

U.S. PATENT AND TRADEMARK OFFICE

Public Hearing

Friday, October 12, 2001

Location:

U.S. Patent and Trademark Office
2121 Crystal Drive
Arlington, Virginia

Reported by:

Frances M. Freeman, Conference Reporter

APPEARANCES:

ANNE H. CHASSER, Commissioner for Trademarks

ROBERT M. ANDERSON, Deputy Commissioner/
Trademark Operations

LYNNE BERESFORD, Deputy Commissioner/
Trademark Examination Policy

SPEAKERS:

HELEN MINSKER, AIPLA

BARBARA FRIEDMAN, INTA

JAMES WALSH, ABA

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1 COMMISSIONER CHASSER: Good morning,
2 everyone. I am Anne Chasser, the Commissioner for
3 Trademarks. And I would like to welcome everyone on
4 behalf of the United States Patent and Trademark
5 Office.

6 This meeting is a public hearing on the
7 subject matter of the Federal Register Notice published
8 on August 30th, 2001, usually referred to as the
9 Mandatory Electronic Filing Notice.

10 The notice was actually entitled Electronic
11 Submission of Applications for Registration and other
12 Documents.

13 That notice sets today, October 12th, as the
14 date of the public hearing for those who wish to
15 comment on the contents of the notice.

16 The public hearing is not the only
17 opportunity to comment on the electronic submission of
18 applications for registration and other documents. The
19 period for submitting written comments opened on August
20 30th, 2001, and will remain open until October 29th,
21 2001.

1 Written comments may be mailed or e-mailed to
2 the office. Details can be found in the Federal
3 Register notice, which is posted with other notices on
4 the U.S. PTO web site at www.uspto.gov.

5 Further, if any of you wish to view the
6 written comments of others, they will be posted on the
7 U.S. PTO web site in the near future.

8 The Federal Register Notice under discussion
9 is a notice of proposed rule-making. The proposed rule
10 has three general requirements.

11 First, if the rule becomes a final rule, it
12 will require that all U.S. pro se applicants and
13 registrants and other U.S. applicants and registrants
14 represented by attorneys file any trademark related
15 document for which a Trademark Electronic Application
16 System, TEAS, form exists on the U.S. PTO web site
17 using the appropriate TEAS form.

18 Second, the proposed rule sets out two major
19 exceptions to that requirement to filing TEAS.

20 The first exception allows foreign applicants
21 as defined in section 44 B of the Trademark Act of 1946

1 to file on paper.

2 The second exception allows any U.S. pro se
3 applicant or registrant or attorney for other U.S.
4 applicant or registrant to file on paper if they submit
5 as part of the paper filing an affidavit stating either
6 that they do not have access to TEAS or the technical
7 capability to use TEAS.

8 Finally, the notice of proposed rule-making
9 suggests amending rule 1.10 to exclude the filing of
10 any trademark document under rule 110 if an electronic
11 form exists for that document.

12 For the trademark operation to meet its goals
13 of improving quality of our products and services,
14 maintaining low pendency and reducing our costs, the
15 office must achieve at least 80 percent of trademark
16 related documents filed electronically by 2003.

17 Therefore, the trademark operation has taken
18 a proactive role in promoting electronic filing.
19 However, this rule is not the only option. We're very
20 eager to hear the comments of the three bar
21 associations represented today. And we hope they will

1 support the goals of the trademark operations and our
2 strategic goals.

3 Further, we hope that members of the
4 trademark bar who may disagree with the contents of the
5 proposed rule will have positive suggestions as to how
6 the office can reach its stated goal of 80 percent
7 electronic filing by 2003.

8 I'll now open the floor to our first speaker.

9 The proceedings are recorded. So I would ask each
10 speaker to identify yourself and the association or
11 organization that you represent.

12 Speakers will be asked to limit the comments
13 for 10 minutes. And we look forward to hearing from
14 you.

15 The order of our speakers are -- our first
16 speaker is Helen Minsker speaking on behalf of the
17 American Intellectual Property Law Association.

18 The second speaker will be Barbara Friedman
19 speaking on the behalf of the International Trademark
20 Association.

21 And the third speaker will be Jim Walsh who

1 will be representing the American Bar Association.

2 Helen Minsker?

3 MS. MINSKER: Thank you, Commissioner
4 Chasser. And thank you on behalf of the AIPLA for
5 allowing us to present our comments today.

