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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	CIV. NO. 02-3415 (TCP)
v.	)	
	)	
ESSEX MARKETING GROUP, INC., et al.	)	
a New York corporation;	)	
_____	)	

YCP

~~(Proposed)~~ FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF AGAINST DEFENDANTS ESSEX MARKETING GROUP, INC., WESTBROOK MARKETING GROUP, WESTBROOK MARKETING ASSOCIATES, LLC, MANHATTAN VENDING, LLC, AND RICHARD J. GUADAGNO

The Court, having granted summary judgment in favor of Plaintiff and having found that Plaintiff is entitled to the relief sought against Defendants Essex Marketing Group, Inc., Westbrook Marketing Group, Inc., Westbrook Marketing Associates, LLC, Manhattan Vending, LLC ("Corporate Defendants"), and Richard J. Guadagno a/k/a Rich Dano, Rich Guadano and Richard Guadago ("Guadagno"), (collectively "Defendants"), for their deceptive acts and practices in connection with the marketing and sale of vending machines, hereby FINDS and ENTERS the following Final Judgment and Order for Permanent Injunction and Other Equitable Relief ("Order"):

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. This Court has jurisdiction over the subject matter of this case and over the parties hereto. Venue in the Eastern District of New York is proper.
2. This is an action instituted by Plaintiff under Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and the Federal Trade Commission Trade Regulation Rule

entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "Original Franchise Rule"), formerly codified at 16 C.F.R. Part 436, and Plaintiff has the authority to seek the relief contained herein. The FTC's amendments to the Original Franchise Rule split it into two parts: 16 C.F.R. Part 436 and 16 C.F.R. Part 437. Part 436 (the "Franchise Rule") now sets forth those amendments to the Original Franchise Rule pertaining to the offer and sale of franchises. Part 437 now sets forth a revised form of the Original Franchise Rule pertaining solely to the offer and sale of business opportunities (the "Business Opportunity Rule").<sup>1</sup>

3. The acts and practices of the Defendants were in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. The Complaint states a claim upon which relief may be granted against the Defendants under Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57b, and the Business Opportunity Rule, 16 C.F.R. Part 437.
5. There is no genuine issue of material fact concerning the liability of Defendants for the illegal practices charged in the Complaint.

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<sup>1</sup> The amended Business Opportunity Rule (Part 437) differs from the Original Franchise Rule in three respects only. First, references to "franchisor" and "franchisee" in the Original Franchise Rule have been changed to "business opportunity seller" and "business opportunity purchaser," respectively. Second, the Original Franchise Rule's definition of "franchise" set out at section 436.(2)(a) has been changed to "business opportunity" and the first part of the original definition—the "franchise" elements—have been deleted; the definition now focuses on the second part of the original definition—the business opportunity elements. Third, Part 437 sets forth a new exemption for franchises that comply with, or are exempt from, Part 436. Except for these three changes, all disclosures and prohibitions in Part 437 are identical to those of the Original Franchise Rule. See Amended Franchise Rule Statement of Basis and Purpose ("Amended Franchise Rule SBP") 61 FR 15444 (March 30, 2007) (Amended Franchise Rule codified at 16 C.F.R. 436).

6. Section 5(a) of the FTC Act prohibits deceptive acts and practices in or affecting commerce. 15 U.S.C. 45(a). To be deceptive, an act or practice must be one that is likely to mislead consumers acting reasonably under the circumstances, and is material. *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000); *FTC v. Minuteman Press*, 53 F. Supp. 2d 258 (E.D.N.Y. 1998).
7. An act or practice is material if it is likely to affect a consumer's choice of or conduct regarding a product. *FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984). "Explicit claims or deliberately-made implicit claims utilized to induce the purchase of a service or product are presumed to be material." *See In re National Credit Management Group*, 21 F. Supp. 2d 424, 441 (D.N.J. 1998).
8. The Business Opportunity Rule requires twenty categories of information to be disclosed prior to the sale of business opportunities to facilitate informed purchasing decisions about such business opportunities. 16 C.F.R. § 437.1(a).
9. When a business opportunity seller makes earnings claims, the Business Opportunity Rule also requires the seller to provide potential business opportunity purchasers with an Earnings Claim Document with cautionary language. 16 C.F.R. § 437.1(b)-(d).
10. The Business Opportunity Rule also requires that a business opportunity seller have a reasonable basis for any earnings representation and set forth that reasonable basis clearly and concisely in the Earnings Claim Document. 16 C.F.R. § 437.1(b)(2)-(3).
11. The Business Opportunity Rule also prohibits a business opportunity seller from making any claim or representation (including an earnings claim) that is contradictory to the

