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March 25, 2003

BY HAND & FACSIMILE

Mr. Donald Clark
Secretary
Federal Trade Commission
6th & Penn. Ave., N.W., Room 159
Washington, D.C. 20580

**RE: Supplemental Petition filed pursuant to 16 CFR §1.25
Regarding Portions of the Amendments to the Telemarketing
Sales Rule 16 CFR Part 310.**

Dear Mr. Clark:

Irrespective of the outcome of the motion for preliminary injunction filed by us on behalf of The Direct Marketing Association ("The DMA") and other clients, which is pending before the U.S. District Court for the Western District of Oklahoma,¹ we submit on behalf of The DMA, and its members, this supplemental petition requesting that the Federal Trade Commission ("FTC") stay until October 1, 2003, the date by which it will require full compliance with two provisions of the safe harbor to the Abandoned Call Rule: the provision that requires telemarketers to employ technology to ensure abandonment of no more than three percent (3%) of all calls answered by a person, measured per day per calling campaign, § 310.4(b)(4)(i), and the safe harbor's record keeping provision, § 310.4(b)(4)(iv), to the extent that it would require record keeping to document compliance with the 3% abandonment rate requirement.

The current compliance date for the above-referenced provisions of the Abandoned Call Rule is March 31, 2003. On March 14, 2003, the FTC extended

¹ *U.S. Security et al. v. FTC*, No. CIV 03-122-W (W.D. Ok.). The motion seeks from the Court a stay of the effectiveness of the requirements of § 310.4(b)(1)(iv) ("Abandoned Call Rule") and § 310.4(a)(6)(i) ("Free-to-Pay/Preacquired Account Rule") of the Telemarketing Sales Rule ("TSR").

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until October 1, 2003, "the date by which it will require full compliance with the call recording provision of the abandoned call safe harbor" to the Abandoned Call Rule, and the safe harbor's record keeping provision "to the extent that it would require record keeping to document the use of a recorded message in instances of call abandonment." On the basis of the administrative record and other information before it at that time, the FTC specifically declined to stay the other provisions of the safe harbor. This partial extension of compliance, and denial, was issued in response to The DMA's petition of February 27, 2003, and other petitions.

Following today's hearing in Oklahoma City, FTC's litigation counsel indicated that the information in the affidavits attached to the Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Preliminary Injunction filed with the U.S. District Court yesterday was not information that was before the FTC when it made its March 14 decision. Attached to this letter are copies of the relevant affidavits. Although we believe that this issue was before the FTC, we are pleased to file this supplemental petition with attachments to enable the FTC to consider these specific affidavits.

As the attached affidavits make clear, the 3% abandonment rate provision of the safe harbor cannot be met by next Monday, March 31, 2003. Therefore, on the basis of this supplemental petition, the DMA renews its request that the 3% abandonment rate provision of the Abandoned Call Rule, and the related record keeping provision, be stayed until October 1, 2003.

The affidavits of predictive dialer manufacturers make clear that the vast majority of predictive dialers currently in use cannot be quickly adjusted to achieve a 3% rate of abandoned calls. Costello Aff. ¶ 3; Fischer Supp. Aff. ¶¶ 6, 7; Kelly Aff. ¶ 4. Almost all predictive dialing equipment that is already in use must be replaced or substantially overhauled to comply with the Final Rule. Kelly Aff. ¶ 4. This is because most existing predictive dialer technology is manufactured to measure abandoned calls based on a different measurement than the definition of the term in the TSR. Brubaker Supp. Aff. ¶¶ 6; 7; Costello Aff. ¶ 4; Kelly Aff. ¶¶ 5, 6. Indeed, one company's experience has shown that even if its existing equipment is set to a 1% or 2% rate, the lower settings are still resulting in abandonment rates of 4 to 5% under the FTC standard. Brubaker Supp. Aff. ¶ 7. Even if all users of predictive dialers order the necessary new equipment on the day the TSR was published, "it would not be possible for all users to obtain [the] new equipment before the effective date of the TSR." Kelly Aff. ¶ 10.