6 First of all, AIPLA wants to let the PTO know
7 that we very much applaud the efforts you have made to
8 date to streamline your operations, including the
9 electronic filing system.

10 Our comments today are really directed toward
11 how to improve that system. In general, AIPLA would
12 support mandatory electronic filing provided certain
13 issues that we have identified through looking at the
14 rule's notice as well as through experiences of our
15 members who use the system are resolved.

16 I think the overriding concern that the AIPLA
17 members have is that we want to make sure that having
18 mandatory electronic filing does not somehow jeopardize
19 an individual's trademark rights perhaps by causing
20 them to miss a filing deadline.

21 Plus, there are some administrative issues

1 that we think should be resolved before the system
2 becomes mandatory.

3 With that, let me make a few specific points
4 of things that we think could be changed or improved.

5 First of all, you have noted in your comments
6 that there is an exception for when you may file
7 papers instead of filing electronically. But our
8 concern is that exception is too narrow. In practice,
9 what it amounts to is either you don't have a computer
10 or access to a computer, at least that's the way we're
11 interpreting it.

12 I think we all know that many of us do have
13 computers and use them regularly. But everybody has a
14 day when something just doesn't work. Perhaps it is a
15 computer virus or a network problem. But the point is
16 we think that there should be a broader catch-all
17 provision to allow you to file by paper when those
18 exception circumstances occur and perhaps submit a
19 declaration saying that you had good cause for filing
20 by paper that day instead of doing an electronic
21 filing.

1 I don't think there is going to be much
2 potential for abuse of that. And I think it would make
3 people much more comfortable of the system if you had
4 that kind of backstop that they could rely on.

5 Second, there are some payment and accounting
6 issues that are causing difficulties and still need to
7 be resolved.

8 As you know, you have to pay by credit card
9 or deposit account. But members have expressed
10 problems that they have had with matching up a
11 particular payment for an application with their file.

12 We would like a system that when you make the
13 payment for an electronic filing it includes the serial
14 number so it appears on your statement with the serial
15 number and with the attorney document number.

16 We respect that the PTO needs to be
17 efficient. But we all need to be efficient in our
18 office operations and our companies as well. This
19 would save an enormous amount of time if it showed up
20 on the statement with the serial number and the
21 document number on it. We hope you will find a way to

1 revise the system to do that.

2 The other thing is I think everybody is a
3 little nervous about what will happen when it becomes a
4 mandatory system and everybody is filing that you could
5 have a glitch with your payment system. Perhaps your
6 credit card account is -- the statement is wrong or it
7 accidentally gets overdrawn because too many people in
8 the firm are filing at the same time.

9 Most fee payments right now under the rules
10 are statutory deadlines that if you miss paying the fee
11 on the date the application goes down. We would like
12 to see a provision added that will add a cure
13 provision.

14 So that if you try to make the payment in
15 good faith but something went wrong, it didn't work,
16 you could submit the payment later and confirm that it
17 was a glitch and you did have a good faith intent to do
18 it.

19 There are still some difficulties with the
20 system for getting signatures on the applications.
21 Many of us have experienced difficulties. We create

1 the electronic application. We need to get it to our
2 client to sign. If the client is not terribly savvy
3 with the computer or the software is not working quite
4 right, it is not a very easy system right now.

5 So we would like to see some technical
6 improvements on that.

7 We do applaud the addition of the text form
8 that you have already added and the pen and ink
9 signature. That is a step in the right direction.

10 Essentially, we would like to have it as easy
11 as having an e-mail attachment. It is not quite there
12 yet based on the experience of most of us with that
13 system.

14 We also note that pen and ink signature it
15 seems right now to only apply to applications, and we
16 think it should apply to everything. At least that's
17 our interpretation of it.

18 There is one issue that we think you may need
19 to look at just to make sure mandatory electronic
20 filing complies with the Trademark Law Treaty, TLT.

21 As you know, under TLT an office cannot

1 require that you specify the basis for the application
2 as a filing date requirement. But right now when you
3 sign under the screen you do specify the basis and
4 that's what gives you the particular form to fill out.