information required to be disclosed by the Business Opportunity Rule. 16 C.F.R. § 437.1(f).

12. Defendants' vending machine business opportunities are "business opportunities" covered by the Business Opportunity Rule. 16 C.F.R. § 437.2(a)(1)(ii)(A), (a)(1)(ii)(B), and (a)(2).
13. Defendant Guadagno, through his complete and total control of the Corporate Defendants, engaged in a scheme whereby Defendants engaged in deceptive conduct in the offering for sale of vending machine business opportunities by misrepresenting the income purchasers would receive and misrepresenting details regarding the delivery of purchased vending machines.
14. In Defendant Guadagno's capacity as an owner of the Corporate Defendants, he signed purchaser contracts, signed letters, made sales calls to prospective purchasers, was responsible for and controlled the marketing and sales of the vending machines, wrote and reviewed the sales scripts, wrote the classified ads, and ran the day-to-day business offices.
15. Defendants' misrepresentations were material to, and relied upon by, consumers acting reasonably under the circumstances in making decisions to purchase Defendants' vending machine business opportunities.
16. On October 4, 2006, Defendant Guadagno pled guilty in a criminal proceeding challenging this same conduct. He pled guilty that he knowingly and wilfully conspired to commit mail fraud by making misrepresentations in the sale of vending machine business opportunities. Defendant Guadagno pled that he knowingly and wilfully used the mail and telephone to make sales, and cause others to make sales, of vending

machines, while misrepresenting: the amount of money purchasers could make; when the machines would be delivered; and that locations would be provided for purchasers.

Defendant Guadagno pled that he orchestrated these misrepresentations with fraudulent intent.

17. Judgment is hereby entered jointly and severally against Defendants Richard Guadagno, Essex Marketing Group, Inc., Westbrook Marketing Group, Inc., and Westbrook Marketing Associates, LLC in the amount of \$3,163,916.
18. Judgment is hereby entered jointly and severally against Defendants Richard Guadagno and Manhattan Vending, LLC in the amount of \$895,319.
19. Entry of this Order is in the public interest.

## **ORDER**

### **DEFINITIONS**

For purposes of this Order, the following definitions shall apply:

1. "Assets" means any legal or equitable interest in, right to, claim to, or expectation to receive, any real or personal property, including, but not limited to, chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, premises, contracts, mail or other deliveries, shares of stock, lists of consumer names, inventory, checks, notes, accounts, credits, receivables, lines of credit, all cash, funds, and other things of value, wherever located.
2. "Business Opportunity Rule" means the FTC Trade Regulation Rule titled "Disclosure Requirements and Prohibitions concerning Business Opportunities," 61 Fed. Reg. 15444 at 15563-15571 (Mar. 30, 2007), codified at 16 C.F.R. Part 437, or as it may be amended.