In fact, the additional hardware and software necessary to provide the functionality that allows leaving a recorded voice message under the safe harbor – which the FTC has stayed until October 1, 2003 – is *the very same equipment*

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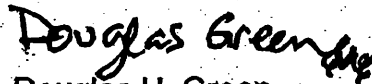
Mr. Donald Clark
Secretary
Page 3

that would allow the predictive dialers to achieve a 3% abandoned call rate. Costello Aff. ¶ 5. Thus, the FTC has stayed the requirement for leaving recorded messages until October 1 but has not stayed the 3% abandoned call rate, when in fact the same equipment will be needed to comply with both of these requirements. *Id.*

If the FTC needs additional time to consider this supplemental petition, we are prepared to request that the U.S. District Court refrain from ruling on our motion until the FTC has made its decision on this supplemental petition – provided that, prior to March 31, 2003, the FTC stays enforcement of the Abandoned Call Rule and the Free-to-Pay/Preacquired Account Rule until one week after the FTC makes its decision on this supplemental petition. This would provide additional time for the FTC to respond to this supplemental petition and time for the Court to then decide the pending motion to stay the Abandoned Call Rule (assuming that such stay motion is not resolved by this supplemental petition) and the Free-to-Pay/Preacquired Account Rule.

We appreciate your consideration of this petition and would be pleased to address any questions that arise as the FTC considers this supplemental petition, as well as our offer to advise the Court of the impact upon Plaintiff's motion for preliminary injunction of any short-term stay that the FTC may grant pending its decision on the petition.

Respectfully submitted,



Douglas H. Green
On Behalf of The Direct
Marketing Association

Encs.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

- (1) U.S. SECURITY, an Oklahoma corporation;
- (2) CHARTERED BENEFIT SERVICES, INC. an Illinois corporation;
- (3) GLOBAL CONTACT SERVICES, INC., a Delaware corporation;
- (4) INFOCISION MANAGEMENT CORPORATION, a Delaware corporation;
- (5) DIRECT MARKETING ASSOCIATION, INCORPORATED, a New York non-profit association,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION,

Defendant.

Case No. 03-122-W

AFFIDAVIT OF KATHLEEN M. KELLY

I, KATHLEEN M. KELLY, do hereby attest as follows:

1. I am over 18 years of age and am competent to provide this Affidavit. The statements contained in this Affidavit are based on my personal knowledge.

2. I am the Chief Executive Officer of TeleDirect International, Inc. ("TeleDirect"), headquartered in Scottsdale, Arizona. TeleDirect manufactures predictive dialer equipment. Predictive dialers are the primary telephone technology used by businesses that engage in telemarketing. TeleDirect sells its predictive dialer equipment to hundreds of different customers in a variety of industries.

3. The Federal Trade Commission's amended Telemarketing Sales Rule ("TSR") imposes new requirements on the use of predictive dialers. The TSR requires that the seller or telemarketer employ technology that ensures abandonment of no more than three percent of all calls answered by a live person, measured per day per calling campaign. As I understand the TSR, a call is considered "abandoned" if the call is either disconnected or not connected to a live operator within two seconds of the completion of the called-party's greeting.

4. The great majority of the predictive dialer equipment that has been manufactured by TeleDirect is still operational and being used by telemarketers. Predictive dialer equipment typically functions for a long period of time and does not need to be replaced. Predictive dialing equipment that is older than two years ("existing equipment"), however, must be replaced with new equipment and software in order to comply with the TSR.

5. The existing equipment measures the abandonment rate by dividing the abandoned calls by the total number of calls that the machine makes. The total number of calls for purposes of determining the abandonment rate using the existing equipment includes all calls generated by the equipment, whether they result in a busy signal, no answer, an answer by an answering machine or voice mail, or are connected to a live person. Thus, for example, if the machine is set to make 1,000 calls, it knows that it can abandon 30 calls to achieve a three percent abandonment rate (the complex algorithm in the software does not function this simply, but this example demonstrates the end result – no more than 30 calls can be abandoned in the period of time measured).

