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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91226317
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Date	04/08/2016
Attachments	Opposer's Motion to Strike Applicant's Answer and Affirmative Defenses - YOLOTech.pdf(3009164 bytes) Declaration of Ralph H. Cathcart - YOLOTech.pdf(1285790 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

-----X	:	
mMETRO.COM LLC,	:	
	:	
Opposer,	:	Opposition No. 91/226,317
	:	
v.	:	Serial No. 86/504,326
	:	
YOLOTech, LLC,	:	
	:	
Applicant.	:	
-----X	:	

**OPPOSER'S MOTION TO STRIKE
APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES**

Opposer, mMetro.com LLC (“Opposer”), moves pursuant to Fed. R. Civ. P. 12(f) and Fed. R. Civ. P. 8 to strike portions of Applicant’s putative Answer to Notice of Opposition and Affirmative Defenses (“Answer”).

BACKGROUND

On February 16, 2016, Opposer timely filed with the Board a Notice of Opposition seeking to oppose Applicant’s THRILLIA Application No. 86/504,326. Dkt. 1. On March 18, 2016, Applicant filed its Answer and also pleaded four separate “Affirmative Defenses.” Dkt. 4.

Applicant’s Answer contains significant material that is insufficient, redundant, immaterial, impertinent or scandalous. Declaration of Ralph H. Cathcart (“Cathcart Decl.”). Cathcart Decl. ¶¶ 4-12. Applicant’s Answer to the Notice of Opposition also makes improper “demands” for proof or discovery, includes lengthy, impermissible and extraneous single-spaced quotations in its pleadings, which are improperly introduced into evidence and are prejudicial, is argumentative (resembling a legal brief) and is nonresponsive. *Id.*; *see* Dkt. 4. Further, contrary

to the requirements of Fed. R. Civ. P. 8, Applicant's responses are not stated in short and plain terms, but in rambling, immaterial, redundant prose. Cathcart Decl. ¶¶ 4, 6-8; *see* Dkt. 4.

Finally, Applicant's Affirmative Defenses are not well grounded and must be struck as a matter of law. Cathcart Decl. ¶¶ 10-12; *see* Dkt. 4.

I.

APPLICANT'S ANSWER MUST BE STRUCK

Applicant's Answer must be struck because the argumentative "Answer" contains immaterial, redundant, impertinent and scandalous material which violates Fed. R. Civ. P. 12(f) and Fed. R. Civ. P. 8, requiring short and plain responses. Cathcart Decl. ¶¶ 4-12.

Indeed, Fed. R. Civ. P. 12(f) provides in relevant part:

Motion to Strike. The Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. (Emphasis added.)

Fed. R. Civ. P. 8 provides in relevant part:

Rule 8. General Rules of Pleadings.

* * *

(b) Defenses; Admissions and Denials

(1) In general, in responding to a pleading, a party must:

- (A) State in short and plain terms its defenses to each claim asserted against it; and
- (B) Admit or deny the allegations asserted against it by an opposing party. (Emphasis added.)

For at least the reasons set forth below, Applicant's Answer must be stricken:

A. Applicant's Answer Contains Improper Demands for Proof and Discovery

In paragraph 1 of its Answer, Applicant impermissibly demands proof or evidence: "It is denied that Opposer ever used, currently uses, or has any intention to use the THRILLIST Mark for all of the goods and services recited in the Opposition or any other registration, and proof of

same is demanded.” Dkt. 4 (emphasis added). Similarly, Applicant states in paragraph 2 of its Answer: “These allegations are therefore denied, and proof of same is demanded”). *Id.* (emphasis added). Paragraph 3 likewise demands that “proof of same is demanded.”

Applicant’s improper demands for discovery in the body of its supposed responses to specific allegations in Opposer’s Notice of Opposition are improper and must be struck.

