

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

<p>In the Matter of</p> <p style="text-align: center;">KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.,</p> <p style="text-align: center;">a corporation.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 9309</p>
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**RESPONDENT’S RULE 3.24 SEPARATE STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Rule 3.24 of the Commission’s Rules of Practice, and in support of its Motion for Summary Decision, Respondent, Kentucky Household Goods Carriers Association, Inc. (“Respondent” or “Kentucky Association”), hereby submits its Statement of Material Facts as to which there is no Genuine Dispute.

A. Kentucky Household Goods Carriers Association, Inc.

1. The Kentucky Association is a non-profit corporation organized and existing under the laws of the Commonwealth of Kentucky and functions as a trade association of the Household Goods Moving & Storage Industry for household goods carriers located in the Commonwealth of Kentucky. [Declaration of James C. McMahon dated December 19, 2003, identifying Exhibits submitted in support of Respondent’s

Motion for Summary Decision (hereinafter “McM Decl.”); Para. 4; Exhibit 1; 11/18/03 Deposition of A.F. “Bud” Mirus (hereinafter “Mirus Dep.”); pp. 16-19.]

2. The Kentucky Association is also in the business of acting as a motor carrier rate bureau for the purpose of publishing and filing tariffs naming rates for the intrastate transportation of household goods on behalf of its household goods carrier members. [McM. Decl. Para. 4; Ex. 1; 11/18/03 Mirus Dep.; pp. 19-20.]

3. The Kentucky Association has one (1) paid employee, who functions as an Executive Director, and one (1) compensated independent contractor, who functions as an Administrative Consultant and serves as Chairman of the Kentucky Association’s Tariff Committee. No other person who is connected with the Kentucky Association is compensated, and it is managed by a voluntary Board of Directors comprised of representatives of member firms elected by the membership. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p. 19.]

4. Every household goods carrier operating in the Commonwealth of Kentucky is required by law to file a tariff containing its rates, charges, and rules with the Kentucky Transportation Cabinet (“KTC”). [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; pp.19-20.]

5. Under Kentucky law and regulations, a “tariff publishing agent” may file a tariff on behalf of one or more household goods carriers. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p. 20.]

6. Any member of the Kentucky Association is free to file its own individual tariff. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p 20.]

7. Any member of the Kentucky Association is free to participate in the Kentucky Association's tariff, and direct the Kentucky Association to file a tariff rate which is the same, higher, or lower than a rate contained in the collectively filed tariff approved by KTC. [McM. Decl.; Para. 4; Ex. 1; 11/18/03 Mirus Dep.; p.17.]

B. Kentucky Transportation Cabinet

8. The only witnesses designated in this proceeding are witnesses who have provided testimony in support of Respondent's State Action Defense. These witnesses include: (a) Hon. Denise King, Director of the Division of Motor Carriers of KTC; (b) Mr. William C. Debord, Administrative Specialist, Division of Motor Carriers, KTC; (c) Mr. A.F. Mirus, Chairman of the Kentucky Association's Tariff Committee; and (d) Mr. Dennis Tolson, President of the Kentucky Association. Since Complaint Counsel has failed to cause deposition testimony to be placed in the pre-trial record which would in any way contradict the deposition testimony of Respondent's witnesses, Respondent believes that there is no dispute concerning the statements contained herein - - almost all of which are drawn from deposition testimony.

9. Ms. Denise King has been Director of the Division of Motor Carriers of KTC since May, 2003. She reports to Mr. William M. Bushart, Commissioner of the Department of Vehicle Regulations. Commissioner Bushart reports to Deputy Secretary of Transportation Clifford Linkes, who in turn reports directly to Secretary of Transportation James Codell, III. [McM. Decl.; Para. 5; Ex. 2; 11/12/03 King Dep.; pp. 7-11.]

C. Active Supervision

10. The laws of Kentucky and regulations of KTC require that household goods carriers file tariffs with KTC and KTC has a program in place for taking certain actions with regard to tariff filings. Mr. William Debord is responsible for that program of activity and he acts with the authority of KTC. [McM. Decl.; Para. 5; Ex. 2; 11/12/03 King Dep.; pp. 8-11.]

