

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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FEDERAL TRADE COMMISSION,)	
)	
	Petitioner,)	
)	
	v.)	Misc. No. 3:14-mc-00005-REP
)	
RECKITT BENCKISER)	
PHARMACEUTICALS, INC.,)	
)	
	Respondent.)	
)	
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**FEDERAL TRADE COMMISSION REPLY MEMORANDUM IN SUPPORT
OF MOTION TO ENFORCE CIVIL INVESTIGATIVE DEMAND**

I. Introduction

This Court has rejected Reckitt Benckiser Pharmaceuticals, Inc.’s interpretation of the Fourth Circuit attorney-client privilege rule regarding published documents: “The Fourth Circuit law is clear, and the position taken by the FTC on the law is correct, and the position that the . . . respondent is taking is not correct.” Dkt. 37 at 94.¹ Thus, at issue in this Reply and before this Court is not *whether* Reckitt should produce documents it is withholding without basis, but *how* to identify unprivileged documents.

Reckitt has exclusive access to these documents. Thus, only Reckitt can accurately identify – to the Court and to the FTC – which documents it is withholding based on a legal position that the Court has rejected. Dkt. 37 at 94. But

¹ “Dkt.” refers to entries in the docket for this matter. Page references are to

rather than comply with this Court's directions and provide necessary information so "that [the FTC] can easily go through here and pull these out and figure out what we're really dealing with[,]" Dkt. 37 at 97, Reckitt only made token changes to its privilege log that do not enable the FTC to ascertain either the nature of the 22,000 documents that Reckitt has withheld or the validity of Reckitt's privilege claims.

Because Reckitt's response to the Court's directives was plainly insufficient – and because it has refused to provide anything more – the FTC filed this motion, proposing its own procedure for obtaining information necessary to its investigation. This procedure asks the Court to apply the governing Fourth Circuit rule to the documents Reckitt persists in withholding, requires Reckitt to re-review and produce any documents no longer privileged, further requires Reckitt to revise its insufficient privilege log for documents it continues to withhold, and allows for the document-by-document (or category-by-category) review of any remaining disputed documents.

The FTC's proposed procedure is consistent with the approach followed by other district courts in this Circuit and in fact is exactly what Reckitt has said it supports: "a procedure that would permit the parties to narrow their dispute and submit whatever remained to the type of process courts in this circuit as in others have relied on to make . . . determinations of whether individual communications are privileged." Dkt. 39 at 20-21. The Court should therefore grant the FTC's motion.

numbers in the ECF header, where available.

II. Argument

A. **Reckitt's revised privilege log does not enable the FTC to make challenges to specific documents.**

After the October 27, 2014 show cause hearing, Reckitt added two columns to its privilege log. First, it added a column that identified whether a privilege log entry “[r]elated to a document that was published” with “Yes” or “No.”² Second, it added another column labeled “Privilege Subject Matter” that purported to identify the subject-matter category of each withheld document. Dkts. 38 at 3-5; 38-2 at 2; 38-4 at 4. Reckitt contends that these two columns “provided more than enough information” for the FTC to make specific challenges to withheld documents. Dkt. 39 at 11. To the contrary, these columns demonstrate only that approximately 22,000 of Reckitt’s withheld documents relate to published documents, but provide no way for the FTC to determine *how* individual entries relate to those documents. Thus, in the FTC’s view, Reckitt has not complied with the Court’s instruction to “identify the documents that were published and the entries that relate to those documents.” Dkt. 37 at 103. Reckitt’s revised log simply does not enable the FTC to determine “related to particular entries what documents you think need to be produced that are subject to the rule.” Dkt. 37 at 94-95.

² Reckitt also added another column to its log that indicated whether the entry was related to a document that was intended to be published but was not. Dkts. 38 at 3-4; 38-2 at 2. This column also used a “Yes,” or “No” format. Because Reckitt stated that all of these entries relate to documents that were intentionally not published, the FTC does not challenge these documents. Dkt. 38-2 at 2.

