

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 07-125

In the Matter	)	EB Docket No. 07-147
	)	
PENDELTON C. WAUGH, CHARLES M. AUSTIN, and JAY R. BISHOP	)	File No. EB-06-IH-2112
	)	
PREFERRED COMMUNICATION SYSTEMS, INC.	)	NAL/Acct. No. 200732080025
	)	
Licensee of Various Site-by-Site Licenses in the Specialized Mobile Radio Service	)	FRN No. 0003769049
	)	
PREFERRED ACQUISITIONS, INC.	)	
	)	
License of Various Economic Area Licenses In the 800 MHz Specialized Mobile Radio Services	)	FRN No. 0003786183
	)	
	)	
	)	

**MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE**

**I. PENDLETON C. WAUGH’S MOTION TO STRIKE WAS IMPROPERLY SERVED, AND MR. SAITO’S *EX PARTE* PRESENTATION WAS TIMELY.**

This memorandum is being submitted on behalf of Mr. Toshiaki Saito and in opposition to the Motion to Strike dated August 19, 2010, which was apparently submitted by William D. Silva, Esq., on behalf of Pendleton C. Waugh (“Waugh”), a disbarred attorney and convicted felon (*see* July 18, 2007, Order to Show Cause), in the above-captioned matter. Said Motion seeks to strike Mr. Saito’s August 13, 2010, Memorandum and attached documents, which were sent to Federal Communications Commission (“FCC”) Chairman Julius Genachowski, Esq. and Anjali K. Singh, Esq., Acting Assistant Chief, FCC Investigations and Hearings Division.

Said Motion to Strike was not properly served, as it was allegedly sent to Mr. Saito only by electronic mail—not in paper form as required by 47 C.F.R. § 1.47(d) (2009). Mr. Saito has not at any point agreed, and was not a party to any prior hearing where the parties agreed to accept

service by e-mail. (Mr. Saito was not a party to the previous hearing, as admitted in the Motion to Strike, 1:2.) Since electronic service is less reliable,<sup>1</sup> compliance with § 1.47(d) would have avoided a “spam blocker” blocking Mr. Silva’s e-mail, as apparently occurred, resulting in Mr. Saito not seeing the Motion to Strike until more than a month after it was allegedly sent.

Since the Motion was not served properly, Mr. Saito asks that it be stricken. Alternatively, if the FCC chooses not to strike the improperly served Motion, Mr. Saito respectfully requests that it accept this Memorandum in Opposition under 47 C.F.R. § 1.45(e) as an *ex parte* disposition, or under 47 C.F.R. § 1.3 since “good cause is shown.”

Mr. Saito submitted documents to the Commission on August 13, 2010, as an *ex parte* presentation, not as a motion to intervene.<sup>2</sup> That communication meets the *ex parte* presentation requirements since it was “directed to the merits or outcome of a proceeding.” 47 C.F.R. § 1.1202(a). Furthermore, since he filed “a complaint or request to revoke a license . . . [and] has served it on the subject of the complaint,” and to the FCC as a whole, Mr. Saito meets that statute’s definition of a party. 47 C.F.R. § 1.1202(d)(2). Mr. Saito’s *ex parte* presentation is exempt from the prohibitions in restricted proceedings (§1.1208) because it was “made with the advance approval of the Commission or staff for the clarification or adduction of evidence, or for the

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<sup>1</sup> E-mail is subject to data corruption, interception, misdirection, transmittal of viruses, cookies, etc.

<sup>2</sup> Mr. Saito may also be able to join the proceedings as an intervening party. 47 C.F.R. § 1.302 states if “an appeal [of a presiding officer’s final ruling] is filed, or if the Commission reviews the ruling on its own motion, the effect of the ruling is further stayed pending the completion of proceedings on appeal or review.” Thus, when an appeal is filed, the proceedings are not completed. Since they are not completed, Mr. Saito may intervene under 47 C.F.R. § 1.223(c).