11. Mr. William Debord is an “Administrative Specialist 3” employed by the Division of Motor Carriers, KTC, and has held this position since March, 2003. His responsibilities include oversight of intrastate regulation of carriers for hire, including passenger type carriers and household goods carriers; oversight of tariff filings, auditing carriers, responding to complaints and telephone inquiries from the public, and administering the statutes contained in Chapter 281. From 1972 to 1979 he was employed with the “Division of Rates & Services” of the “Department of Motor Transportation” which was the name by which the Division of Motor Carriers was known at that time. From December, 1979 to October, 1999, he served as either (a) Director; (b) Acting Director; or (c) Assistant Director, of the Division of Motor Carriers, KTC. For fifteen (15) of the years between 1979 and 1999, he was either Acting Director or Director. From 1972 until the present, Debord has been responsible for administering the Commonwealth of Kentucky’s program for the regulation of household goods carriers. Debord has been a member of the National Association of State Transportation Specialists since 1972 and served as its President in 2000-2001. He has been involved with other trucking industry groups including the Specialized Riggers Conference and tax

associations and groups. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 11-15; 66.]

12. It has been a part of Debord's employment responsibilities since 1972 to be familiar with the Kentucky laws regulating household goods carriers. [McM. Decl. Para. 6; Ex 3; 11/13/03 Debord Dep. p. 15.]

13. During his Deposition, Mr. Debord identified various statutes and regulations as being laws and regulatory provisions which constitute a part of the Kentucky household goods regulatory program with which he was familiar, and as to which he had administrative responsibility. As to each provision, he provided an explanation and, in many cases, concrete examples of KTC's active involvement in administering the particular requirements of the subject provision. The statutes and regulations which formed the basis for this part of his testimony were marked as Exhibits during his deposition and are as follows: Kentucky Constitution, Section 196; Section 281.010, Kentucky Revised Statutes ("KRS"); KRS 281.011; KRS 281.012; KRS 281.590; KRS 281.600; KRS 281.624; KRS 281.625; KRS 281.640; KRS 281.675; KRS 281.680; KRS 281.685; KRS 281.690; KRS 281.695; KRS 281.705; KRS 691.900; 601 Kentucky Administrative Regulations ("KAR"), Section 1:029; 601 KAR 1:030; 601 KAR 1:031; 601 KAR 1:040; 601 KAR 1:045; 601 KAR 1:050; 601 KAR 1:060; 601 KAR 1:070; 601 KAR 1:075; 601 KAR 1:080; 601 KAR 1:095; and 601 KAR 1:101. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 16-79.] [McM. Decl. Para. 7; Ex. 4-A to 4-Z-1 contain copies of these statutes and regulations.]

14. Mr. Debord has attended Meetings of the Kentucky Association to "obtain information relative to the industry" and to "be made aware of tariff change

proposals.” He has attended such meetings as part of his responsibilities with KTC.

[McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 86-87.]

15. Debord has been present at Kentucky Association Meetings for discussions about revenues and costs including labor costs and insurance costs; he has had private discussions with household goods carriers regarding costs; “any time that [he] would do a field audit or what [he refers] to as a tariff compliance investigation, you know, they would share with me, or even at the board meetings, the various people that might attend, you know, they would share with me their costs, their—the issues that were affecting their rates—the rate making process.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp.88-89.]

16. Information that Debord learned at Kentucky Association Meetings was considered by KTC in the collective ratemaking process. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; p. 89.]

17. Debord is on the Kentucky Association mailing list; he receives Tariff Bulletins whenever they are sent to the Kentucky Association Membership. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; 93-94.]

18. Other than his Mother’s emergency surgery, Debord has attended all of the Kentucky Association’s Board of Directors Meetings “the last couple of years.” He has attended at least eighty five percent of the Kentucky Association’s Annual Membership Meetings since 1972. [McM. Dec. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 111; 114.]

19. Debord remembers being a guest speaker at the Kentucky Association’s 1995 Annual Membership Meeting and discussing household goods

carriers who were charging rates contrary to the rates contained in their tariffs. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; pp. 96-97.]