3. "Business Venture" means any written or oral business arrangement, however denominated, that is covered by the Business Opportunity Rule or the Franchise Rule, or that consists of the payment of any consideration in exchange for:
  - a. the right or means to offer, sell, or distribute goods or services (regardless of whether identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and
  - b. more than nominal assistance, or the promise of more than nominal assistance, to any person or entity (including, but not limited to, referrals to any persons providing or promising location services), in connection with or incident to: (1) the establishment, maintenance, or operation of a new business, or (2) the entry by an existing business into a new line or type of business.
4. "Corporate Defendants" mean Essex Marketing Group, Inc., Westbrook Marketing Group, Inc., Westbrook Marketing Associates, LLC, and Manhattan Vending, LLC, and their successors and assigns.
5. "Defendants" means the Individual Defendant and all of the Corporate Defendants, individually, collectively, or in any combination.
6. "Individual Defendant" means Richard J. Guadagno, a/k/a Rich Dano, Rich Guadano and Richard Guadago.
7. "Franchise" is defined as that term is defined in the Franchise Rule at 16 C.F.R. Part 436.1(h), or as the Franchise Rule may be amended.
8. "Franchise Rule" means the FTC Trade Regulation Rule titled "Disclosure Requirements and Prohibitions Concerning Franchising," 61 Fed. Reg. 15444 at 15544-15563 (Mar. 30, 2007), codified at 16 C.F.R. Part 436, or as it may be amended.

9. "Person" means a natural person, organization or other legal entity, including a corporation, partnership, proprietorship, association, or cooperative, or any other group or combination acting as an entity.
10. "Plaintiff" means the Federal Trade Commission;
11. "Telemarketing," "telemarketer," "seller," and "material" are defined as in Section 310.2 of the Telemarketing Sales Rule, 16 C.F.R. § 310.2.

#### **I. PERMANENT BAN-BUSINESS VENTURES**

**IT IS THEREFORE ORDERED** that the Defendants, whether acting directly or through any trust, corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined from, directly or indirectly, participating, controlling, directing, managing, or receiving any remuneration of any kind whatsoever from, or holding any ownership or controlling interest, share, or stock in, or serving as an officer, director, member, trustee, or general manager of, any business or business entity engaged, in whole or in part, in advertising, marketing, promoting, offering for sale, or sale of any Business Venture, or assisting others engaged in the same.

#### **II. PERMANENT BAN-TELEMARKETING ACTIVITIES**

**IT IS FURTHER ORDERED** that the Defendants, whether acting directly or through any trust, corporation, subsidiary, division, or other device, are permanently restrained and enjoined from engaging, participating, assisting or facilitating in any manner or capacity whatsoever, directly or indirectly, individually or through any corporation, limited liability company, subsidiary, division, or other device, in telemarketing.

### III. PROHIBITED BUSINESS ACTIVITIES

**IT IS FURTHER ORDERED** that, in connection with the advertising, marketing, promoting, offering for sale, or sale of any good or service whatsoever, the Defendants and their officers, agents, employees, and corporations, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby permanently restrained and enjoined from making or assisting or facilitating others in making, either expressly or by implication, any false or misleading representation, either orally or in writing, of any material fact.

### IV. MONETARY JUDGMENT

**IT IS FURTHER ORDERED** that:

A. Judgment in the amount of \$3,163,916.00 is hereby entered in favor of the Commission, jointly and severally against Defendant Guadagno individually and Defendants Essex Marketing Group, Inc., Westbrook Marketing Group, Inc., and Westbrook Marketing Associates, LLC, for equitable monetary relief and for paying any attendant expenses of administering any redress fund. No portion of any payments under the Judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment, or forfeiture;

B. Judgment in the amount of \$895,319.00 is hereby entered in favor of the Commission, jointly and severally against Defendant Guadagno individually and Defendant Manhattan Vending, LLC, for equitable monetary relief and for paying any attendant expenses of administering any redress fund. No portion of any payments under the Judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment, or forfeiture;

C. All funds paid pursuant to this Section shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including, but not limited to,



payment of restitution and any attendant expenses for the administration of any fund to redress consumer injury. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after such redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to the Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the Treasury as disgorgement. Defendants shall have no right to challenge the Commission's choice of remedies under this Section;

D. Defendants shall also furnish to the Commission, in accordance with 31 U.S.C. § 7701, their taxpayer identification numbers (Social Security number, employer identification number, or Revenue Canada identification number), which shall be used for purposes of collecting and reporting on any delinquent amount arising out of each Defendant's relationship with the government; and

E. Individual Defendant Guadagno is further required to provide the Commission with clear, legible and full-size photocopies of all valid driver's licenses he possesses, which will be used for collection, reporting, and compliance purposes, within ten (10) days of the Court's entry of this Order.