Mr. Saito is an interested party since he has a non-dischargeable judgment against Waugh and his companies. Mr. Saito’s participation in the proceeding would assist the FCC in this matter because Mr. Saito had numerous dealings with Waugh over more than 16 years, and is knowledgeable of Waugh’s entities’ wireless licenses. Mr. Saito has a non-dischargeable judgment against Waugh, and other information presented in his prior communications with the FCC, which justify revoking PCSI’s licenses for the public good.

It was not possible for Mr. Saito to file a petition in the earlier proceeding because he had no notice of those FCC proceedings until seeing EB Docket 07-047 in Jan 2009.

resolution of issues, including possible settlement.” 47 C.F.R. § 1.1204(a)(10); *Letter from FCC to Mr. Saito*, July 21, 2010.<sup>3</sup>

## II. PAI AND PCSI MISREPRESENTED MATERIAL FACTS TO THE FCC, AND IT IS IN THE PUBLIC INTEREST TO REVOKE THEIR LICENSES.

Preferred Acquisitions, Inc. (“PAI”) and Preferred Communication Systems, Inc. (“PCSI”) egregious misconduct has already been found, justifying the revocation of their licenses. *In re Waugh*, FCC 07-125, 2:1 (July 20, 2007). As the FCC previously stated:

effective regulation of the communications industries . . . is premised on our ability to depend on the accuracy and truthfulness of our licensee's representation to us. Once we find that we cannot rely on a licensee's representations to us, **the only suitable penalty is revocation of the license.**

*Sea Island Broadcasting Corp. v. Federal Communications Com.*, 627 F.2d 240, 241 (D.C. Cir. 1980) (corporation’s licenses revoked because of misrepresentations); *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980) (“Effective regulation is premised upon the agency's ability to depend upon the representations made to it by its licensees.”). Similarly, in *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946), the U.S. Supreme Court upheld the FCC’s denial to renew licenses for willful misrepresentation, holding the FCC, not the courts, determines what is in the “public interest” when its licenses are concerned. “[S]ince the Commission must proceed on the basis of absolute trust and confidence in the representations made to it by its licensees,” permitting misrepresentations “even on [relatively minor matters]” may “weaken its regulation authority or encourage or sanction shady tactics by licensees.” *WOKO* 329 U.S. at 243. Often, the “very fact of misrepresentation is more important than the item involved.” *Id.*<sup>4</sup> “The bedrock requirement for absolute truth and candor from a Commission licensee or from a licensee or applicant is,

<sup>3</sup> While Mr. Saito’s correspondence was not sent within Anjali Singh’s recommended time frame, “where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules.” § 1.1200.

<sup>4</sup> *WOKO* 329 U.S. at 227 (“The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.”); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965).

simply stated, [the FCC's] *quintessential* regulatory demand.” *California Broadcasting Corporation*, 2 FCC Rcd 4175, 4177 (FCC 1987). “Material misrepresentations to the Commission or an intentional lack of candor with respect to matters affecting an applicant’s basic eligibility status are two species of misconduct that thoroughly disqualify applicants for the public trust embodied in a Commission license.” 47 C.F.R. § 1.17 (2009); *In re Waugh*, FCC 07-125 at 14:34.<sup>5</sup>

“The Commission [also] takes licensee character qualifications very seriously” -- looking very strictly upon felony convictions. *Id.*; 47 U.S.C. § 308(b) (2009). The FCC’s character analysis focuses on “misconduct which violates the Communications Act or a Commission rule or policy, and . . . certain specified non-FCC misconduct which demonstrates the proclivity of an applicant to deal truthfully,” such as “fraudulent representations to government agencies, criminal false statements or dishonesty.”<sup>6</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1190-91, 1195-1203 (1986); *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 192 (D.C. Cir. 2000). Further, the FCC has previously declared:

a propensity to comply with the law generally is relevant to the Commission’s public interest analysis, and that an applicant’s or licensee’s willingness to violate other laws, and, in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies . . . Thus, evidence of any conviction for misconduct constituting a felony will be relevant to our analysis of an applicant’s or licensee’s character.

*Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3252 (1990).<sup>7</sup>

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<sup>5</sup> “[The] extent of a licensee’s candor with the Commission and compliance with its rules are paramount concerns when determining whether such licensees should gain or continue to hold existing authorizations.” *Id.* at 19:52.

<sup>6</sup> It is ironic, considering the Commission’s tough stance on character qualifications, that *Waugh* can be disbarred, convicted of a felony involving moral turpitude, suspended from practicing before the SEC, but his companies can still hold FCC licenses. *In re Waugh*, Release No. 38761, File No. 3-9336 (June 24, 1997).

<sup>7</sup> *Contemporary Media, Inc.*, 214 F.3d at 192-93 (“a felony conviction--any felony conviction--is certainly a factor to be considered”); *Schoenbohm v. FCC*, 204 F.3d 243, 246-49

In *Contemporary Media, Inc.*, for example, licensees represented to the FCC that a certain company owner with a felony conviction was prohibited from having a “managerial [and] policy” role when, in fact, he “participated extensively in station affairs.” 214 F.3d at 195. The court found, even if the licensees had adequately disclosed the individual’s consultative role (which they did not), “there [was] substantial evidence in the record that [he] was involved in management as well,” and that he had “participated in intentional misrepresentations . . . during [his] supposed rehabilitation period.” 214 F.3d 187 at 195-97. Consequently, the “licensees were . . . found to have violated the Commission’s candor requirements” and the FCC’s revocation of the licenses was upheld. *Contemporary Media, Inc.*, 214 F.3d at 194, 199.

Just as Contemporary Media, Inc. was stripped of its licenses, PCSI and PA’s licenses should be revoked for violating the FCC’s candor requirements, “[showing] a disregard for the Commission’s rules,” and not disclosing a convicted felon’s role in the company. *In re Waugh*, FCC 07-125 at 19:52. Specifically, “evidence in the record shows” they:

- (1) failed to disclose a real-party of interest and engaged in unauthorized transfers of control of Commissions licenses;
- (2) misrepresented material facts to the Commission;
- (3) lacked candor in their dealings with the Commission;
- (4) failed to disclose the involvement of convicted felons in ownership and control of the licenses;
- (5) failed to file required forms and information and respond fully to Enforcement Bureau letters of inquiry; and
- (6) discontinued operation of certain licenses.

*In re Waugh*, FCC 07-125 at 19:52.

Further, PCSI and PAI were formed by two convicted felons, Waugh and Jay Bishop, with longtime “emissary” Charles M. Austin and Charles Guskey, who cleverly and deceptively structured the corporations to benefit all of them (except Guskey) as owners without mentioning

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(D.C. Cir. 2000), *cert denied*, 531 U.S. 968 (2000) (denial of license based on licensee’s lack of candor regarding licensee’s felony conviction); *Terry Keith Hammond*, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 21 FCC Rcd 10267 (EB 2006) (ordering licensee show cause why license should not be revoked for felony convictions).

Waugh's participation.<sup>8</sup> *In re Waugh*, FCC 07-125 at 5:9; 10:23 (reference to Raymond A. Hebrank Irrevocable Voting Trust). For example, PCSI alleged Waugh worked as a "consultant" for 10 years and "did not share PCSI's profits," but later admitted he had an agreement that "entitled [him] to a considerable beneficial ownership in the company's stock." *Id.* at 9:19; *Appeal From Presiding Officer's Final Ruling*, FRN No. 0003769049, 5:2 (October 26, 2009).