5 So I think that's something you will have to
6 work out internally to make sure you are in compliance
7 with TLT.

8 We also would like to see a provision for
9 restoring lost electronic submissions, sort of the lost
10 paper or lost in cyberspace exclusion. You already
11 have that. If the paper filing is lost in the PTO, we
12 could present evidence that we really did file it.

13 And we would like to have some similar system
14 where we could present evidence that we actually did
15 submit the electronic filing if for some reason there
16 is some terrible problem and it doesn't go through.

17 You mentioned the Section 44 exception for
18 foreign applicants. And we perceive that there may be
19 an ambiguity there that needs to be resolved.

20 Under the proposed rule it says, a person
21 described in 15 U.S.C. 1125(b), better known to most of

1 us as Section 44(b), certain foreign attorneys will be
2 and applicants will be exempted.

3 What is not clear to us is whether that only
4 applies to filings under Section 44, which would be
5 Section 44(d) and (e), or whether it applies to any
6 application filed by a foreign applicant, which could
7 include Section 1(a) and Section 1(b).

8 So we would like to see that clarified. We
9 think it should apply to all applications. But it was
10 not clear to us.

11 Also, we would like confirmation that that
12 exception will apply even if the foreign applicant uses
13 a U.S. attorney to file the application on his behalf.

14 One other technical point relates to image
15 formats. Right now if you have to scan specimens the
16 only formats allowed are GIF or JPG.

17 Those do not work so well for some people
18 with their computer hardware. PDF is very widely used,
19 and we would like to see you add PDF as another format
20 that people could turn to to scan their specimens and
21 design marks and things like that.

1 And then the last issue that I wanted to
2 raise is simply the timing of when we have mandatory
3 filing. We certainly think you should continue to
4 encourage applicants to file electronically as much as
5 possible. But until these issues that we have raised
6 are resolved, we think making it mandatory should be
7 deferred.

8 We know that you are going to the X and L
9 (phonetic) standard. And that will probably help some
10 of these things. But still, we think all of these
11 issues need to be resolved first.

12 Also, our impression is that while you do
13 have the goals of the deadline, I think you said 2003,
14 trademark filings have decreased this year which
15 perhaps will give the office a chance to catch its
16 breath and perhaps deal with some of these things in an
17 orderly fashion before making it mandatory.

18 But as I said at the beginning, we do very
19 much applaud the efforts you have made, and we would
20 like to continue to work with you to make this a great
21 system for everybody. Thank you.

1 COMMISSIONER CHASSER: Barbara?

2 MS. FRIEDMAN: Good morning.

3 And on behalf of the International Trademark
4 Association, I would like to thank you very much for
5 the opportunity to present our comments on the proposed
6 rule-making on mandatory electronic filing.

7 As I hope we demonstrated in the past, INTA
8 strongly supports and is committed to increasing
9 voluntary electronic filing. INTA's president, Nils
10 Montan, expressed that commitment before Congress
11 noting in his June 7th, 2001, testimony before House
12 members that, "The benefits are obvious."

13 These include improved and quick access to
14 information, transmission of a filing receipt free of
15 clerical errors within 24 hours and avoidance of lost
16 papers.

17 These all go down to the benefit of trademark
18 owners seeking registration of marks. While INTA is a
19 clear supporter of electronic filing, as Mr. Montan
20 stated in his testimony last summer, we strongly
21 believe that mandatory electronic filing is not

1 indicated or necessary at this time. And therefore, we
2 cannot endorse the PTO's proposal.

3 I believe that you will find many of my
4 specific comments echo those just made by my colleague
5 from AIPLA, Ms. Minsker.

6 We understand that voluntary usage of the
7 automated system has increased steadily and is now
8 around 30 percent. We believe this increase speaks
9 volumes for continuing effort to promote voluntary
10 usage.

11 We are also mindful that the slowdown in new
12 trademark filings appears to have enabled the agency to
13 bring key indicators of productivity within very
14 desirable ranges.

15 We are aware that first action pendency is
16 down. In some cases to as low as two months.

17 Under these circumstances, we take the
18 position that the PTO should continue on the already
19 very successful course of promoting usage rather than
20 promulgating rules that would impose mandatory
21 electronic filing.

1 Continued voluntary use of E-filing is
2 further indicated because many practitioners still are
3 becoming accustomed to using the automated system. With
4 such a significant customer base still getting its feet
5 wet, so to speak, we believe that mandate and usage of
6 the system would not be the best practice.