1. The “related to” column does not enable the FTC to conduct a meaningful review.

Reckitt’s first additional column simply states “Yes” or “No” as to whether the entry relates to a published document. But the log does not identify *which* published document or *how* the entry is related. It therefore does not enable the FTC to “pull these out and figure out” which entries are likely not privileged. Figure 1, below, is a sample entry from the revised log with the “related to” column highlighted.

Fig. 1 – Sample Reckitt Privilege Log Entry Produced to FTC (Nov. 21, 2014)³

Control ID	Family ID	Production Status	Date	Author	Addressee	Other Recipients	Privilege Asserted	Privilege Subject Matter	Privilege Description	Bates Range	Page Count	Related to a document that was published	Related to a document that was intended to be published but was not
RBPPRIV2_32033	FamilyID2_0015011	Privileged - Withheld					Attorney-Client	Related to Regulatory Compliance	Notes reflecting confidential Attorney-Client communications with Reckitt Benckiser Legal Department* regarding regulatory compliance issues.		1	Yes	No

This entry demonstrates that the information provided in the “related to” column has little value. For example, an entry marked with a “Yes” in this column might be a clean draft of a published document, a draft with attorney notes, a cover email attaching a draft, or a memo containing material that was later included in a draft. It provides the FTC with no basis for distinguishing a document marked “Yes” from

³ The fact that this entry indicates neither a date nor author for this allegedly privileged document shows it also plainly insufficient and thus further refutes Reckitt’s claim that its privilege log is satisfactory. Dkt. 39 at 13-16.

any other document marked “Yes.” Indeed, even a document described as a “draft” in the “Privilege Description” column may not be a draft of the published document to which it relates; instead, it might just as easily be a draft of a different internal document that happens to relate to the published document.

Instead of using a generic “Yes” or “No,” Reckitt could have used the categories originally proposed by the FTC: (1) drafts of a published document; (2) drafts of a published document that include attorney edits, redlines, or comments; (3) documents accompanying drafts of a published document (*i.e.*, cover emails); and (4) other documents related to a published document (*i.e.*, email communications related to the data).⁴ *See* Dkts. 35-3 at 3-4; 35 at 14-15. This information would allow the FTC to determine which entries are almost certainly not privileged (such as the drafts themselves) and which documents might require individualized review.

2. *The “subject matter” column provides no new information.*

Reckitt’s second new column is even less helpful. It provides a short “Privilege Subject Matter” category for each document. These categories are extremely vague; they include descriptions such as “Related to Suboxone Marketing or Sale” or “Related to FDA Communications.” But, more significantly, this new column provides no new information. Rather, the “Privilege Subject Matter” column

⁴ Indeed, Reckitt was not willing to even indicate the Bates numbers of the published documents that relate to the entries on their privilege log. Dkt. 38-4 at 2-3.

merely repeats information already contained in the “Privilege Description” column. Figure 2, below, highlights the relevant columns and provides examples.

Fig. 2 – Sample Reckitt Privilege Log Entries Produced to FTC (Nov. 21, 2014)

Control ID	Family ID	Production Status	Date	Author	Addressee	Other Recipients	Privilege Asserted	Privilege Subject Matter	Privilege Description	Bates Range	Page Count	Related to a document that was intended to be published but was not	Related to a document that was published but was not
RBPPRIV2_00443	FamilyID2_0000216	Privileged - Withheld					Attorney-Client	Related to Suboxone Marketing or Sale	Notes reflecting confidential Attorney-Client communications with Sarah Mulligan* regarding the marketing or sale of Suboxone.		3	Yes	No
RBPPRIV2_19487	FamilyID2_0009007	Privileged - Withheld	9/19/2012	Anson, Batisha			Attorney-Client	Related to 2012 Citizen Petition	Draft Report reflecting confidential Attorney-Client communications with Javier Rodriguez* regarding Citizen Petition FDA Docket No. 2012-P-1028.		3	Yes	No
RBPPRIV2_33392	FamilyID2_0015632	Privileged - Withheld	9/22/2012	Green, Jody			Attorney-Client	Related to Suboxone Risk of Pediatric Exposure	Draft Report reflecting confidential Attorney-Client communications with David Clissold* and Javier Rodriguez* regarding risk of pediatric exposure to Suboxone.		5	Yes	No

Thus, for example, the first document in Figure 2 is described in the “Privilege Subject Matter” column as “Related to Suboxone Marketing or Sale” but was already described in the “Privilege Description” column as “regarding the marketing or sale of Suboxone.” The entire log follows this pattern.