Mr. Silva argues the Bureau cannot punish Waugh without also punishing Mr. Austin. *Appeal from Presiding Officer's Final Ruling*, FRN No. 0003769049, 11:14 (October 26, 2009). Mr. Saito agrees. Mr. Austin misrepresented that he was the 100% shareholder in PCSI and PAI. *Id.* at 15:36. Further, Austin and Waugh both carefully concealed Waugh's involvement in the company, which misrepresentation allowed PAI to participate in Auction No. 34 and allowed PCSI to retain its site-based SMR licenses. *Id.* at 15:38. Waugh's and Austin's behavior must be imputed to PCSI and PAI, and clearly does not reflect the "absolute truth and candor" required of FCC licensees. Because PCSI, PAI, Waugh, and Austin have a record of misrepresenting material facts to the FCC, which allowed PCSI and PAI to acquire and retain the licenses, the licenses should be revoked.

### **III. THE FCC HAS BROAD AUTHORITY TO REVOKE LICENSES AND TO GRANT MR. SAITO A SECURITY INTEREST IN THE PROCEEDS OF THE LICENSES' NEW SALE.**

The FCC has the power to divest corporations of licenses when it is in the public interest.<sup>9</sup> *Melcher v. FCC*, 134 F.3d 1143, 1147 (D.C. Cir. 1998) (FCC found "the requested authorization is consistent with the public interest, convenience, and necessity."); *Mobiletel, Inc. v. FCC*, 107 F.3d

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<sup>8</sup> Austin and Waugh have a longstanding relationship. *Letter from Waugh to Express*, July 8, 1996.

<sup>9</sup> While Congress has said "[t]he government is not to revoke a bankruptcy debtor's license solely because of a failure to pay his debts," the FCC has a statutory mandate to administer communication licenses for the "public interest," which gives it wide latitude to grant and revoke licenses. *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 307 (2003).

888, 895 (D.C. Cir. 1997) (“Only the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision.”); *In re Tak*, 985 F.2d at 918-19 (any change in this policy was “a matter for the FCC rather than the courts to decide.”).<sup>10</sup>

Forfeiture proceedings can be used to divest a corporation of its licenses. 47 C.F.R. § 1.80. “Revocation comes when the Commission concludes that the licensee can no longer be trusted to deal with it honestly, to follow its regulations, and to operate in the public interest.” *Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 n.2 (D.C. Cir. 1989); *Leflore Broad. Co.*, 636 F.2d at 461-62. Although “the revocation of FCC license privileges ‘may hurt and ... may cause loss,’” since the “purpose is not to punish licensees for past wrongs,” it does not “implicate the Excessive Fines Clause of the Eighth Amendment.” *West Coast*, 695 F.2d at 622; *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981); *WOKO*, 329 U.S. at 228.

the Court’s precedents do not reflect an understanding that FCC license revocations or nonrenewals based on character considerations constitute punishment. To the contrary . . . a denial of an application for a license because of the insufficiency or deliberate falsity of information lawfully required to be furnished is not a penal measure.

*West Coast Media, Inc. v. Federal Communications Com.*, 695 F.2d 617, 622 (D.C. Cir. 1982); citing *WOKO*, 329 U.S. at 228.

The FCC’s power to revoke and sell licenses is also usually evident in the license contract :

Debtor hereby acknowledges the Commission’s authority, pursuant to the Communications Act of 1934, as amended, and the Commission’s orders and regulations then-applicable to such licenses, to conduct another public auction or assign the License in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement . . . . Debtor further acknowledges that in the event that the Commission rescinds, cancels, or revokes the License for any default under this Agreement . . . Debtor has no right or

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<sup>10</sup> 47 C.F.R. § 271(d)(3)(C) (2009); *State Street Bank v. Arrow Commc'ns, Inc.*, 833 F. Supp. 41 (D. Mass. 1993) (district court appointed receiver and authorized her to sell defendant’s radio station, and the FCC approved each change in broadcast licensee for the station, including the temporary acquisition of the broadcast license by the receiver); *Sea Island Broadcasting Corp.*, 627 F.2d at 242 (“The Commission stated: ‘The crux of our decision to revoke Sea Island’s license is our conclusion that the owner and officers of Sea Island made deliberate misrepresentations to the Commission. . . .’ It is abundantly clear from the foregoing that there was substantial evidence to support the Commission’s order of revocation.”).

interest in any moneys or evidence of indebtedness given to the Commission by a subsequent licensee . . .