B. Applicant’s Answer Contains Statements that are Immaterial, Impertinent and Prejudicial

Applicant’s Answer must also be struck because it contains lengthy, extraneous, single-spaced quotations that are immaterial, impertinent and prejudicial. *See, e.g., Moore’s Fed. Practice 3d.* (2010) § 12.37[3] (“Pleadings containing unnecessary allegations, conclusions or evidence beyond a “short and plain statement” of the grounds for relief may be challenged as impertinent by a motion to strike”); *see also Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1297 (7th Cir.) (it is appropriate to strike matter to “remove unnecessary clutter from the case”).

Indeed, in paragraphs 1, 2 and 6 of Applicant’s Answer, Applicant impermissibly includes the following lengthy, immaterial and impertinent single-spaced, extraneous, quotations in sequential order:

SO, WHAT’S THE DEAL WITH THRILLIST?

It’s pretty simple, actually. We’re obsessed with everything that’s worth caring about in food, drink, and travel. Need to find that speakeasy hidden beneath abandoned subway station? We’ll let you in. Do you care deeply about staying on top of the best burger joints, steakhouses, dive bars, cocktail lounges, clubs, concerts, and festivals where you can throw tomatoes at your friend’s faces really hard in places all over the world? It’s all here. Wondering how to legitimately live it up in amazing foreign lands for just \$50 a day? We’ve got that. If a store starts selling 100-packs of beer, we’re on it. If a pizza cake exists, we’ll be the first to tell you about that pizza cake. Also, the pizza cake does exist, and it’s glorious.

How we got here

Back in 2003, when the Internet was barely past a twinkle in Al Gore’s lusty eye,

we began as an email newsletter in New York that highlighted the best bar and restaurant openings each day. From there, we expanded to LA, Chicago, San Francisco, and most of the rest of the meaningful world. We were also once home to a little something called Thrillist Nation, which dutifully covered everything important in life NOT involving food and booze. These days, its rampaging spirit lives on at our brother sites Supercompressor and Jack Threads.

We also sell basically everything you need to live right.

Home bar essentials. Kitchenware that's smarter than most grad students. A curated selection of sneakers, dress shoes & boots that we can stand behind. Watches that people will absolutely mistake for significantly more expensive watches. Tailored-fit suits made and priced to be lived in (and inevitably spilled on). Art and apartment furnishings your mother would be proud of. That perfect bachelor party weekender bag. Basically, we're trying to make it easy to upgrade your life without ever leaving the ketchup-stained comfort of the Thrillist experience.

These quotations are immaterial impermissible "pleadings," and an improper attempt to introduce unauthenticated hearsay evidence outside the four corners of the Notice of Opposition. Further, it is well-settled that in deciding a § 2(d) likelihood of confusion claim, the Board must compare the marks at issue and their corresponding recitation of goods and services. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1323 (2014). In *Stone Lion Capital Partners L.P.*, the Court held that it was proper "for the Board to focus on the application and registration rather than on real world conditions, because 'the question of registerability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application.'" *Id.* (citation omitted) Thus, the above-quotations are immaterial, impertinent, extraneous statements that must be struck as they only serve to clutter the pleadings. *See Heller Fin.*, 883 F.2d at 1297.

II.

APPLICANT'S ANSWER RESEMBLES A BRIEF

Applicant's Answer must also be struck because it is argumentative, and rather than admitting or denying allegations in short plain responses, Applicant prematurely attempts to

argue the merits of the case based on hearsay and cherry-picked statements, which are not properly before the Board and which are in any event impertinent and immaterial to Opposer's § 2(d) likelihood of confusion claim.

In particular, paragraphs 5 and 6 of the Answer include substantial material that does not admit or deny the allegations in Opposer's Notice of Opposition, but rather attempts to argue the merits of this case. Cathcart Decl. ¶¶ 6-9; *see* Dkt. 4. Such material must be struck as immaterial, impertinent and improper under Fed. R. Civ. P. 12(f) and violative of the "short" concise pleadings requirement of Fed. R. Civ. P. 8. Indeed, such immaterial, superfluous and misleading material only adds unnecessary clutter to the pleadings and is prejudicial to Opposer. For example, at ¶ 5 of its Answer, Applicant inexplicably "argues" that Opposer has made a "tacit admission" against its own claim. Dkt. 4. Such statements are groundless, immaterial and prejudicial to Opposer.