The redundancy of the information provided in the two side-by-side columns is particularly problematic because Reckitt appears to have categorized the same type of document in dramatically different ways. Figure 3, below, copies four entries

from the log that Reckitt has elsewhere identified as drafts of its 2012 citizen petition. Second Declaration of Garth Huston (Reply Exh. 1), ¶ 6. Even though these documents are all drafts of *the same published document*, they are placed into two different “Privilege Subject Matter” categories, and characterized in at least four different ways, including the descriptions shown below: “Draft Exhibit,” “Memorandum,” “Draft Report,” and “Draft Letter.” Nowhere in the entries does it indicate that these documents are drafts of the citizen petition.

Fig. 3 – Sample Reckitt Privilege Log Entries Referring to Drafts of the 2012 Citizen Petition (Nov. 21, 2014)

Control ID	Family ID	Production Status	Date	Author	Addressee	Other Recipients	Privilege Asserted	Privilege Subject Matter	Privilege Description	Bates Range	Page Count	Related to a document that was published	Related to a document that was intended to be published but was not
RBPPRIV2_16159	FamilyID2_0007434	Privileged - Withheld	7/30/2012	Rodriguez, Javier*			Attorney-Client	Related to 2012 Citizen Petition	Draft Exhibit providing legal advice regarding Citizen Petition FDA Docket No. 2012-P-1028.		6	Yes	No
RBPPRIV2_03918	FamilyID2_0001911	Privileged - Withheld	9/24/2012	Johnson, Ed			Attorney-Client	Related to FDA Communications	Memorandum reflecting confidential Attorney-Client communications with Javier Rodriguez* regarding communications with the FDA concerning Suboxone or Subutex.		48	Yes	No
RBPPRIV2_09298	FamilyID2_0004379	Privileged - Withheld	9/24/2012	Rodriguez, Javier*			Attorney-Client	Related to FDA Communications	Draft Report providing legal advice regarding communications with the FDA concerning Suboxone or Subutex.		48	Yes	No
RBPPRIV2_03045	FamilyID2_0001490	Privileged - Withheld	9/24/2012				Attorney-Client	Related to 2012 Citizen Petition	Draft Letter reflecting confidential Attorney-Client communications with Reckitt Benckiser Legal Department* regarding Citizen Petition FDA Docket No. 2012-P-1028.		48	Yes	No

Other than establishing the bare fact that 22,000 entries relate to a published document, these vague log descriptions make it impossible for the FTC to pinpoint which documents are subject to challenge as not privileged under Fourth Circuit law. Reckitt has refused to provide any additional information. Dkt. 38-4 at 2-3.

B. Reckitt's privilege log is not sufficient to justify its continued withholding of the 22,000 documents related to published documents.

Reckitt argues at length that its privilege log meets the standard set out in *NLRB v. Interbake Foods, LLC*, 637 F.3d 492 (4th Cir. 2011). Dkt. 39 at 14-16. This argument is entirely beside the point. As a preliminary matter, a privilege log in an FTC investigation is governed by FTC Rule of Practice 2.11, 16 C.F.R. § 2.11, not FED. R. CIV. P. 26(b)(5).⁵ *Interbake* – which interprets Rule 26 in a case that does not involve the Fourth Circuit rule at issue here – is therefore not controlling. 637 F.3d at 501-02.

