interests are additionally protected by the involvement of the Replay Defendants, with whom their interests are closely allied.

This Motion pertains only to a small portion of the documents produced in response to the document requests propounded by the Replay Defendants. Moreover, much of the information in those documents has nothing to do with the prosecution or defense of the issues in this case and everything to do with EFF's lobbying activities and organizational mission. The lobbying documents, current business plans and internal financial analyses are the most highly sensitive of the documents that formed the basis of the Copyright Owner Plaintiffs' motion below.[2]

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[1] A true and correct copy of the Minute Order of Magistrate Judge Eick dated October 15, 2002, and entered and served on October 17, 2002 (the "October 17 Order"), is attached to the accompanying Declaration of Scott P. Cooper, dated October 31, 2002 ("Cooper Decl."), as Exhibit 11.

[2] The lobbying documents and current business plans and financial documents on which the Copyright Owner Plaintiffs move represent a small fraction of the total number of "Highly Restricted" documents produced by the Copyright Owner Plaintiffs. The Copyright Owner Plaintiffs do not move for reconsideration of that portion of the Magistrate Judge's ruling that applies to the vast majority of their "Highly Restricted" documents; namely, the documents produced to the Department of Justice in response to Civil Investigative Demands, and business plans and financial documents predating 2000.

Indeed, allowing access to this confidential information would impinge on the Copyright Owners' unfettered right to petition the government and to participate in the legislative process.

While the Magistrate Judge expressly accepted for purposes of his ruling that the Ninth Circuit holding in *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992), constituted the controlling standard for the Copyright Owner Plaintiffs' motion, he erred in his finding that "the relief sought would impair significantly the prosecution of the Newmark Plaintiffs' claims by preventing attorneys from [EFF] from serving as litigation counsel for the Newmark Plaintiffs in this action," and in finding that the "Copyright Owner Plaintiffs have failed to demonstrate a sufficiently significant disclosure-related risk or danger to warrant the relief requested." (Declaration of Scott P. Cooper ("Cooper Decl."), Exh. 11.)

There is no evidence to support either of the Magistrate Judge's findings, and the undisputed record requires the granting of the motion -- especially on the narrow categories of documents as to which the Copyright Owner Plaintiffs move for reconsideration.

Ironically even EFF's attorneys did not seriously argue that a protective order would prejudice the Newmark Plaintiffs. Rather, the EFF attorneys argued that the EFF's First Amendment rights would be violated if the Motion for Protective Order were granted. EFF's attorneys contend that, as a self-proclaimed "public interest" organization, EFF enjoys a privileged place in the hierarchy of First Amendment protections, and that any order restricting *its* access to documents in a lawsuit, absent a compelling state interest, violates its rights to free speech and free association. EFF's argument fails because it ignores the applicable standards enunciated in *Brown Bag*, which balance the prejudice *to a client,* not the prejudice to an attorney, against the risk that such access will lead to the disclosure or use of sensitive confidential information to the detriment of the moving party. It also

fails because the Supreme Court has held that, in general, the First Amendment is not "offend[ed]" by protective orders issued in civil discovery. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 37 (1984).

In the face of the undisputed facts and applicable law, the Magistrate Judge's finding of any substantial prejudice -- let alone prejudice outweighing harm to the Copyright Owner Plaintiffs -- was legal error and an abuse of discretion.

## II. PROCEDURAL HISTORY AND STANDARD OF REVIEW

On August 15, 2002, this Court granted the Newmark Plaintiffs' motion to consolidate the action titled Newmark, et al. v. Turner Broadcasting Network, et al. (Case No CV 02-04445 FMC (Ex) (the "Newmark Action") with the above-captioned action (the "Replay Action"). In granting the order, the Court acknowledged the Copyright Owner Plaintiffs' concerns about EFF, as co-counsel in the case, obtaining unrestricted access to all of their production. While deciding not to deny consolidation on that ground, the Court expressly left "the determination of the precise scope of discovery [to which the Newmark Plaintiffs would be allowed access] to the magistrate judge." (Cooper Decl., Exh. 3, at Exh. A at 13, n.9.) This Court implicitly invited the Copyright Owner Plaintiffs to seek further protection of their confidential information as the issues presented themselves:

