

RECEIVED IN CLERK'S OFFICE
U.S.D.C. Atlanta

ORIGINAL

FILED IN CHAMBERS
THOMAS W. THRASH JR.
U. S. D. C. Atlanta

JAN 19 2011

FEB 3 2011

JAMES N. HATTEN, Clerk
By: *[Signature]* Deputy Clerk
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES N. HATTEN, Clerk
By: *[Signature]* Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff,

v.

GOTHIC LENS, LLC, a Georgia
Limited Liability Corporation, also
doing business as Kim Lens
Sales, and

DA YOUNG KIM, also doing business
as Gothic Lens and Kim Lens
Sales, individually, and in her
official capacity as managing
member of GOTHIC LENS, LLC,

Defendants.

Case No. _____

TWT

CONSENT DECREE AND ORDER
FOR CIVIL PENALTIES,
PERMANENT INJUNCTION, AND
OTHER RELIEF

1:11-CV-0159

WHEREAS, Plaintiff, the United States of America, has commenced this action by filing the Complaint herein; Defendants have waived service of the Summons and Complaint; the parties have been represented by the attorneys whose names appear hereafter; and the parties have agreed to settlement of this action upon the following terms and conditions, without adjudication of any issue of fact or law;

THEREFORE, on the joint motion of Plaintiff and Defendants, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

FINDINGS

1. This Court has jurisdiction of the subject matter and of the parties pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57b.

2. Venue is proper as to all parties in the Northern District of Georgia under 28 U.S.C. §§ 1391(b)-(d) and 15 U.S.C. § 53(b).

3. The activities of Defendants are in or affecting commerce as 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 Defendants under Sections 9(a) and 9(b) of the Fairness to Contact Lens Consumers Act ("FCLCA"), 15 U.S.C. §§ 7608(a) and (b), and Sections 5(a)(1), 5(m)(1)(A), 13(b), 16(a), and 19(a)(1) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), 56(a), and 57b(a)(1).

5. Defendants have entered into this Consent Decree and Order for Civil Penalty, Permanent Injunction, and Other Relief ("Order") freely and without coercion. Defendants further acknowledge that they have read the provisions of this Order and are prepared to abide by them.

6. Plaintiff and Defendants hereby waive all rights to appeal or otherwise challenge or contest the validity of this Order.

7. Plaintiff and Defendants stipulate and agree that the entry of this Order shall constitute a full, complete, and final settlement of this action.

8. Defendants have agreed that this Order does not entitle Defendants to seek or to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, and Defendants further waive any rights to attorneys' fees that may arise under said provision of law.

9. Entry of this Order is in the public interest.

DEFINITIONS

10. "Individual Defendant" means Da Young Kim.

11. "Corporate Defendant" means Gothic Lens, LLC, also doing business as Kim Lens Sales, and its successors and assigns.

12. "Defendants" means the Individual Defendant and the Corporate Defendant, individually, collectively, or in any combination.

13. "Rule" means the Federal Trade Commission's Contact Lens Rule, 16 C.F.R. Part 315.

14. The term "contact lens" means any contact lens for which State or Federal law requires a prescription.

15. The term "contact lens prescription" means a prescription, issued in accordance with State and Federal law, that contains sufficient information for the complete and accurate filling of a prescription for contact lenses, including the following:

- a. The name of the patient;
- b. The date of the examination;
- c. The issue date and expiration date of prescription;
- d. The name, postal address, telephone number, and facsimile telephone number of prescriber;
- e. The power, material, or manufacturer or both of the prescribed contact lens;
- f. The base curve or appropriate designation of the prescribed contact lens; and
- g. In the case of a private label contact lens, the name of the manufacturer, trade name of the private label brand, and, if applicable, trade name of the equivalent brand name.

16. "Contact lens fitting" means the process that begins after an initial eye examination for contact lenses and ends when a successful fit has been achieved or, in the case of a renewal prescription, ends when the prescriber determines that no change in the existing prescription is required, and such term may include:

- a. An examination to determine the lens specifications;
- b. Except in the case of a renewal of a contact lens prescription, an initial evaluation of the fit of the contact lens on the eye; and
- c. Medically necessary follow-up examinations.

17. "Private label contact lenses" means contact lenses that are sold under the label of a seller where the contact lenses are identical to lenses made by the same manufacturer but sold under the labels of other sellers.

18. "Direct communication" means completed communication by telephone, facsimile, or electronic mail.

19. "Prescriber" means, with respect to contact lens prescriptions, an ophthalmologist, optometrist, or other person permitted under State law to issue prescriptions for contact lenses in compliance with any applicable requirements established by the United States Food and Drug Administration. "Other person," for purposes of this definition, includes a dispensing optician who is permitted under State law to issue prescriptions and who is authorized or permitted under State law to perform contact lens fitting services.