6. The TSR, however, only counts the number of calls answered by a live person for purposes of determining the abandonment rate. Thus, calls are not counted that result in busy signal, no answer, an answer by an answering machine or voice mail. For example, if, out of the

thousand calls the machine makes, it only connects with 500 live customers (because of out-of-service numbers in the list, busy signals, unanswered calls, and calls answered by answering machines and voice mail), then the 30 abandoned calls that the existing equipment thinks that it can make will result in a six percent abandonment rate under the TSR's definition. Thus, setting the existing equipment for a three percent abandonment rate will likely result in an abandonment rate under the TSR's definition of greater than three percent. Even choosing a setting lower than three percent (e.g., one or two percent) with the existing software would not consistently yield a TSR abandonment rate of three percent or lower. With the example above, if the existing equipment were set at one percent, then 10 calls could be abandoned. If 500 calls are connected to a live person, this would produce an abandoned rate of two percent. But, if 300 calls are connected, the abandonment rate would be an impermissible 3.33%. It is impossible for the existing equipment to make the calculation based on the number of calls answered by a live person.

7. The only way for a user of existing equipment to obtain an abandonment rate of three percent as defined in the TSR would be to set the predictive dialing equipment to a zero percent abandonment rate. This would eliminate entirely the utility and efficiencies that result from predictive dialers and effectively rendering meaningless the FTC's allowance of up to a three percent abandoned rate.

8. It is my understanding that most of the predictive dialers produced by other manufacturers currently being used by telemarketers also measure abandoned calls differently than TSR's definition of abandoned calls.

9. Altering the software and hardware in the existing predictive dialer equipment to measure the abandonment rate consistently with the TSR's definition of abandoned calls is not a

practical alternative for users of predictive dialers. Undertaking such alterations would be highly complicated given the constraints of the older versions of predictive dialer software and is therefore cost prohibitive.

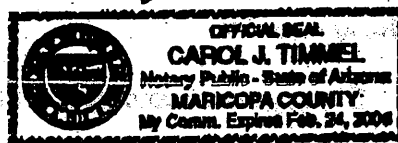
10. In order to comply with the new rule, therefore, it is my understanding that users of predictive dialers across the industry (i.e., customers of TeleDirect and those who use other systems) will have to obtain equipment with new software that is capable of measuring abandonment rates as defined in the TSR. It is my further understanding that even if users of predictive dialers had ordered new equipment the day that the FTC published the new TSR rules in the Federal Register that it would not be possible for all users to obtain new equipment before the effective date of the TSR.

Dated at Scottsdale, AZ, this 21st day of March, 2003.

Kathleen M. Kelly
Kathleen M. Kelly

Sworn to, subscribed and acknowledged in my presence this 21 day of March, 2003 by
Carol Timmel

Carol J. Timmel
Notary Public



**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

- (1) U.S. SECURITY, an Oklahoma corporation;**
- (2) CHARTERED BENEFIT SERVICES, INC. an Illinois corporation;**
- (3) GLOBAL CONTACT SERVICES, INC., a Delaware corporation;**
- (4) INFOCISION MANAGEMENT CORPORATION, a Delaware corporation;**
- (5) DIRECT MARKETING ASSOCIATION, INCORPORATED, a New York non-profit association,**

Plaintiffs,

v.

Case No. 03-122-W

FEDERAL TRADE COMMISSION,

Defendant.

AFFIDAVIT OF RICHARD COSTELLO

I, RICHARD COSTELLO, do hereby attest as follows:

1. I am over 18 years of age and am competent to provide this Affidavit. The statements contained in this Affidavit are based on my personal knowledge.

2. I am the President of Amcat, headquartered in Edmond, Oklahoma. Amcat is a global leader in providing contact center solutions to improve productivity and enhance business communication. Amcat is a manufacturer of predictive dialer equipment. U.S. Security, which I

understand is a plaintiff in the above captioned lawsuit, is a customer of Amcat and uses predictive dialers manufactured by Amcat.

3. Over 1,000 Amcat manufactured predictive dialers have been deployed. Of these predictive dialers, only a handful of the most recently deployed are capable of achieving an abandoned call rate of 3% as defined by the Federal Trade Commission's ("FTC") so-called "abandoned call" rule issued on January 29, 2003. U.S. Security does not possess one of these predictive dialers.