> The Entertainment Defendants also claim that the Newmark Plaintiffs, in seeking consolidation, are merely attempting to gain unfettered access to discovery documents, and to widen the scope of discovery in ReplayTV action. That a party may seek discovery of irrelevant documents is a danger in any litigation; this concern is not unique to consolidated cases. *There are procedural protections in place that assist parties in guarding against a party obtaining that irrelevant*

*discovery. The Entertainment Defendants are well versed in seeking such protection. The Court does not at this time resolve issues regarding the scope of discovery*; rather, the Court merely notes that the Entertainment Defendants' concerns regarding *access* to discovery do not persuade the Court that consolidation is inappropriate.

(Cooper Decl., Exh. 3, at Exh. A at 13 (italics supplied).)

Immediately following the order, the Newmark Plaintiffs, through their counsel Ira Rothken, requested that they be given access to all of the discovery produced in the Replay Action, subject to the terms of the Protective Order. In response, the Copyright Owner Plaintiffs attempted to negotiate with the Newmark Plaintiffs certain restrictions and limitations on access to the discovery, including an agreement that the Newmark Plaintiffs' co-counsel, EFF, not be given access to the most sensitive proprietary information produced by these companies. Those meet and confer efforts failed, however, necessitating the Copyright Owner Plaintiffs' Motion for Protective Order.

Importantly, the Copyright Owner Plaintiffs do not seek in their Motion for Protective Order to restrict *all* of the Newmark Plaintiffs' attorneys from gaining access to the Copyright Owner Plaintiffs' documents. They ask only that EFF, their antagonists before Congress and elsewhere, not be granted access to those documents that are at greatest risk of disclosure by EFF's review.

On October 15, 2002, the Magistrate Judge heard the Motion for Protective Order. After taking the matter under submission, the Magistrate Judge concluded that, in balancing the applicable *Brown Bag* factors – the risk of inadvertent disclosure against the impairment of the party's ability to prosecute its case – the motion should be denied. Although the Magistrate Judge correctly adopted the standard set forth in *Brown Bag, supra,* 960 F.2d 1465, he failed to apply it correctly.

A district court may reconsider a magistrate judge's determination of non-dispositive pretrial matters if the magistrate's order is "clearly erroneous or contrary to law." 28 U.S.C. Sec. 636(b)(1)(a); *see also* Fed. R. Civ. P. 72(a); Central District Local Magistrate rule 3.3.1. The "clearly erroneous" standard applies to the magistrate judge's findings of fact, while legal conclusions are reviewable *de novo* to determine whether they are contrary to law. *See Wolpin v. Phillip Morris Co.,* 189 F.R.D. 418, 422 (C.D.Cal. 1999). In this case, the applicable facts are *not* in dispute. It is the legal conclusions drawn from these facts that are in dispute. Accordingly, the Court should review the Magistrate Judge's October 15 ruling *de novo.*[3]

## III. ARGUMENT

### A. Contrary to the Magistrate Judge's Conclusion, the Copyright Owner Plaintiffs Have Demonstrated That There Exists Not Only a Risk of Inadvertent Disclosure or Use of Their Proprietary Information, But That Such Disclosure or Use Is Inevitable.

In their portion of the Joint Stipulation, the Copyright Owner Plaintiffs demonstrated both the extreme sensitivity of, and the dangers posed by disclosure or use of, the information contained in each category of documents to which EFF's attorneys would be restricted from gaining access under the proposed protective order. (Cooper Decl., Exh. 2 ("Joint Stipulation") at 13-17.) EFF's attorneys did not dispute the assertion.