20. Debord recalls discussion at a Kentucky Association Board Meeting held on July 16, 2003 regarding Proposed Supplement No. 81 to Tariff KDVR No. 5 which would address excess valuation charges. He also recalls discussing the issue of household goods carriers discounting their rates at this Meeting. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 102-103.]

21. KTC enforces the provision of the Kentucky Constitution which regulates transportation of freight by common carrier, prohibits unjust discrimination in rates and services, and prohibits liability disclaimers. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. P. 17.]

22. There is a Kentucky State policy to promote economical and efficient transportation service which Debord interprets “to be service provided by a transportation provider that was profitable.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; p. 24.]

23. It was Debord’s testimony that it is State policy that “the regulations would foster companies that were healthy and financially - - financial condition.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep.; p. 25.]

24. KTC has “the ability to establish rates or to approve, to maintain a system where rates of various transportation services can be established.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 25.]

25. Reference to “unfair or destructive competitive practices” in the Kentucky State transportation policy “refer[s] to situations where a provider might charge

one person one rate or some other person a different rate or provide a service for one that would not be provided to someone else. Perform a service or a function that would not be in the best interest of the public.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 26.]

26. KTC has the responsibility to ensure that every rate charged by household good carriers is just and reasonable; this is the statutory standard which is required to be observed by household goods transportation rates in Kentucky. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 33.]

27. Kentucky intrastate household goods transportation rates are required to be open to the public and maintained in a public place in the offices of household goods carriers. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 35.]

28. KTC ultimately determines household goods transportation rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 36.]

29. KTC has collective ratemaking procedures for household goods transportation rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 37.]

30. Collective ratemaking means that “rates are collectively filed through a joint tariff publishing agency representing rates of more than one carrier or a group of carriers.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 38.]

31. The Kentucky Association files collective rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 38.]

32. KTC makes efforts to determine the costs of household goods carriers as part of the ratemaking process. This includes Debord’s knowledge of the trucking industry, the various costs involved with transportation services, general

guidelines relative to economic situations that are across the board as far as trucking is concerned, insurance costs, labor costs, equipment costs, workers compensation insurance costs, fixed overhead. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 39.]

33. Debord keeps up to date with regard to costs by contact with trucking companies, conversations, the audit process, information from other states, national associations, *Wall Street Journal*. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 38-39.]

34. A carrier cannot charge any more or less than what its tariff says. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 44.]

35. A “tariff” contains a schedule of rates, fares, and charges, and the rules that carriers impose on their transportation processes. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 42-43.]

36. A household goods carrier cannot change its tariff rates except on thirty (30) days’ notice to KTC and any interested party; the proposed changes are shown by filing new tariffs; short notice is sometimes permitted when its in the best interest of the public; the same rules apply to a tariff publishing agency such as the Kentucky Association, and to collectively set rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 43-44.]

37. Information about a proposed tariff change is available for inspection at KTC. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 48.]

38. KTC has suspended proposed rates submitted by the Kentucky Association; there are situations where individual carriers were proposing rates that were

placing a particular carrier in a more positive competitive environment than the other carriers; two rates are presently under suspension pending receipt of supplemental information; one situation involved “a flat rate.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 45-47.]

39. During his deposition, Debord stated that he could not recall a situation in “recent history” where KTC held a hearing and found a rate to be unreasonable. He stated that situations have been “administratively” resolved, and proposed rates were “voluntarily changed.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 47-48.]

40. KTC issued an initial “minimum rate order” in the 1950s or 1960s; these rates were set by order of KTC. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 49.]

41. Debord discusses proposed collective rates before they are filed with KTC by the Kentucky Association; he attends Kentucky Association meetings when there are discussions about proposed tariff changes. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 50.]

42. One reason why collectively set rates have not been suspended by KTC is that “they [the Kentucky Association] know that through our discussions what I would probably recommend as a just and reasonable adjustment of some sort. They have some idea what, through my recommendations, the Cabinet would allow. And, they have stayed within those parameters that are voiced at those types of meetings.” [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 51.]

43. During his deposition, Debord described the initial minimum rate order where rates were fixed by hearing and the manner in which those rates have been increased since that time.