4. The Amcat predictive dialers possess recordkeeping capabilities. However, most of the Amcat predictive dialers will not produce records required to indicate a 3% abandoned rate as defined by the FTC. This is because the FTC has discretely defined how abandoned calls are measured as calls answered by live persons that are disconnected or "dropped." This definition is different than the predictive dialer industry's standard, including equipment manufactured by Amcat, that measures abandoned calls as a percentage of all calls made, not just those that are answered by live persons. As a result, the vast majority of the predictive dialers in use by telemarketers are not capable of complying with the abandoned call rule's requirement that telemarketers keep records showing compliance with the new 3% abandonment limit.

5. For many of the Amcat predictive dialers, including those currently in use by our customer U.S. Security, to achieve a 3% abandoned call rate, additional hardware and software will need to be added to the equipment that contains digitized features. This hardware is the very same equipment that will provide the functionality that allows the leaving of recorded voice messages, a requirement also contained in the so-called "safe harbor" to the abandoned call rule. I understand, however, that the FTC has stayed the effective date of this component of the abandoned call rule -- the requirement to leave a recorded message when a telemarketing call is

abandoned -- to October 1, 2003. In other words, the FTC has given an extension until October 1 for leaving recorded messages, but not achieving the 3% abandoned rate, when in fact, the same exact equipment needs to be installed in order to comply with both of these new requirements.

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

Richard Costello

Richard Costello

Executed

3-21-03

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

- (1) U.S. SECURITY, an Oklahoma corporation;**
- (2) CHARTERED BENEFIT SERVICES, INC. an Illinois corporation;**
- (3) GLOBAL CONTACT SERVICES, INC., a Delaware corporation;**
- (4) INFOCISION MANAGEMENT CORPORATION, a Delaware corporation;**
- (5) DIRECT MARKETING ASSOCIATION, INCORPORATED, a New York non-profit association,**

Plaintiffs,

v.

Case No. 03-122-W

FEDERAL TRADE COMMISSION,

Defendant.

SUPPLEMENTAL AFFIDAVIT OF STEVE BRUBAKER

I, Steve Brubaker, do hereby attest as follows:

1. I am over 18 years of age and am competent to provide this Affidavit. The statements contained in this Affidavit are based on my personal knowledge.

2. I am Senior Vice-President of Corporate Affairs at InfoCision. InfoCision operates call centers in Ohio, Pennsylvania and West Virginia. We currently employ over 2,700 employees, nearly 2,000 of whom work as communicators on the telephone. InfoCision completed over 30 million calls in 2003 for approximately 200 different clients, ranging from

national charities and non-profit organizations to large Fortune 1000 corporations.

3. InfoCision in the past year alone has invested nearly \$4,000,000 dollars in overhauling our predictive dialer equipment.

4. Following the issuance of the Federal Trade Commission's ("FTC") amendment to the Telemarketing Sales Rule, InfoCision has been pressuring our vendors so that we can obtain hardware and software in an attempt to comply with the FTC's 3% abandonment requirement. We understand that this requirement becomes effective at the end of this month, on Monday, March 31st. We have obtained and installed some of this equipment and begun testing the same in an effort to integrate it into our existing operations to meet the 3% abandonment limit. We are continuing to push our vendors to supply us with more equipment given that compliance is required in 11 days.

5. This has proven to be an extraordinarily complex and troubling task. Integrating the new equipment is not a matter of simply substituting one predictive dialer for another and flipping a switch. Given the breadth and complexity of our telemarketing services, a major operational change of this nature ordinarily takes many months to a year or more to ensure that all systems are working and applicable compliance conditions can be met.

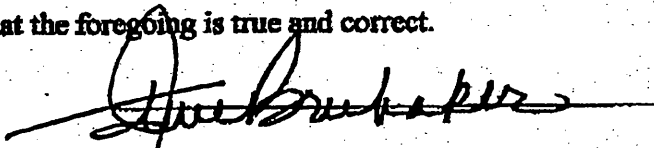
6. In this particular instance, tests of the new equipment that we have been able to obtain to date reveal that InfoCision will be unable to reach an abandoned rate of 3% as measured by the FTC's new abandoned call rule. This is because the FTC calculates abandoned calls by considering the number of calls that are disconnected or "dropped" out of all of the calls answered by live persons. This is different than the way that our predictive dialers measure abandoned calls. Our equipment measures abandoned calls as the number of disconnected or dropped calls of all calls made (including busy signals, calls answered by live operators, and

calls answered by answering machines), not just those that are answered by live persons.