The Magistrate Judge likewise did not dispute the extreme sensitivity of the information, or question in his ruling the harm that would likely occur in the event

[3] However, whatever the standard of review, the Magistrate Judge's order is clearly erroneous and an abuse of discretion.

of its disclosure or use. Rather, the Judge found that the Copyright Owner Plaintiffs had failed to "demonstrate a sufficiently significant *disclosure-related risk* or danger to warrant the relief requested." (Cooper Decl., Exh. 11.)

As the Magistrate Judge recognized, *Brown Bag* sets forth the appropriate analysis for determining whether a protective order should issue restricting attorneys from gaining access to confidential information. The court must "balance the risk [to the moving party] of inadvertent disclosure of trade secrets to competitors against the risk to [the party opposing the motion] that protection of [the confidential information] impaired prosecution of [the opposing party's] claims." *Id.* at 1470.[4]

Here, EFF's attorneys acknowledge that the organization "participates in both public advocacy and lobbying before legislative and administrative bodies," and that "EFF has ended up on the opposing side to the Entertainment Companies . . . in other government fora on occasion, most particularly in representations it has made to Congress on law reform and *proposed legislation concerning how the copyright bargain should adapt to new technologies*." (Joint Stipulation at 34-35 (italics supplied).) If EFF's attorneys are allowed access to documents detailing the Copyright Owner Plaintiffs' legislative goals and

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[4] EFF's attorneys have challenged this Motion primarily on First Amendment grounds, and on grounds that the *Brown Bag* analysis applies only to *in-house* lawyers engaged in *for-profit* activities. (Joint Stipulation at 31-35.) The Magistrate Judge clearly rejected those arguments, as is reflected not only in his written decision, but also in his questions and comments at the October 15 hearing on the Motion. (See Cooper Decl., Exh. 12.) From its inception, the access restrictions allowed by *Brown Bag* were never intended to be limited to in-house counsel. Nor have they been in practice. *See, e.g., In re Pabst Licensing,* 2000 U.S. Dist. LEXIS 6374 (E.D.La.) (protective order granted restricting both in-house and retained counsel "because risk of inadvertent disclosure or misuse is identical . . ."). Nor is there any reason to limit its application to *for-profit* competitors. Rule 26(c) protects parties from a "range of troubles" not restricted to business interests; to so limit the *Brown Bag* analysis would frustrate the rule's purpose. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1114, n.10 (3rd Cir. 1986).

strategies concerning, among other things, the regulation of personal video recorders such as the ReplayTV 4000, it is inconceivable that the information contained in these documents would not inform EFF's lobbying activities. Armed with this information, EFF's attorneys -- the very same individuals who actively engage in lobbying activities – would inevitably use their newfound knowledge to the detriment of admittedly direct antagonists, the Copyright Owner Plaintiffs.

Similarly, there can be no doubt that the risk of disclosure of the Copyright Owner Plaintiffs' current business plans and financial information is significant if EFF's attorneys are permitted access to these documents. As demonstrated below, an EFF attorney identified as counsel in this case has publicly argued that the Copyright Owner Plaintiffs are not harmed, but rather are helped, by the advent of new technologies for the distribution of their copyrighted content. (Joint Stipulation at 13-14.) The Copyright Owner Plaintiffs' current strategic business plans (for all of their distribution channels) and detailed financial information (tracking specific revenue sources and expenses) bear directly on EFF's argument, regardless of its merits or its application to this case. If EFF's attorneys are permitted access to these recent documents, it is hard to imagine how they would be able to continue to press the argument outlined above without drawing on the content of the Copyright Owner Plaintiffs' business plans and financial information, resulting in their use or disclosure.