III.

APPLICANT'S ANSWER CONTAINS IMPERTINENT AND SCANDALOUS ALLEGATIONS

Rather than simply answer the claims in the Notice of Opposition, Applicant's "over-the-top" Answer contains immaterial and scandalous statements. For example, in paragraph 6 of Applicant's Answer, Applicant states: "The THRILLIST Mark is more pedestrian, guttural and conjures imagery of lists of items and things." Dkt. 4 (emphasis added). The self-serving and unsavory description of Opposer's THRILLIST Mark as "guttural" is prejudicial and unnecessarily reflects on the moral character or reputation of Opposer's trade and its principals. *See, e.g., Cobell v. Norton*, 224 F.R.D. 1, 5 (D.D.C. 2004) (citing *Moore's* for proposition that statement may be stricken when it contains allegations that "unnecessarily reflects on the moral

character of an individual or states anything in repulsive language that detracts from the dignity of the Court”). Accordingly, for the reasons stated above, such material must be struck.

IV.

APPLICANT’S AFFIRMATIVE DEFENSES SHOULD BE STRUCK

A. Applicant’s First Affirmative Defense Must be Struck as Opposer has Plead a Cognizable Claim

Applicant’s First Affirmative Defense, namely, the skeletal statement “Opposer fails to state a claim upon which relief can be granted” must be struck. Indeed, failure to state a claim is not a valid affirmative defense. *See, e.g., Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 U.S.P.Q.2d 1733, 1738, n. 7 (TTAB 2001).

Nevertheless, Opposer requests that the Board treat Opposer’s Rule 12(f) motion as testing the sufficiency of Applicant’s purported affirmative defense prior to trial. *See, e.g., Order Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 U.S.P.Q.2d 1221, 1223 (TTAB 1995).

In order to withstand a Motion to Dismiss for failure to state a claim upon which relief can be granted, an Opposer need only allege such facts as would, if proved, establish that 1) the Opposer has standing to maintain the proceeding, and 2) a valid ground exists for opposing registration. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 104, 213 U.S.P.Q. 185 (CCPA 1982). Moreover:

[F]or purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of Opposer’s well-pleaded allegations must be accepted as true, and the notice of opposition must be construed in the light most favorable to opposer . . . dismissal for insufficiency is appropriate only if it appears certain that the Opposer is entitled to no relief under any set of facts which could be proved or supported as claimed.

Order Sons of Italy in America, 36 U.S.P.Q.2d at 1222-1223 (citations omitted) (emphasis

added). Thus, Applicant's First Affirmative Defense must be stricken as Opposer clearly has standing, priority and has plead a cognizable claim.

B. Applicant's Second and Third Affirmative Defenses must be struck as "insufficient, immaterial and redundant"

Applicant's Second Affirmative Defense states "there is no likelihood of confusion, mistake or deception because, *inter alia*, the Applicant's Mark and the alleged trademark of Opposer are not confusingly similar." This does not set forth a valid "affirmative defense."

Likewise, Applicant's Third Affirmative Defense states:

Alternatively, any similarity between the Applicant's Mark and Opposer's alleged trademark is restricted to that portion of the mark consisting of the word "thrill", which is not distinctive. As a result, under the antidissection rule, any secondary meaning Opposer may have in its alleged THRILLIST trademark is narrowly circumscribed to the exact trademark alleged and does not extend to any other feature of the trademark beyond the word "thrill."

Again, this too does not set forth an "affirmative defense."

Indeed, an affirmative defense assumes the allegations in the Notice of Opposition are true, but nevertheless constitutes a viable defense to the Notice of Opposition. Thus, an affirmative defense does not negate the elements of a cause of action; rather it is an explanation that otherwise bars the claim. *See, e.g., Gwin v. Curry*, 161 F.R.D. 70, 71 (N.D. Ill. 1995) ("basic notion that an [affirmative defense] should accept rather than contradict well-pleaded allegations of the complaint remains valid"). Here, Applicant's Second and Third Affirmative Defenses impermissibly seek to contradict Opposer's well-pleaded likelihood of confusion claims in the Notice of Opposition, by alleging there is no "likelihood of confusion" between the parties' respective trademarks.