More importantly, however, Reckitt ignores a fundamental requirement of Rule 2.11, and of privilege law generally: a party that withholds a document under a claim of privilege bears the burden of producing a privilege log “of sufficient detail to enable the Commission staff to assess the validity of the claim for each

⁵ See FED. R. CIV. P. 81 advisory committee's note (1946) (noting that the Federal Rules of Civil Procedure apply in pre-complaint process enforcement proceedings to the extent “the district court deems them helpful.”); see also *United States v. Markwood*, 48 F.3d 969, 982 (6th Cir. 1995) (holding that most of the Federal Rules of Civil Procedure are inapplicable to pre-complaint process enforcement proceedings); *Linde Thomsen Langworthy Kohn & Van Dyke, P.C. v. RTC*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) (holding that administrative investigations such as this one are “distinct” from resulting litigation).

document.” 16 C.F.R. § 2.11(a)(1); *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). Reckitt has admitted that more than 22,000 withheld documents relate to documents that were actually published, and further that 222 of those documents are themselves drafts of a publicly filed citizen petition. In light of the rule in *United States v. (Under Seal)*, 748 F.2d 871, 875 & n.7 (4th Cir. 1984) (Ervin, J.), and this Court’s statement that the FTC’s interpretation of that rule is “correct,” Reckitt is therefore required by Rule 2.11 and *Jones* to provide the FTC a privilege log with sufficient information to justify withholding these documents. At a minimum, such a log must explain the nature of the relationship between a withheld document and the published version.

Reckitt refuses to provide any of this information. Instead, it attempts to re-litigate the issues already decided by this Court during the show cause hearing. Despite the Court’s clear statements that Reckitt had incorrectly interpreted Fourth Circuit law and is withholding draft documents (and possibly other documents) that are not privileged, Reckitt continues to argue that every one of its entries adequately asserts a claim of privilege. Dkt. 39 at 15-16. It also repeats its argument that this case is analogous to the kind of internal investigation addressed in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Dkt. 39 at 17-19.⁶ Reckitt

⁶ Reckitt has revised this argument to claim that such an investigation constitutes “legal services.” Dkt. 39 at 18-19 (citing cases). If the Court would like briefing on what constitutes a “legal service,” the FTC is willing to address the issue more fully. For present purposes, we note only that the preparation of a regulatory filing was found to be unprivileged in *In re Grand Jury Proceedings, Thursday Special Grand Jury September Term, 1991*, 33 F.3d 342, 354-55 (4th Cir. 1994) (Murnaghan, J.), which post-dated *Upjohn*. Preparation of a regulatory filing thus cannot constitute privileged “legal services” in the Fourth Circuit.

should not be able to re-litigate the existence or scope of the Fourth Circuit's rule governing draft documents. Instead, this motion focuses on the most appropriate procedure to evaluate Reckitt's withheld documents under the rule already decided by the Court.

C. In light of Reckitt's failures to provide the information directed, this Court should adopt the FTC's proposed and well-accepted procedure.

In light of Reckitt's failure to provide sufficient information, the FTC has proposed an alternate procedure in which the Court will first clarify how Fourth Circuit law applies, then direct Reckitt to comply by producing documents that fall within this rule, and, finally, direct Reckitt to revise its log to support any remaining claims. Dkt. 38 at 10-11. The FTC further proposed that a special master could resolve any remaining disputes on a document-by-document (or category-by-category) basis. *Id.* at 11. This procedure will reduce the number of privileged documents at issue, while providing the FTC and any potential special master sufficient information to address Reckitt's privilege claims. It is therefore consistent with the procedure Reckitt claims to support: "a procedure that would permit the parties to narrow their dispute and submit whatever remained to the type of process courts in this circuit as in others have relied on to make . . . determinations of whether individual communications are privileged." Dkt. 39 at 20-21.