#### **V. USE OF FALSE OR FICTITIOUS NAMES**

**IT IS HEREBY ORDERED** that in connection with any Business Venture or telemarketing, except as authorized under the Telemarketing Sales Rule, the Individual Defendant is hereby permanently restrained and enjoined from using any aliases, pen names, pseudonyms, or otherwise misrepresenting his true identity in the course of business dealings or in publicly filed documents.

## VI. LIFTING OF ASSET FREEZES

**IT IS FURTHER ORDERED** that, upon payment of the monetary judgment pursuant to the Section titled "Monetary Judgment," the freezes of Defendants' assets, as ordered in the Preliminary Injunction Order signed by this Court on October 26, 2002 and entered by this Court on November 7, 2002, shall be dissolved.

## VII. ENFORCEMENT OF CONTRACTS

**IT IS FURTHER ORDERED** that the Defendants and their officers, agents, employees, and corporations, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, are hereby permanently restrained and enjoined from demanding payment on or enforcing or threatening to enforce any contract or agreement for the sale of a Business Venture entered into by any Defendant prior to the effective date of this Order.

## VIII. CUSTOMER LISTS

**IT IS FURTHER ORDERED** that the Defendants and their officers, agents, employees, and corporations, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, are permanently enjoined and restrained from selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any customer of the Defendants who paid any money to any Defendant at any time prior to entry of this Order in connection with the advertising, marketing, promoting, offering for sale, or sale of any business venture, or assisting others engaged in the

same; *provided, however*, that the Defendants may disclose such identifying information (i) to a law enforcement agency, or (ii) as required or authorized by any law, regulation, or court order.

**IX. COMPLIANCE MONITORING**

**IT IS FURTHER ORDERED** that, for the purpose of monitoring and investigating compliance with any provision of this Order:

A. Within ten (10) days of receipt of written notice from a representative of the Commission, Defendants each shall submit additional written reports, which are true and accurate and sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and provide entry during normal business hours to any business location in each Defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to use all other lawful means, including but not limited to:

1. obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, 45 and 69;
2. posing as consumers and suppliers to Defendants, their employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice; and

C. Defendants each shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

***Provided however,*** that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

#### **X. COMPLIANCE REPORTING**

**IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this Order may be monitored:

A. For a period of five (5) years from the date of entry of this Order:

1. The Individual Defendant shall notify the Commission of the following:
  - a. Any changes in the Individual Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;
  - b. Any changes in the Individual Defendant's employment status (including self-employment), and any change in the Individual Defendant's ownership in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that the Individual Defendant is affiliated with, employed by, creates or forms, or performs services for; a detailed description of the nature of the business; and a detailed description of the Individual Defendant's duties and responsibilities in connection with the business or employment; and

- c. Any changes in the Individual Defendant's name or use of any aliases or fictitious names;
2. Defendants shall notify the Commission of any changes in structure of any Corporate Defendant or any business entity that any Defendant directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to: incorporation or other organization; a dissolution, assignment, sale, merger, or other action; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; or a change in the business name or address, at least thirty (30) days prior to such change, *provided that*, with respect to any proposed change in the business entity about which a Defendant learns less than thirty (30) days prior to the date such action is to take place, such Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. One hundred eighty (180) days after the date of entry of this Order and annually thereafter for a period of five (5) years, Defendants each shall provide a written report to the FTC, which is true and accurate and sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