Based on these undisputed facts, the only reasonable conclusion that can be drawn is that use or disclosure of the Copyright Owner Plaintiffs' sensitive, proprietary information is not only at *risk,* it is inevitable. Importantly, under *Brown Bag*, the Court is not required to find, nor do the Copyright Owner Plaintiffs contend, that EFF's attorneys would intentionally distribute "Highly Restricted" documents in violation of the Protective Order previously entered by the Court. Rather, the law recognizes the human reality that it is often impossible

for an attorney working in several different capacities to separate in his or her own mind an adversary's trade secrets. Here, EFF's attorneys admittedly serve as attorneys, lobbyists, and purported public advocates, seeking judicial rulings, legislation, and public sentiment in direct conflict with the Copyright Owner Plaintiffs' interests. Once EFF's attorneys review the Copyright Owner Plaintiffs' lobbying documents and recent business plans and financial documents, there is no way to "lock-up" the information contained in them inside the minds of EFF's attorneys in their roles as attorneys. *Brown Bag, supra,* 960 F.2d at 1471. The information contained in these documents cannot help but to aid these same attorneys in their role as lobbyists, as well as in their public relations campaign against the interests of the Copyright Owner Plaintiffs.

**B. <u>There Is No Prejudice to the Newmark Plaintiffs in Granting This Motion.</u>**

The limited nature of this Motion necessarily eliminates EFF's argument that the relief requested before the Magistrate Judge would prejudice the Newmark Plaintiffs because EFF's attorneys would not be permitted access to a large volume of documents in the case. (See Joint Stipulation at 21.) This Motion does not challenge the portion of the Magistrate Judge's ruling that applies to the overwhelming majority of the documents at issue in the Copyright Owner Plaintiffs' initial motion -- namely, the documents produced to the Department of Justice concerning the Movies.com and Movielink joint ventures, and business plans and financial documents predating 2000. Rather, this Motion is limited to the relatively few lobbying documents, and business plans and financial documents from 2000 to the present. Given the small volume of documents at issue here, the Newmark Plaintiffs cannot credibly argue that they will be prejudiced if only one set of their lawyers, the Rothken Law Firm, has access to these documents.

As described above, the *Brown Bag* analysis requires the Court to "balance the risk [to the moving party] of inadvertent disclosure of trade secrets to competitors against the risk to [the party opposing the motion] that protection of [the confidential information] impaired prosecution of [the opposing party's] claims." 960 F.2d at 1470.

In this case, the uncontroverted evidence reveals that the Newmark Plaintiffs' ability to prosecute their declaratory relief claim will not be impaired if this motion is granted. The Newmark Plaintiffs are represented by two sets of lawyers: the Rothken Law Firm, and EFF's attorneys. EFF's attorneys failed to present any compelling evidence to suggest that the Rothken Law Firm cannot well represent the interests of its clients.

In opposing the Motion for Protective Order, EFF's attorneys simply equated "impairment" with *potential relevance* and argued that, because the documents were relevant, denying *EFF's attorneys* access to them would impair their clients' ability to prosecute their case. (See Joint Stipulation at 22-23.) [5] Their argument misses the point. The *Brown Bag* analysis presumes potential relevance; the issue is, rather, whether and under what circumstances one party's lawyers may be denied access to the other party's documents.

Moreover, many of the documents at issue in this Motion are of dubious relevance, at best, to the Newmark Plaintiffs. EFF's attorneys claim that the lobbying documents are relevant because they "include representations made to Congress about the current and future impact on the markets for their works posed

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[5] EFF's attorneys argued that, applying "the discovery standard that information need be 'likely to lead to the discovery of admissible evidence,' this information is clearly subject to discovery in this case and withholding it from the EFF Attorneys will create prejudice to the Newmark Plaintiffs." They concluded with the tautology that, "[i]f EFF Attorneys are denied access to these categories, there is no question it would be materially prejudicial to the development of the core claims of Newmark Plaintiffs' case." (Joint Stipulation at 23:15-21.)

by various challenges, including PVRs." (Joint Stipulation at 23.) In fact, however, EFF's attorneys already have access to lobbying documents reflecting representations and/or presentations made to Congress concerning market impact. The "Highly Restricted" lobbying documents at issue here consist of a relative handful of documents, mostly e-mails, which can be of no possible relevance to the Newmark Plaintiffs in this litigation. They will, however, provide EFF's attorney-lobbyists with key insights about confidential lobbying strategies involving the Copyright Owner Plaintiffs. How compromises may be reached in the process to build consensus among the various parties interested in content protection legislation says nothing about fair use, but gives the EFF the blueprint for a "divide and conquer" legislative strategy. But for joining this litigation as attorneys for the Newmark Plaintiffs, EFF's attorneys would never have gained access to such documents.