Further, Applicant's Second and Third Affirmative Defenses must likewise be struck because they are redundant. Applicant already "Denied" Opposer's claims of likelihood of

confusion earlier in its Answer. Dkt. 4; *see, e.g., Order Sons of Italy in America*, 36 U.S.P.Q.2d at 1223 (since applicant denied earlier in its answer opposer's allegation of disparagement, Board struck applicant's affirmative defense that merely restated that denial as redundant).

Accordingly, Applicant's Second and Third Affirmative Defense must be stricken as insufficient, immaterial and redundant.

C. Applicant's Fourth Affirmative Defense Impermissibly Attacks the Validity of Opposer's THRILLIST Registrations

Lastly, Applicant's Fourth Affirmative Defense must be stricken as an impermissible attack on the validity of Opposer's pleaded registrations. *See generally* TBMP § 313. 37 C.F.R.

§ 2.106 provides in relevant part:

When a defense attacks the validity of a registration pleaded in an opposition, ¶ b(2) of this section shall govern.

* * *

(2)(i)

A defense attacking the validity of any one of more of the registrations pleaded in the opposition shall be a compulsory counterclaim if grounds for counterclaim exist at the time when the Answer is filed. If grounds for a counterclaim are known to the Applicant when the answer to the opposition is filed, the counterclaim shall be pleaded with or as part of the answer. (Emphasis added.)

See also Continental Gummi-Werke AG v. Continental Steel Corp., 222 U.S.P.Q. 822, 825 (TTAB 1984) (affirmative defense was "in effect, a collateral attack on the validity of the registrations" and therefor struck.)

Here, Applicant has affirmatively attacked the validity of Opposer's pleaded THRILLIST Registrations by affirmatively alleging that they are either "generic" or "merely descriptive." Accordingly, Applicant's Fourth Affirmative Defense must be struck.

V.

PROCEEDINGS SHOULD BE SUSPENDED PENDING THE BOARD'S DECISION

Opposer respectfully requests that proceedings herein be suspended for all purposes pending the determination by the Board of this Motion to Strike. Indeed, the Board's decision may necessarily impact upon the scope of discovery and therefore suspension would be proper and serve the purpose of avoiding unnecessary uncertainty as to the relevant claims and defenses at issue. Alternatively, Opposer requests that discovery be stayed and trial and discovery deadlines be reset once the Board issues its decision.

37 C.F.R. § 2.117 provides in relevant part that “[p]roceedings may . . . be suspended for good cause, upon motion or a stipulation of the parties approved by the Board.”

Here, the more prudent course would be to suspend proceedings pending the Board's decision on Opposer's Motion to Strike. *See, e.g., SDT, Inc. v. Patterson Dental Co.*, 30 U.S.P.Q.2d 1707, 1708 (TTAB 1994). In *SDT, Inc.*, where a party had moved to amend pleadings, the Board noted that the “wiser” and more “cautious” practice would have been “for [the movant] to seek an extension or suspension [as] we believe in both parties' interest to have the motion for leave to amend settled before the parties engage in significant discovery and trial activities.” *Id.* The situation here is analogous, since striking the pleadings (in whole or in part) is akin to amending the pleadings, so the same rationale should apply.

For all of the foregoing reasons, Applicant's Answer should be struck in its entirety or, alternatively, the objectionable material referenced above in Applicant's Answer should be struck, as well as each of the Affirmative Defenses, and proceedings should be suspended for all purposes or discovery stayed, pending the determination of this motion by the Board, at which time discovery and trial dates could be reset.