Reckitt claims – incorrectly – that such a procedure is unprecedented in this Circuit. Dkt. 39 at 20. Actually, as the Commission previously explained, Dkts. 35 at 12, 37 at 83-84, the Fourth Circuit affirmed such an order in *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221, 225, 231 (4th Cir. 2011). The

district court's order in that case (attached hereto as Reply Exh. 2) does not require document-by-document review. Rather, it required the production of all documents that the court found no longer privileged by operation of the fiduciary exception to the attorney-client privilege. The court therefore directed the production of documents previously redacted or withheld as privileged in categories corresponding to specifications in the Secretary of Labor's subpoena, as well as documents "outside [these] categories that the Plans withheld based on privilege claims." Reply Exh. 2 at 2; *Solis*, 644 F.3d at 221. There is also nothing novel about requiring Reckitt to re-review its documents and revise its privilege log. *See Veolia Water Solutions & Techs. Support v. Siemens Indus., Inc.*, No. 5:11-cv-00296-FL, 2014 WL 6679107, *11 (E.D.N.C. Nov. 25, 2014); *Khoshmukhamedov v. Potomac Elec. Power Co.*, No. AW-11-449, 2012 WL 1357705, *6-*7 (D. Md. Apr. 17, 2012). By contrast, Reckitt's proposal to resolve the issue of privilege for over 22,000 documents on the basis of *in camera* review of a single document selected by Reckitt itself is unprecedented and fundamentally unfair. Dkt. 39 at 17-18. The Court should reject it.⁷

⁷ Indeed, to be at all fair and representative, Reckitt would have to generate a statistically-significant random sample of withheld documents and provide these to the Court for *in camera* review, along with the published documents to which these relate. The Court in *Veolia* employed a similar procedure involving representative samples. *See Veolia*, 2014 WL 6679107, *6.

III. Conclusion

For the reasons stated above, the Court should issue an opinion and order articulating the application of the Fourth Circuit rule to Reckitt and directing Reckitt to produce documents that are not privileged, including the 222 documents identified as drafts of the published 2012 citizen petition.

Respectfully submitted,

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Dated: December 15, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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REPLY EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

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FEDERAL TRADE COMMISSION,)	
)	
	Petitioner,)	
)	
	v.)	Misc. No. 3:14-mc-00005-REP
)	
RECKITT BENCKISER)	
PHARMACEUTICALS, INC.,)	
)	
	Respondent.)	
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SECOND DECLARATION OF GARTH HUSTON


Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am an attorney employed by the U.S. Federal Trade Commission (“FTC” or “Commission”) in Washington, DC. I am assigned to the FTC’s investigation of Reckitt Benckiser Pharmaceuticals, Inc. (“Reckitt”) for potentially anticompetitive conduct related to its Suboxone drug products.
2. I am authorized to execute a declaration verifying the facts that are set forth in the FTC’s Reply in Support of Motion to Enforce Civil Investigative Demand (“Reply”).
3. The facts set forth herein are based on my personal knowledge or information made known to me in the course of my official duties, including documents, narrative responses, and privilege logs submitted by Reckitt that I have reviewed.

4. I selected the privilege log entries that appear in the FTC's Reply from entries in the privilege log provided to the FTC by Reckitt on November 21, 2014. I have reviewed each of these entries and – other than minor formatting changes such as shading – they are identical to entries in Reckitt's log.
5. On November 21, 2014, Reckitt also produced a list of documents identified on its privilege log that are drafts of the 2012 citizen petition it filed with the FDA. This list identifies 222 such documents by Control ID only and provides no other information.
6. Using this list, I confirmed that the privilege log entries in Figure 3 of the FTC's Reply, which bear Control ID Nos. RBPPRIV2_16159, RBPPRIV2_03918, RBPPRIV2_09298, and RBPPRIV2_03045, are four of the 222 documents identified by Reckitt as drafts of the 2012 Citizen Petition.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on December 15, 2014.


s/ Garth Huston
Garth Huston
Staff Attorney
Federal Trade Commission

REPLY EXHIBIT 2

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2010 MAY 19 P 3:00
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

HILDA L. SOLIS, SECRETARY OF LABOR)
UNITED STATES DEPARTMENT OF LABOR) Misc. Civil No. JFM-10-CV-629
P.O. Box 1914)
WASHINGTON, D.C. 20013)
)
Petitioner,)
)
v.)
)
THE FOOD EMPLOYERS LABOR RELATIONS)
ASSOCIATION AND UNITED FOOD AND)
COMMERCIAL WORKERS PENSION FUND,)
)
THE FOOD EMPLOYERS LABOR RELATIONS)
ASSOCIATION AND UNITED FOOD AND)
COMMERCIAL WORKERS HEALTH AND)
WELFARE FUND,)
)
Respondents.)
_____)