In opposing the Copyright Owner Plaintiffs' Motion for Protective Order, EFF also focused on the prejudice to *itself* if the motion was granted, arguing that *EFF's* First Amendment rights would be violated. EFF's attorneys claimed that, "[a]t issue here are the First Amendment speech, petition, and association rights *of EFF and its attorneys*," as well as "the rights of the Newmark clients *to associate with EFF* for political purposes. . . ." (Joint Stipulation at 28 (italics supplied).) EFF insists that, under the authority of cases such as *NAACP v. Button,* 371 U.S. 415, 429 (1963), EFF's *public interest* activities give it special First Amendment rights that – at least in the absence of a *compelling state interest* – trump the rights of parties in civil litigation to protect their most sensitive proprietary information from disclosure outside of the litigation. (Joint Stipulation at 28-31.) In fact, none of the cases cited by EFF's attorneys suggest that a different set of discovery rules apply to EFF, or that they should apply differently because of EFF's self-proclaimed "public interest" activities.

In *NAACP v. Button,* for instance, the NAACP, as a *party-litigant* raised First Amendment challenges to state disciplinary rules restricting client solicitation that were amended by the Virginia state legislature to thwart efforts by groups like the NAACP to locate and assist individuals in "obtain[ing] meaningful access to the courts" to vindicate fundamental rights. The NAACP sued to enjoin enforcement. The Supreme Court held that the attorneys' activities in identifying individuals whose fundamental rights may have been violated and consulting them with respect to potential legal action were protected under the First Amendment, and could not be the subject of disciplinary proceedings by the state:

> We hold that the activities of the NAACP . . . are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business . . .

NAACP v. Button, supra, 371 U.S. at 428-429.

Neither *NAACP v. Button* nor any of the other cases relied on by EFF's attorneys stand for the proposition that there should be "much higher scrutiny" given to *discovery* rules applied evenhandedly when they impact public interest legal service providers. Indeed, such an interpretation is inconsistent with well-established authority to the contrary.[6]

EFF's attorneys' argument that their First Amendment rights are somehow threatened by the granting of this Motion is thus misplaced. Again, the only relevant consideration concerning the rights of the Newmark Plaintiffs is whether their ability to prosecute their case will be impaired by the requested protective

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[6] The Supreme Court has held that, "where . . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." *Seattle Times Co., supra,* 467 U.S. at 37.

relief. *Brown Bag, supra,* 960 F.2d at 1470. On that point, the undisputed evidence is to the contrary. The Newmark Plaintiffs' are represented by two sets of lawyers, and there is no basis for concluding that the Rothken Law Firm cannot well represent the interests of its clients on issues that are also being vigorously pursued by counsel for the Replay Defendants, or even that EFF's attorneys cannot meaningfully contribute to the representation of the Newmark Plaintiffs, especially in light of the limited scope of this Motion.

## IV. CONCLUSION

The Magistrate Judge's ruling should be reversed and this Motion should be granted.

DATED: October 31, 2002

By: Scott P. Cooper /A.G.
SCOTT P. COOPER

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## PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that: I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2049 Century Park East, Suite 3200, Los Angeles, California 90067-3206.

On October 31, 2002, I served the foregoing document described as:

**THE COPYRIGHT OWNER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR REVIEW AND RECONSIDERATION OF MAGISTRATE JUDGE'S DISCOVERY ORDER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

on the interested parties in this action:

(By Mail) By placing true copies thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, the envelopes would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

-and-

(By Email) By transmitting a true and correct copy thereof via email transmission to:

PLEASE SEE ATTACHED SERVICE LIST

(Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 31, 2002, at Los Angeles, California.

KAREN J. JONES

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