7 We also have received comments from members
8 of our organization who make fairly substantial
9 e-filings. They have indicated concerns regarding the
10 effectiveness of the system.

11 For example, whether due to action or fault
12 on the front end or the back end, it appears that
13 transmission and reception of drawings in special form
14 and specimens lead to some level of distortion and/or
15 mishap.

16 This has created an understandable reluctance
17 among practitioners to utilize electronic filing for
18 youth-based applications and marks and design format.

19 Additionally, a significant number of
20 practitioners will not sign applications or other
21 documents on behalf of their clients. The reasons for

1 this are varied and all are well reasoned.

2 Some lack sufficient knowledge to sign on
3 behalf of their clients. Some believe it is in their
4 client's best interest not to have their attorney sign
5 for them. Some simply are not willing to take on the
6 ethical question of whether they should be signing on
7 behalf of their client.

8 For these customers of the PTO, and we
9 believe that it is a sizable population, there remains
10 logistical difficulties in obtaining a client's
11 signature, thus making mandatory electronic filing
12 impractical.

13 Experience with the system also indicates to
14 our members that one is unable to modify or insert in
15 the TEAS application language other than that
16 specifically designated in the TEAS format.

17 The inability under the present format to
18 insert comments, explanations or modifications of
19 standard language makes mandatory electronic filing
20 impractical.

21 Finally, one cannot make an initial 2 F claim

1 based on evidence other than prior registrations.

2 And that's another indicia of the
3 impracticality of mandatory filing at this time.

4 We are well aware that since the inception of
5 electronic filing the PTO consistently has addressed
6 customer concerns and defined a process consistent to
7 meet customer needs.

8 As the trend demonstrates, practitioners have
9 responded in turn by increasing their use of the
10 system. We applaud the PTO for its efforts and suggest
11 that the agency continue to rely on this successful
12 formula of improvement and educational initiative.

13 I would also take this opportunity to address
14 the proposed exceptions to mandatory electronic filing.

15 First, regarding the proposed section
16 2.22(a), the exception to the rule pertaining to lack
17 of access or technical inability to use the TEAS
18 system, we have the following comments and issues.

19 First, the proposed language does not specify
20 whether the exception encompasses circumstances of
21 temporary inaccessibility. For example, when one's

1 system or the PTO system goes down.

2 Additionally, the proposed exception is
3 somewhat ambiguous in that it is unclear whether an
4 applicant or attorney without access is expected to
5 make reasonable efforts to obtain access.

6 Second, will the declaration or affidavit
7 filed under 2.22(a) be examined.

8 Third, might the voracity of a declaration be
9 used by others to call into question a filing date
10 accorded a paper-filed application. And similarly,
11 what might be the administrative process in the PTO for
12 challenging such a filing and the underlying
13 application.

14 Fourth, what would be the effect on the
15 application of filing a false affidavit or
16 declaration.

17 Given all these questions and uncertainties,
18 we easily can envision the creation of a process that
19 might serve to undermine any efficiencies to be
20 realized by mandatory electronic filing.

21 We would also take this opportunity to raise

1 an issue regarding the second proposed exception, a
2 proposal creating a process for dispirit treatment as
3 between U.S. and non U.S. applicants ostensibly to
4 obviate an issue with U.S. compliance under the
5 Trademark Law Treaty.

6 I think it is safe to say that there is at
7 the very least uncertainty among practitioners as to
8 the appropriateness of creating such dispirit
9 treatment, especially if the purpose of the exception
10 is compliance with the treaty whose objective is to
11 create a system of standardized filing requirements.

12 It also would appear that the creation of a
13 dispirit system for U.S. and non U.S. applicants, even
14 if it is legally permissible, may be inadvisable.

15 To the extent that there is a concern that
16 mandatory e-filing would violate TLT provisions that
17 apply to foreign applicants, it would appear to be more
18 appropriate to seek to amend TLT to permit member
19 countries to require electronic filing rather than to
20 carve out an exception that creates dispirit treatment.

21 This concludes my remarks. In summary, INTA

1 does not believe mandatory electronic filing is
2 necessary, but strongly supports continued voluntary
3 use of the automated system.

4 In order to promote greater voluntary use, we
5 suggest ongoing educational outreach by the PTO
6 regarding use of the system and its many benefits and,
7 where indicated, modifications to the system.