Q. Are you aware of any situation in which the Cabinet has fixed the rate under this section?

A. In years past, I have, but not recently.

Q. And why is that, so you think?

A. One of the reasons I think is back – I referred to earlier, when the regulatory scheme first was developed and household goods was removed from the exempt list, and what I mean by that is when they were – become regulated as to the rates they charge, there was a very elaborate process that – in the Department of Motor Transportation went through where they established these minimum rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 67-68.]

44. KTC requires financial data from household goods carriers from time to time, as it sees fit. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 56.]

45. KTC conducts audits of household goods carriers from time to time. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 57.]

48. After a tariff is published, the public can file a protest on a new rate and existing rates. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 62.]

49. Debord recalls a situation where a big shipper filed a protest regarding a tariff rate increase. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 62.]

50. The tariff of a households goods carrier must be available for public inspection; the purposes for this are public inquiries regarding the cost of moving

or rules of the company and for enforcement purposes so far as review of tariffs is concerned. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp. 69-70.]

51. KTC enforces all of the provisions of its regulations regarding tariffs. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 71.]

52. Kentucky does not permit discounting of household goods rates. [McM. Decl. Para.6; Ex. 3; 11/13/03 Debord Dep. p. 74.]

53. KTC does not permit “binding estimates” for household goods moves. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 75.]

54. During his deposition, Mr. Debord provided the following testimony which is appropriate to consideration of the Respondent’s State Action defense and the requirements of the Ticor and Midcal decisions:

Q: I’d like to ask you some questions about the program of regulation the Kentucky Transportation Cabinet has regarding household goods carriers and household goods carriers intrastate transportation rates. Can you tell me – does KTC have control over the rates which are charged by household goods carriers for intrastate transportation services in Kentucky?

A: Yes.

Q: Is there a public purpose to the Commonwealth’s regulation of household goods transportation rates in Kentucky?

A: Yes.

Q: Is KTC involved in the establishment of household goods intrastate transportation rates in Kentucky?

A: Yes, The procedures of the rules and regulations of the statutes, yes.

Q: Does KTC in any way participate in the formulation of household goods rates in Kentucky?

A: Yes, we do.

Q: Does KTC exercise any oversight over household goods rates in Kentucky?

A: Yes. We review the filings of them. We investigate the just and reasonableness of them. We follow up to make sure the public is not discriminated against by some people charging different rates.

Q: Is KTC's role in the regulation of household goods rates restricted to enforcing the rates that are privately agreed on by movers?

A: I don't understand your question.

Q: Is KTC's role in the regulation of household goods rates restricted simply to enforcing the rates that are privately agreed on by movers?

A: You say restricted to only those that are privately submitted or –

Q: I'm going to withdraw the question. Does KTC do more than just act as a policing agent for a bunch of private agreements that are made by movers?

A: Most certainly, yes.

Q: Are tariff rate filings that are made by the Kentucky Association checked for mathematical accuracy?

A: Yes.

Q: By whom?

A: By myself. Me.

Q: Are there any filings made by the Kentucky Association, which are never checked?

A: Not to my knowledge.

Q: Would you know?

A: Yes.

Q: Has KTC ever requested information from the Kentucky Association with regard to proposed tariff rates?

A: Have we ever requested information?
Yes.

Q: Has the Association furnished information when it has been requested?

A: Yes.

Q: Has the Association ever failed to comply to a KTC request for information?

A: I don't think the Association has ever failed to comply. Individual carriers may have had to have some follow-up activity. And, as I described earlier in my testimony, some additional requests in suspension – some types of disciplinary action on our part to get the statutes and regulations fulfilled.

Q: But, has there ever – withdrawn. Has there ever been an information request with regard to collectively set rates that the Association has failed to comply with?

A: No.

Q: Does KTC – withdrawn. Is it the intention of the Kentucky Transportation Cabinet to allow collective rate making activity –

A: Yes

Q: - by the Kentucky Association?

A: Yes. We have a statute that allows carriers either to file their own tariff or become a member of the joint tariff publishing agency.

Q: Does the Kentucky Transportation Cabinet exercise independent judgment with regard to household goods rate proposals that are made by the Kentucky Association?

A: Yes.