§ 301; *Thacker v. FCC (In re Magnacom Wireless, LLC)*, 503 F.3d 984, 989 (9th Cir. Wash. 2007); 47 U.S.C. § 309(j).<sup>11</sup> Thus, a licensee is not entitled to the proceeds from the auction of a new FCC license once the old one is cancelled.

Aware of this general “policy against a licensee giving a security interest in a license,” the Chief of the Mobile Services Division held a “security interest in *the proceeds* of the sale of a license [to pay a creditor] does not violate Commission policy.” *In re Cheskey*, 9 F.C.C.R. 986, 987 & n.8 (Mobile Serv. Div. 1994). Other circuits found this ruling persuasive, and today virtually all courts have adopted a distinction between the public right (between the FCC and the licensee which is governed by the FCC) and the private right (the right of a creditor to perfect a security interest in any proceeds from a debtor’s license sale).<sup>12</sup> Thus, a creditor may obtain a

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<sup>11</sup> “Once an FCC license is cancelled, a licensee no longer has any right derived from that license and therefore has no entitlement to the proceeds from the auction of a new license.” *FCC v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 307-08 (2003) (describing cancellation as “eliminating the licenses”); echoed in *In re Magnacom Wireless*, 503 F.3d 984, 989 (9th Cir. Wash. 2007).

<sup>12</sup> *MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746, 748-49 (9th Cir. 1998); *In re Beach Television Partners*, 38 F.3d 535, 537 (11th Cir. 1994); cited in *Airadigm Communs., Inc. v. FCC*, 519 F.3d 640, 653 (7th Cir. Wis. 2008). A security interest in *a license*, which is not allowed, has been clearly distinguished from a security interest in *the proceeds* from the sale of the license. *In re Beach Television Partners*, 38 F.3d 535, 537 (11th Cir. 1994) (“A security interest in the proceeds of an FCC-approved sale of a broadcast license in no manner interferes with the FCC’s authority and mandate under the Act to regulate the use of broadcast frequencies”); *In re Thomas Commc’ns, Inc.*, 166 B.R. 846, 848 (S.D.W. Va. 1994) (“If there was room for doubt about the FCC’s position regarding liens on proceeds from sale of broadcast licenses when the parties briefed this appeal, there is not now.”); *In re PBR Commc’ns Sys., Inc.*, 172 B.R. 132 (Bankr. S.D. Fla. 1994) (“Once the FCC approves a sale and grants the buyer the right to hold the license, public regulatory functions are not impacted by the pledge of the sale proceeds.”); *MLQ Investors*, 146 F.3d at 749 (“[W]e see no reason why the proceeds should not be considered ‘general intangibles,’ therefore subject to perfection prior to sale . . . The fact that in the present case the actual dollar proceeds from the sale of the licenses were generated only after the sale . . . is immaterial.”)

security interest in the proceeds of the sale of a license, even before those proceeds come into existence.<sup>13</sup>

Here, Mr. Saito has a non-dischargeable judgment of \$1,111,058.73 against Waugh and many of the companies he participated in or co-founded.<sup>14</sup> If the FCC were to require a sale of the licenses, it could also allow Mr. Saito a security interest in the sale proceeds. Even in the case of outright revocation or cancellation (without forcing a sale) due to misrepresentation, the FCC has the authority under 47 C.F.R. § 1.41 to grant Mr. Saito's request for the satisfaction of his non-dischargeable judgment.<sup>15</sup>

#### **IV. CONCLUSION: THE SETTLEMENT SHOULD BE APPEALED AND THE LICENSES REVOKED.**

Despite Mr. Saito's divergent interests from Waugh, he agrees the subject settlement agreement should be vacated. Said settlement is not in the public interest, as it leaves licenses in the hands of licensees who have lacked candor and made material misrepresentations to the FCC. Waugh's very appeal leaves no room for doubt that his interests in PAI and PCSI went well beyond what was originally represented to the Commission and reinforces the contention that the corporations themselves should bear the consequences of the misrepresentations.