8 We would also not oppose consideration of
9 certain financial incentives to encourage increased
10 volume of electronic filing in the form of fee
11 adjustments for those who submit documents
12 electronically.

13 And INTA stands ready to assist the PTO in
14 developing and implementing these initiatives.

15 Thank you.

16 COMMISSIONER CHASSER: James Walsh.

17 MR. WALSH: Good morning. And thanks for the
18 opportunity to speak on this subject this morning.

19 I'm Jim Walsh. I'm with the Washington
20 office of Arnold and Porter. I'm here today in two
21 capacities. Number 1, as the chair of Committee 203 of

1 the ABA, the Trademark Office Practices Committee. And
2 secondly, I'm going to speak on behalf of our firm and
3 Hershey Chocolate and Confectionery Company and Hershey
4 Foods Corporation.

5 Both the firm and those companies have made
6 almost exclusive use of the electronic filing system
7 since it became available. But I will change hats
8 midway in my presentation.

9 First, with regard to the ABA. We're
10 currently looking at the notice and the issues, and we
11 have not yet formed a formal position. But for the
12 purposes of today's hearing, I would like to identify
13 some of the issues that we are considering and that we
14 will take positions on as appropriate.

15 I think you will find that a lot of issues
16 that we're looking at are the same that were addressed
17 by the two previous speakers.

18 First of all, we're looking at whether or not
19 there remains any urgency about undertaking mandatory
20 filing at this time in view of the fact that pendency
21 in the office appears to be at record lows.

1 Secondly, we're looking at a number of
2 technical issues. First, whether the signature
3 requirement as implemented in the electronic system is
4 sufficiently flexible for all types of filers to
5 facilitate easy filing.

6 Secondly, whether the payment system is
7 appropriate and sufficiently flexible for all types of
8 filers to maintain necessary accounting of where the
9 funds are going.

10 Thirdly, we're looking at the broader
11 question of whether the format, the formats that are
12 available, are sufficiently expansive to accommodate
13 all potential filers.

14 And lastly, on the technical issues, we're
15 looking generally at the issue as to whether the
16 current system is sufficiently flexible enough in every
17 sense to be user friendly for all the different types
18 of parties who would wish to use it.

19 Another general area that we're looking at
20 are the exceptions. And with regard to the exceptions,
21 we're looking at the overall issue as to whether the

1 exceptions are sufficiently broad, whether something
2 like the good cause exception might also be required.

3 Secondly, we're looking at the exception with
4 regard to foreign filers and the issue as to whether it
5 is a good precedent for the PTO to be setting to
6 establish one system for filing which is TLT compatible
7 and another system which is not by making this
8 exception for foreign filers.

9 And in that regard, we'll be looking at
10 whether it is the kind of precedent that we would want
11 to set within the U.S., might other exceptions like
12 this the TLT requirements be instituted. And even more
13 importantly, is it the kind of example that the U.S.
14 would want to set for the rest of the world within this
15 regime, which was so supposed to establish a simple and
16 uniformed system for filings around the world. Do we
17 want to set an example where we have a dual system for
18 foreign versus domestic filers one compatible with TLT
19 and one not.

20 The other issue that we're looking at in the
21 ABA committee is whether or not mandatory filing really

1 is necessary at all, that ultimate question, and in
2 relation to that, whether some other mechanism like
3 financial incentives might be one that should be
4 considered before mandatory electronic filing is
5 instituted.

6 At this point I'm going to change hats and
7 speak with a little bit more definition about
8 positions. And I am speaking now in my capacity as an
9 attorney at Arnold and Porter and as a representative
10 of Hershey companies.

11 I want to emphasize at the outset that both
12 in the case of Arnold and Porter and Hershey Foods,
13 both of these, both this law firm and these companies
14 have used this system almost exclusively since it
15 became available.

16 We're not speaking from the standpoint of
17 what I would say. We're not looking to turn the clock
18 back, and we're not looking to stop the advance of
19 technology. Quite the contrary. Both are totally
20 committed to using the electronic system and improving
21 it.

1 In that regard, I want to first say that the
2 office has made a tremendous beginning in setting up
3 this system. And they have not only made a good
4 beginning, but the office has been extremely responsive
5 to provide assistance in individual instances where
6 difficulties were encountered and likewise when an
7 engineering problem was found we found people very
8 responsive in trying to change the system so that it
9 works better.