OFF THE RECORD

Q: Are the rates contained in the Kentucky Association household goods tariffs established as a direct result of the Kentucky Transportation Cabinet's intervention in the collective rate setting process?

MR. ABRAHAMSEN: Object to the form of the question.

Q. Withdrawn. To your knowledge, are there proposed rates contained in tariffs that are filed with the KTC by the Kentucky Association?

A: You're asking, are there rates that have been filed?

Q: Yes.

A: Yes.

Q: And, is there a process known as collective rate making that has brought about the creation of the proposals that are contained in those tariffs?

A: Yes.

Q: And would you say that the Kentucky Transportation Cabinet were permitting the rates contained in the tariffs to become effective has intervened in the collective rate making process?

A: Yes.

Q: Is the Kentucky Transportation Cabinet aware of the specific details of the rate filings that have been made by the Kentucky Association?

A: Yeah. We're aware of what's contained in the tariff of those, you know. We really - I do scrutinize changes that they propose, whether it's rates or change of ownership. You know, our statutes set up these authorities be granted at a - with a situs. So, even a change of address could be an important matter. So -

Q: Do you examine the details of all of the filings they make?

A: Yes. Most certainly.

Q: They meaning the Kentucky Association?

A: Anybody that files a tariff, as far as they're concerned.

Q: Does the Kentucky Transportation Cabinet actively supervise the rate setting process as far as collectively set rates are concerned?

MR. ABRAHAMSEN: Objection. Calls for a legal conclusion.

Q: You can answer that question.

A: I believe so, yes.

Q: Do you have any doubt?

A: No. [McM. Decl. Para. 6; Ex. 3; 11/13/03

Debord Dep. pp. 79-84.]

55. Debord remembers the Kentucky Association rate request for peak and off-peak times; he discussed this filing with the Kentucky Association before it became effective; KTC looked at the matter closely; the matter was almost set down for a public hearing. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. pp.100-101.]

56. Debord recalls the process involved in the Kentucky Association's 4% insurance surcharge proposal in 1996. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 101.]

57. KTC has a goal of doing audits on all household goods carriers in an 18-month period. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p.106.]

58. Debord "learns a lot" about household goods carriers' costs and revenue from audits of carriers. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 106.]

59. Debord is aware of discussions that took place regarding valuation changes in the tariff prior to filing. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 107.]

60. Debord examines Tariff 400-N, the interstate household goods tariff, from time to time, as part of his investigating of tariff matters. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p.109.]

61. Debord has presented tariff seminars on behalf of the KTC to members of the Kentucky Association. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 113.]

62. It is customary for Kentucky Association representatives to have discussions with Debord regarding collective rate proposals prior to the time of filing; informal justification is submitted either verbally or in writing to show a need for increases. [McM. Decl. Para. 6; Ex. 3; 11/13/03 Debord Dep. p. 132.]

63. Debord is familiar with every item in the Kentucky Association tariff; he has reviewed every item at the time it was filed and afterwards; he has revised each Supplement to the tariff. [McM. Decl. Para. 6; Ex. 3; 11/14/03 Debord Dep. pp.4-5.]

64. In the case of a general increase, the Kentucky Association starts getting information together of the type KTC will require be submitted. [McM. Decl. Para. 6; Ex. 3; 11/14/03 Debord Dep. p. 58.]

65. Debord has advised the Kentucky Association that particular proposed tariff exceptions might be rejected as contrary to law. [McM. Decl. Para. 6; Ex. 3; 11/14/03 Debord Dep. p.65.]

66. KTC issues a written statement regarding a tariff filing if it is disapproved or KTC has questions or is seeking additional information. [McM. Decl. Para. 6; Ex. 3; 11/14/03 Debord Dep. p.78.]

67. Many times Debord will examine pages from the interstate tariff in connection with tariff filings. [McM. Decl. Para. 6; Ex. 3; 11/14/03 Debord Dep. p. 102.]

68. If an increase is questionable, Debord will compare it to similar rates from other states. [McM. Decl. Para. 6; Ex. 3; 11/14/03 Debord Dep. p. 114.]

Dated: New York, NY
December 19, 2003

Respectfully submitted,

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