(PROPOSED) ORDER

Upon consideration of the Secretary of Labor's ("Secretary") Petition to Enforce Administrative Subpoenas, the Respondents' Opposition and Motion for a Protective Order, the Secretary's Reply thereto, and the parties' accompanying memoranda and exhibits, and after a hearing on this matter, it is hereby ORDERED that the Secretary's Petition is GRANTED subject to the limitations set forth below, and the Respondents' Motion for a Protective Order is DENIED. It is further ORDERED that Respondents shall produce all documents covered by the Administrative Subpoenas *Duces Tecum* issued by the Secretary on April 15, 2009 and served on Respondents on April 17, 2009 (as modified by previous agreements between the Department and Respondents, which agreements are not in dispute), as follows:

1. All documents responsive to the Subpoenas (as modified) that Respondents have redacted or withheld based upon claims of attorney-client or work product privilege, specifically:
 - a. Board of Trustees meeting and Policy Committee meeting minutes for the Health Plan from 2000 to present, and for the Pension Plan for the year 2000 and for the years 2004 to present;
 - b. documents, including handwritten notes, that were referred to in or distributed with the meeting agendas, or maintained in the same packet of materials as the minutes, for those meetings from 2004 to 2006;
 - c. notes taken at the those meetings, for both the Health Plan and the Pension Plan from 2000 to present, limited to matters relating to "Madoff," "Meridian," or "Tremont" as those terms are defined in the Subpoenas;
 - d. correspondence relating to both the Pension Plan and Health Plan from 2000 to present, limited to matters relating to "Madoff," "Meridian," or "Tremont" as those terms are defined in the Subpoenas; and
 - e. documents outside the above four categories that the Plans withheld based upon privilege claims.
2. All documents responsive to the Subpoenas (as modified) in the possession or custody of the Trustees who were serving as of May 2009 that were created from January 1, 2000 to the present, without redactions for attorney-client or work product privilege.
3. Notwithstanding the provisions of Paragraphs 1 and 2 above,
 - a. Respondents can redact any information pertaining to or withhold in full any document dealing exclusively with: benefit disputes, benefit claims, subrogation agreements, delinquent contributions, withdrawal liability, or collection actions involving employers.
 - b. For any document dated after March 24, 2009 and prepared in connection with *In re: Meridian Funds Group Securities & Employee Retirement Income Security Act (ERISA) Litigation*, Case No: 1:09-md-02082-TPG (S.D.N.Y.), Respondents can redact information covered by the attorney-client or work product privilege and can withhold in full any publicly available court filings.


- c. For any document dated after October 25, 2007 for the Health Plan or after February 3, 2009 for the Pension Plan prepared in connection with the Secretary's investigation of the Plans, Respondents can redact information covered by the attorney-client or work product privilege.

Respondents' compliance with this Order does not waive any attorney-client or work product privilege with respect to any third party, and the Secretary will not assert that the Respondent has waived any privilege with respect to any third party. If the Department receives a request under the Freedom of Information Act ("FOIA"), as amended, 5 U.S.C. § 552, for any documents that must be produced under this Order, the Department will timely notify Respondents.

Respondents shall deliver the documents to the Employee Benefits Security Administration, Silver Spring Metro Center One, 1335 East-West Highway, Suite 200, Silver Spring, Maryland, 20910-3225, within ten (10) days of the date of this Order. The documents shall be produced "to the present," which means to date of this Order or to the date of production, whichever is earlier.

IT IS SO ORDERED

Dated: May 19, 2010



J. Frederick Motz
United States District Judge

Certificate of Service

I certify that on this 11th day of May, 2010, a true copy of the within (PROPOSED) ORDER was caused to be served by electronic notification through the District of Maryland's Electronic Case Filing system upon:

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/s/Elizabeth Goldberg