10 Craig Morris, in particular, I think, should
11 be recognized for the good work he has done and how
12 responsive he has been in this regard.

13 I'm going to talk with a little more
14 particularity now from experience about some of those
15 technical issues that I addressed earlier and that you
16 have heard about from the other speakers.

17 First of all, as to signatures, although the
18 system has improved as of June, we still don't have a
19 really perfectly user friendly system on signatures.
20 And there is more that needs to be done on that to make
21 things absolutely fluid in getting documents

1 transmitted back and forth between parties and signed
2 without having to reenter data or reattach documents.

3 Likewise, with regard to payments, this is an
4 issue you have heard about from everyone. There is a
5 need within law firms and indeed corporations to keep a
6 strict accounting of who is responsible for the
7 ultimate payment of the fee. And in the current
8 system, there is no real easy way to do that.

9 So we're looking forward to a payment system
10 that will facilitate that.

11 Likewise, with regard to drawings, in many
12 instances we have had -- we have now gone to having
13 draftsmen do all of our drawings doing perfect
14 drawings. We have scanned them in the prescribed
15 format.

16 But in spite of that, we find in most
17 instances that we're still required to provide a new
18 drawing later on in the process. I don't know yet know
19 what the answer to that is.

20 One issue is documents other than
21 applications haven't really been discussed here to any

1 great extent. But in particular, in filing extensions
2 of time to file statements of use which we file
3 exclusively electronically we have had five or six
4 instances fairly recently where applications have been
5 held abandoned and we're protected because we have the
6 confirmations that have come back to us electronically
7 showing that we made the timely filings.

8 But we still haven't, and I know if PTO has
9 found out yet, why it is those filings weren't
10 processed after they were filed electronically.

11 The other, these are more macropoints that
12 derive from all of those particular technical points I
13 just addressed.

14 Again, what is needed is a very fluid and
15 flexible system that is totally user friendly from all
16 the different types of filers.

17 People need the ability to send documents
18 back and forth to clients to have them sign. And to do
19 all of that without the need to reinput data they have
20 to have the ability to prove things to see that clients
21 haven't made changes that are inappropriate.

1 In the end, as I said, what we need is a
2 totally flexible user friendly system.

3 In conclusion, I think in the proposal at
4 this point there is a fundamental tension. On the one
5 hand, the office, I believe, is sincere in putting
6 forth a proposal which is based on customer service and
7 efficiency.

8 But on the other hand, particularly for those
9 people who have haven't tried to use the system yet,
10 this customer service is going to be rendered with some
11 pain.

12 I don't think that's -- we're going to help
13 you, but it is going to hurt. I think that's sort of
14 the message that is going out.

15 What I would propose would be more sort of a
16 field of brains approach to this. Continue the good
17 work you are doing. Build on the system that you have
18 made, improve it. And when you have a system that is
19 really totally user friendly, people will come to it.

20 And I think in view of the record low
21 pendency, I think the opportunity is out there for you

1 to do that without ever having the need to go to a
2 mandatory system.

3 I would propose that you just continue what
4 you are doing. This is, again, on behalf of the firm
5 and Hershey Foods. Put the mandatory proposal on hold
6 until you do these further things, these technical
7 fixes, the educational aspect of it.

8 And I think you will find that you will be at
9 that 80 percent level without the need for a mandatory.

10 Thank you.

11 COMMISSIONER CHASSER: I would like to now
12 open the floor up for comments.

13 If anyone would like to share their comments,
14 if you could limit it to five minutes.

15 No? Then we will end the public hearing on
16 the rule for the electronic submission of application
17 for registration and other documents.

18 I thank everybody for attending today. The
19 comment period closes on October 29th. We will review
20 all of the comments and respond accordingly to those
21 comments.

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Thank you very much.

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[Whereupon, at 10:30 a.m., the
hearing concluded.]

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CERTIFICATE OF STENOTYPE REPORTER

I, Frances M. Freeman, Stenotype Reporter, do hereby certify that the foregoing proceedings were reported by me in stenotypy, transcribed under my direction and are a verbatim record of the proceedings had.

FRANCES M. FREEMAN

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****I-N-V-O-I-C-E****

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