7. InfoCision technicians have set the new equipment to an abandoned rate of 3%. The results, however, show an abandoned rate as measured by the FTC's measurement of abandoned (i.e., answered calls not connected to a sales representative within two seconds of being answered) of 5%, 6%, and greater. We are continuing to investigate this problem, but believe that the reason for a higher rate is that the FTC's new rule measures abandoned calls differently than the capabilities of our vendor's equipment. We have even attempted to set the equipment at 1% and 2% abandonment rates in an effort to obtain a 3% abandoned rate using the FTC's standard. Even these lower settings are resulting in an abandonment rate of upwards of 4% or 5% using the FTC's standard.

8. InfoCision is facing a business crisis. The equipment that we recently have purchased for approximately \$ 4,000,000 does not allow us to comply with the abandonment rate of 3% by the new rule's March 31 effective date. Absent a deferral of the effective date until these technical problems can be resolved and compliance can be assured, InfoCision is facing the specter of either significant noncompliance or ceasing a substantial portion of its business.

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


Steve Brubaker

Executed 3-21-2003

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

- (1) U.S. SECURITY, an Oklahoma corporation;**
- (2) CHARTERED BENEFIT SERVICES, INC., an Illinois corporation;**
- (3) GLOBAL CONTACT SERVICES, INC., a Delaware corporation;**
- (4) INFOCISION MANAGEMENT CORPORATION, a Delaware corporation;**
- (5) DIRECT MARKETING ASSOCIATION, INCORPORATED, a New York non-profit association,**

Plaintiffs,

v.

Case No. 03-122-W

FEDERAL TRADE COMMISSION,

Defendant.

SUPPLEMENTAL AFFIDAVIT OF RICK RATLIFF

I, RICK RATLIFF, do hereby attest as follows:

- 1. I am over 18 years of age and am competent to provide this Affidavit. The statements contained in this Affidavit are based on my personal knowledge.
- 2. This Affidavit supplements the Affidavit submitted to the Court on March 10, 2003.
- 3. I am President of U.S. Security, Inc. ("U.S. Security"). U.S. Security operates call centers in Oklahoma. We currently employ more than 950 employees in

12 states, more than 300 of whom work as callers to generate face-to-face appointments that enable U.S. Security's sales representatives to sell burglar and fire alarm services.

4. It is my understanding that the FTC has extended the compliance date for leaving recorded messages in instance of abandoned calls until October 1, 2003.

Without a similar extension for the 3% abandonment rate, U.S. Security will be unable to comply with the FTC's rule by March 31, 2003.

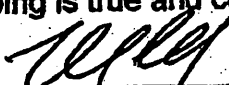
5. I have contacted the manufacturer from whom U.S. Security purchases predictive dialing equipment. This company, Amcat, based in Oklahoma, has informed me that the predictive dialer equipment that U.S. Security purchased from Amcat and currently uses is not capable of being set to an abandoned call rate of 3% as defined by the FTC.

6. In order to comply with the FTC's 3% abandonment rate, U.S. Security would have to purchase new predictive dialer equipment at considerable expense including training and other human resource type expenses. U.S. Security is not in a position at the current time to undertake such a significant expense.

7. Irrespective of the expense, U.S. Security cannot purchase and implement such equipment by the March 31 deadline. This will require a fundamental overhaul of our operations that will necessitate several months in installation, implementation, and training. Once the necessary hardware and software can be obtained, there are significant testing that needs to occur to integrate the equipment with the rest of the business.

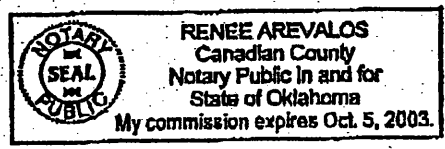
8. If forced to comply with the 3% condition by Monday, March 31, I will have no option but to shut down significant components of operations, causing certain employees of U.S. Security to lose their jobs.