1. For the Individual Defendant:
  - a. the Individual Defendant's then-current residence address, mailing addresses, and telephone numbers;

- b. the Individual Defendant's then-current employment status (including self-employment), including the name, addresses, and telephone numbers of each business that the Individual Defendant is affiliated with, employed by, or performs services for; a detailed description of the nature of the business; and a detailed description of the Individual Defendant's duties and responsibilities in connection with the business or employment; and
  - c. Any other changes required to be reported under Subsection A of this Section.
2. For all Defendants:
- a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to the Section titled "Distribution of Order;" and
  - b. Any other changes required to be reported under Subsection A of this Section.

C. Each Defendant shall notify the Commission of the filing of a bankruptcy petition by such Defendant within fifteen (15) days of filing.

D. For the purposes of this Order, Defendants shall, unless otherwise directed by the Commission's authorized representatives, send by overnight courier all reports and notifications required by this Order to the Commission, to the following address:

Associate Director for Enforcement  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Room NJ-2122  
Washington, D.C. 20580  
Re: FTC v. Essex Marketing, et al. Civil Action No. 02-3415

**Provided** that, in lieu of overnight courier, Defendants may send such reports or notifications by first-class mail, but only if Defendants contemporaneously send an electronic version of such report or notification to the Commission at: [DEBrief@ftc.gov](mailto:DEBrief@ftc.gov).

E. For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with each Defendant. **Provided however**, nothing in this provision shall limit the Commission's authority to pose as a consumer or supplier pursuant to Subsection B.2 of the Section titled "Compliance Monitoring."

#### **XI. RECORD KEEPING PROVISIONS**

**IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of entry of this Order, Defendants, in connection with Essex Marketing Group, Inc., Westbrook Marketing Group, Inc., Westbrook Marketing Associates, LLC, Manhattan Vending, LLC and any business where Defendant Guadagno is the majority owner, or directly or indirectly manages or controls the business, and their agents, employees, officers, corporations, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;

C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly, or through any third party) and any responses to those complaints or requests;

E. Copies of all sales scripts, training materials, Franchise or Business Opportunity Disclosure Documents, Earnings Claim Disclosure Documents, advertisements, or other marketing materials; and

F. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order required by the Sections titled "Distribution of Order" and "Acknowledgment of Receipt of Order" and all reports submitted to the FTC pursuant to the Section titled "Compliance Reporting."

## **XII. DISTRIBUTION OF ORDER**

**IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Order, Defendants shall deliver copies of the Order as directed below:

A. **Corporate Defendant:** Each Corporate Defendant must deliver a copy of this Order to (1) all of its principals, officers, directors, and managers; (2) all of its employees, agents, and representatives who engage in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within five (5) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in



structure set forth in Subsection A.2 of the Section titled "Compliance Reporting," delivery shall be at least ten (10) days prior to the change in structure.

**B. Individual Defendant as Control Person:** For any business that the Individual Defendant controls, directly or indirectly, or in which the Individual Defendant has a majority ownership interest, the Individual Defendant must deliver a copy of this Order to (1) all principals, officers, directors, and managers of that business; (2) all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting." For current personnel, delivery shall be within five (5) days of service of this Order upon such Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. For any business entity resulting from any change in structure set forth in Subsection A.2 of the Section titled "Compliance Reporting," delivery shall be at least ten (10) days prior to the change in structure.

**C. Individual Defendant as employee or non-control person:** For any business where the Individual Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, the Individual Defendant must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

**D.** Defendants must secure a signed and dated statement acknowledging receipt of the Order, within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section.

**XIII. ACKNOWLEDGMENT OF RECEIPT OF ORDER**

IT IS FURTHER ORDERED that each Defendant, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

**XIV. RETENTION OF JURISDICTION**

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED, this 4<sup>th</sup> day of October, 2008, at 5 P. m.

*[Handwritten signature]*

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THOMAS C. PLATT  
UNITED STATES DISTRICT COURT JUDGE