Respectfully submitted,

LADAS & PARRY LLP
Attorneys for Opposer

Dated: April 8, 2015

By: 
Ralph H. Cathcart
Jennifer Kwon
1040 Avenue of the Americas
New York, NY 10018
(212) 708-1920
(Our Ref: C15672442)

CERTIFICATE OF TRANSMISSION

I, Reinaldo M. Roa, hereby certify that a copy of the foregoing **OPPOSER'S MOTION TO STRIKE APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES** is being electronically transmitted to the United States Patent and Trademark Office on the date indicated below:

Dated: April 8, 2015



Reinaldo M. Roa

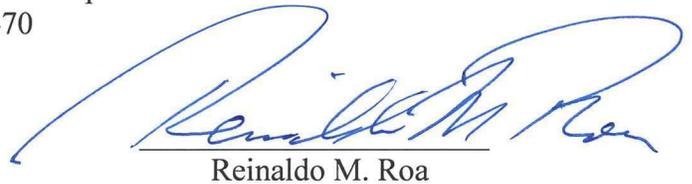
CERTIFICATE OF SERVICE

I, Reinaldo M. Roa, hereby certify that a copy of the foregoing **OPPOSER'S MOTION TO STRIKE APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES** was served by first-class mail, postage prepaid, to the following persons:

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Phone: 267-398-7470

Dated: April 8, 2015



Reinaldo M. Roa

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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mMETRO.COM LLC,	:		
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Opposer,	:	Opposition No. 91/226,317	
	:		
v.	:	Serial No. 86/504,326	
	:		
YOLOTech, LLC,	:		
	:		
Applicant.	:		
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DECLARATION OF RALPH H. CATHCART, ESQ.

I, Ralph H. Cathcart, declare that the following is true and correct pursuant to 28 U.S.C. § 1746:

1. I am a partner at the law firm of Ladas & Parry LLP, attorneys for Opposer mMetro.com LLC (“Opposer”) and respectfully submit this declaration in support of Opposer’s Motion to Strike Applicant’s putative Answer to the Notice of Opposition and Affirmative Defenses.

2. On or about February 15, 2016, Opposer timely filed with the Board a Notice of Opposition seeking to oppose Applicant’s THRILLIA Application No. 86/504,326. Dkt. 1.

3. On or about March 18, 2016, Applicant filed its putative Answer to the Notice of Opposition and Affirmative Defenses (“Answer”). Dkt. 4.

APPLICANT’S ANSWER MUST BE STRUCK

4. Applicant’s Answer does not respond with short and plain admissions or denials Dkt. 4.

5. Applicant's Answer is replete with improper demands for discovery. *See* Dkt. 4 (paragraphs 1, 2, 3 of Applicant's Answer).

6. Applicant's "Answer" also includes lengthy, extraneous, single-spaced quotations presumably in an attempt to improperly introduce evidence of unauthenticated facts or evidence, including the following:

SO, WHAT'S THE DEAL WITH THRILLIST?

It's pretty simple, actually. We're obsessed with everything that's worth caring about in food, drink, and travel. Need to find that speakeasy hidden beneath abandoned subway station? We'll let you in. Do you care deeply about staying on top of the best burger joints, steakhouses, dive bars, cocktail lounges, clubs, concerts, and festivals where you can throw tomatoes at your friend's faces really hard in places all over the world? It's all here. Wondering how to legitimately live it up in amazing foreign lands for just \$50 a day? We've got that. If a store starts selling 100-packs of beer, we're on it. If a pizza cake exists, we'll be the first to tell you about that pizza cake. Also, the pizza cake does exist, and it's glorious.

How we got here

Back in 2003, when the Internet was barely past a twinkle in Al Gore's lusty eye, we began as an email newsletter in New York that highlighted the best bar and restaurant openings each day. From there, we expanded to LA, Chicago, San Francisco, and most of the rest of the meaningful world. We were also once home to a little something called Thrillist Nation, which dutifully covered everything important in life NOT involving food and booze. These days, its rampaging spirit lives on at our brother sites Supercompressor and Jack Threads.

We also sell basically everything you need to live right.