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



Rick Ratliff

Executed 3-21-03




99016497

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

- (1) **U.S. SECURITY, an Oklahoma corporation;**
- (2) **CHARTERED BENEFIT SERVICES, INC., an Illinois corporation;**
- (3) **GLOBAL CONTACT SERVICES, INC., a Delaware corporation;**
- (4) **INFOCISION MANAGEMENT CORPORATION, a Delaware corporation;**
- (5) **DIRECT MARKETING ASSOCIATION, INCORPORATED, a New York non-profit association,**

Plaintiffs,

v.

Case No. 03-122-W

FEDERAL TRADE COMMISSION,

Defendant.

SUPPLEMENTAL AFFIDAVIT OF ROBERT A. FISCHER

I, ROBERT A. FISCHER, do hereby attest as follows:

1. I am over 18 years of age and am competent to provide this Affidavit. The statements contained in this Affidavit are based on my personal knowledge.
2. This affidavit supplements the affidavit submitted to the Court on March 10, 2003. I am the Senior Vice President and CFO of DialAmerica Marketing, Inc.
3. As indicated in the affidavit of March 6, 2003, DialAmerica is concerned about compliance with provisions of the recently promulgated Federal Trade Commission ("FTC") Telemarketing Sales Rule ("TSR" or "Rule") by the Rule's March 31, 2003 effective date.

4. DialAmerica understands that the FTC has stayed the effective date of the portion of the "safe harbor" relating to the prohibition on abandoned calls that requires leaving a recorded message when a sales representative is not available to speak with the person answering the call within two seconds after the person's completed greeting and the corresponding recordkeeping requirements. I understand, however, that the requirement to employ technology that ensures abandonment of no more than 3% percent of calls answered by a person, measured per day per calling campaign by March 31, 2003 remains in place.

5. The FTC indicated in its response to the DMA's request for a stay on the portion of the rule that has the effect of regulating predictive dialers that it has not stayed the 3% requirement because it is possible for telemarketers using existing equipment and software to comply with the 3% abandonment conditions.

6. The FTC is incorrect in this belief. DialAmerica believes that it is virtually impossible to comply with the 3% abandoned rate as defined by the FTC by March 31. Achieving a 3% rate is an extremely complicated and difficult undertaking for DialAmerica that requires a wholesale overhaul of our existing technology and equipment.

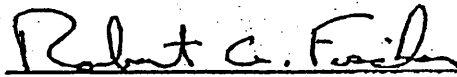
7. Our existing technology does not allow for a setting of 3% abandoned call rate as required by the FTC. It is not possible to simply "adjust the dial" on the equipment to reach 3%. DialAmerica uses three different hardware platforms and over 50 software platforms in our predictive dialers, all of which will have to undergo substantial reprogramming. The platforms use complicated algorithms based on various inputs, including number of operators available, number of calls to be made, time of day, and other variables, all aimed to match a live customer service operator with a potential

customer. These hardware and software platforms must be adjusted for each of DialAmerica's 131 dialers.

8. To make changes to these platforms, such changes must first be simulated in a laboratory environment. DialAmerica uses a simulated call center to test changes to the platforms. DialAmerica has begun to test changes and is encountering significant problems during the tests that are a result of the intricacies of the software platforms. It is common that whenever changes are made to the platforms, problems arise and need to be resolved in order for the equipment to be operational. DialAmerica is attempting to resolve identified problems. Resolving the problems is extremely time consuming and requires a great deal of trial and error.

9. For these reasons, DialAmerica continues to believe, even with the extended time frame for leaving recorded messages, that the 60-day time period allotted by the FTC for coming into compliance with the Rule's abandoned call provision is entirely insufficient.

Dated at DIALAMERICA MARKETING, INC., this 20TH day of MARCH, 2003.
960 MACARTHUR BLVD.
MAHWAH, N.J. 07495


Robert A. Fischer

Sworn to, subscribed and acknowledged in my presence this 20th day of MARCH, 2003, by Robert A. Fischer.


Notary Public

DENISE NADRATOWSKI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 11, 2007