The claim that the settlement is in the public interest because it avoids the expenditure of more resources is, at the very least, unpersuasive. *In re Waugh: Settlement Agreement*, FCC 07-

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<sup>13</sup> *MLQ Investors, L.P. v. Pac. Quadracasting, Inc.*, 146 F.3d 746, 748-749 (9th Cir. 1998) ("A creditor may obtain a security interest in the proceeds of the sale of an FCC license, and such an interest constitutes a "general intangible" that may be perfected prior to sale of the license.); *Ridgely Commc'ns., Inc.*, 139 B.R. 374, 379 (Bankr. D. Md. 1992) ("this Court holds that a creditor may perfect a security interest in a debtor's F.C.C. broadcasting license"); *Urban Communicators PCS Ltd. P'shp v. Gabriel Capital, L.P.*, 394 B.R. 325, 335 (S.D.N.Y. 2008); *In re Media Properties, Inc.*, 311 B.R. 244, 249-50 (Bankr. W.D. Wis. 2004).

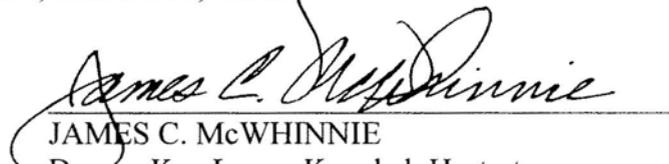
<sup>14</sup> Express Communications, Inc., Personal Communications Corp., Compass PCS, L.C., Orchid PCS, L.C., Arrow PCS, L.C., Jasmine PCS, L.C., Communication Marketing Consultants + Corp., Vermillion PCS Corp., PCC Management Corp.

<sup>15</sup> The FCC may suspend, revoke, amend, or waive any provision of the rules "if good cause is shown." 47 C.F.R. § 1.3.

125 at 4:8. Any expenses incurred from a protracted hearing proceeding would be dwarfed by the significant revenue generated by the cancellation and new sale of the licenses. Surely the public's interest in "cutting a deal" with licensees who have abused the system is outweighed by the need to ensure that "fiduciaries of a great public resource [satisfy] the highest standards of character." *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (internal citations omitted). Cancellation of just some of the licenses is not an adequate remedy as it would still leave licenses in the hands of those who have betrayed the public trust and will likely do so again. Consequently, the settlement should be vacated, and the licenses should be revoked in the public interest, with a portion of the proceeds going to Mr. Saito to satisfy his non-dischargeable judgment.

Alternatively, if Waugh has been "fully rehabilitated" as claimed, and the FCC is considering vacating the settlement on that basis, Mr. Saito respectfully requests that Waugh be required to prove he is, in fact, a "new man" by paying the non-dischargeable judgment against him in favor of Mr. Saito, and his other FCC license-related debts, such as the \$13 million he owes to the SEC, and the roughly \$40 million he confiscated from 3,500 investors in FCC licenses.<sup>16</sup>

DATED: Honolulu, Hawai'i, October 26, 2010.

  
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<sup>16</sup> Not to mention delivery of the 625 Units of Membership Interest in SmartComm, LLC that Waugh pledged as collateral for another loan from Mr. Saito. *Promissory Note and Letter*, March 14, 1995.

## CERTIFICATE OF SERVICE

I hereby certify that on this 26<sup>th</sup> day of October, 2010, a true and correct copy of the foregoing document has been sent via First Class United States mail, postage prepaid and by electronic mail to the following:

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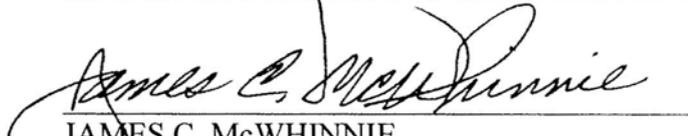
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DATED: Honolulu, Hawai`i, October 26, 2010.

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