Home bar essentials. Kitchenware that's smarter than most grad students. A curated selection of sneakers, dress shoes & boots that we can stand behind. Watches that people will absolutely mistake for significantly more expensive watches. Tailored-fit suits made and priced to be lived in (and inevitably spilled on). Art and apartment furnishings your mother would be proud of. That perfect bachelor party weekender bag. Basically, we're trying to make it easy to upgrade your life without ever leaving the ketchup-stained comfort of the Thrillist experience.

7. Paragraph 5 of Applicant's Answer states "admitted in part and denied in part." It then goes on to state "this is a tacit admission by nMetro.com that there is no confusion or likelihood of confusion between the two marks."

8. Paragraph 6 of Applicant's Answer states "denied." However, it then goes on a lengthy diatribe arguing the merits of the case, in particular:

6. Denied. It is denied that the Trademark Trial and Appeal Board should refuse registration of Applicant's THRILLIA mark pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). It is denied that the THRILLIA Mark "closely resembles" Opposer's THRILLIST Mark. Of particular note, within the space of two paragraphs in Opposer's Notice of Opposition, mMetro.com, LLC's representation of Applicant's THRILLIA Mark metamorphosis from being "virtually identical" to the THRILLIST Mark, *see Notice of Opposition* at 4, to "closely resembles" the THRILLIST Mark. *See id.* at 6. Opposer's representations are palpably contrived and wrong on both counts: These marks are not "virtually identical," nor do they "closely resemble" one another. To the extent that Applicant's mark and Opposer's mark both contain the formative "THRILL-," the same is permitted as a generic formative for any goods or services that may be thrilling or otherwise attractive to consumers, which is why there are more than one-hundred (100) current registrations that include "THRILL-" as an element. THRILLIA and THIRLLIST create different commercial impressions. The THRILLIST Mark is more pedestrian, guttural, and conjures imagery of lists of items and things. The THRILLIA Mark is both whimsical and fanciful, and conjures imagery of thrilling and physically engaging activities. The Applicant's THRILLIA Mark presents no likelihood for confusion with the THRILLIST Mark, nor will the THRILLIA Mark cause the "average purchaser" to be deceived into believing that the Applicant's services originate with Opposer. Additionally, there is no likelihood that the "average consumer" will be confused, deceived, or otherwise come to believe that the Applicant's services are associated with, connected with, sponsored by, or otherwise authorized by Opposer. In fact, Opposer's channels of trade do not reach out to the so-called "average consumer," and instead purportedly appeal to a more sophisticated male-based clientele who gravitate towards upscale products and services, as clearly stated on the THRILLIST website as follows:

9. Applicant describes Opposer's THRILLIST Marks as "guttural" at ¶ 6 of its Answer.

APPLICANT'S AFFIRMATIVE DEFENSES MUST BE STRUCK

10. Applicant purportedly asserts four putative Affirmative Defenses.

11. Applicant's Affirmative Defenses are not supported by applicable law.

12. For all of the above reasons, Opposer respectfully requests that the Board strikes Applicant's Answer in its entirety, or, in the alternative, strike the objectionable portions set forth with particularity in Opposer's brief so that only the unobjectionable admissions and denials remain and suspend proceedings for all purposes during the pendency of this Motion or stay discovery pending the Board's decision.

I declare that the foregoing is true and correct under penalties of perjury.

Executed on April 8, 2016 in New York, New York.



Ralph H. Cathcart

CERTIFICATE OF TRANSMISSION

I, Reinaldo M. Roa, hereby certify that a copy of the foregoing **DECLARATION OF RALPH H. CATHCART, ESQ.** is being electronically transmitted to the United States Patent and Trademark Office on the date indicated:

Dated: April 8, 2016


Reinaldo M. Roa

CERTIFICATE OF SERVICE

I, Reinaldo M. Roa, hereby certify that a copy of the foregoing **DECLARATION OF RALPH H. CATHCART, ESQ.** was served on the persons listed below by First-Class Mail, postage prepaid, on the date indicated below:

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Dated: April 8, 2016


Reinaldo M. Roa