20. "Net proceeds" means any sum remaining after satisfaction of senior recorded liens, and after payment to third parties of reasonable and customary fees and commissions.

INJUNCTION

21. Defendants, their successors and assigns, and their officers, agents, representatives, and employees, and all persons in active concert or participation with any one of them, who receive actual notice of this Order by personal service or otherwise, are hereby enjoined, directly or through any corporation, subsidiary, division, website, or

other device, from selling contact lenses to a consumer without a contact lens prescription for that consumer that is either:

- a. Presented to Defendants by the consumer or prescriber directly or by facsimile; or
- b. Verified by direct communication with the prescriber.

22. Defendants, their successors and assigns, and their officers, agents, representatives, and employees, and all persons in active concert or participation with any one of them, who receive actual notice of this Order by personal service or otherwise, are hereby enjoined, directly or through any corporation, subsidiary, division, website, or other device, from failing to maintain the following:

- a. For prescriptions presented to Defendants as described in Paragraph 21(a), the prescription itself, or the facsimile version thereof (including an email containing a digital image of the prescription); and
- b. For verification requests made by Defendants as described in Paragraph 21(b):
 1. If the communication occurs via facsimile or email, a copy of the verification request, including the information provided to the prescriber regarding the consumer, and confirmation of the completed transmission thereof, including a record of the

date and time the request was made.

2. If the communication occurs via telephone, a log
 - (a) describing the information provided to the prescriber;
 - (b) setting forth the date and time the request was made;
 - (c) indicating how the call was completed; and (d) listing the names of the individuals who participated in the calls.

c. For communications from the prescriber, including prescription verifications:

1. If the communication occurs via facsimile or email, a copy of the communication and a record of the time and date it was received;
2. If the communication occurs via telephone, a log describing the information communicated, the date and time that the information was received, and the name of the individuals who participated in the call.

23. Defendants, their successors and assigns, and their officers, agents, representatives, and employees, and all persons in active concert or participation with any one of them, who receive actual notice of this Order by personal service or otherwise, are hereby enjoined, directly or through any corporation, subsidiary, division, website, or other device, from violating any provision of the Contact Lens Rule, 16 C.F.R. Part 315,

and as the Rule may hereafter be amended. A copy of the Rule is attached hereto as Attachment A and incorporated herein as if fully set forth verbatim.

CIVIL PENALTY

24. Defendants shall pay to Plaintiff a civil penalty, pursuant to Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), in the amount of fifty thousand dollars (\$50,000), which payment shall be suspended except for the net proceeds, if any, from the sale of one automobile, as described below in subparagraph A, subject to the provisions of the section of this Order entitled "RIGHT TO REOPEN." Defendants are jointly and severally responsible for payment of the civil penalty. The payment and the transfer of any net proceeds from the sale of the identified automobile shall be made as follows:

- A. Defendants agree to relinquish all rights, title, and interest in the 2008 BMW 335i, Vehicle Identification Number WBAWL73518PX9922, owned by Individual Defendant. Upon entry of this Order, Defendants shall immediately retain an auction company or other company, designated by a representative of the FTC, and direct the company to take all necessary steps to sell said 2008 BMW 335i at a public auction; or, alternatively, at the FTC representative's designation, Defendants shall sell all of their rights, title, and interest in the vehicle to such designated company.

Defendants shall take all reasonable and necessary steps to assist in the sale of the 2008 BMW 335i; and

B. Within ten (10) business days of the transfer of any interests in said 2008 BMW 335i:

1. Defendants shall pay any outstanding liens on said 2008 BMW 335i and turn over the full amount of the remaining net proceeds of the sale, auction, foreclosure, or other transfer of the motor vehicle, to their attorney, who shall hold the entire sum for no purpose other than payment to the Treasurer of the United States. Within five (5) days of the receipt of such funds, Defendants' attorney shall transfer the full amount in the form of a wire transfer or certified cashier's check made payable to the Treasurer of the United States. The check and/or written confirmation of the wire transfer shall be delivered in accordance with procedures specified by the Office of Consumer Litigation, Civil Division, U.S. Department of Justice, Washington, D.C. 20530; and
2. Defendants shall provide counsel for the FTC with: (1) proof of such transfers, including the amounts paid by the purchaser for said 2008 BMW 335i, (2) proof of the payment of any

outstanding liens on the vehicle, and (3) proof of all payments by Defendants of any fees, commissions, closing costs, and any other charges or other payments.

25. Defendants relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law. Defendants shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise.

26. Defendants agree that the facts as alleged in the Complaint filed in this action shall be taken as true, without further proof, in any subsequent civil litigation filed by or on behalf of the Commission to enforce its rights to any payment or money judgment pursuant to this Order.

27. Defendants agree that the judgment represents a civil penalty owed to the United States Government, is not compensation for actual pecuniary loss, and, therefore, as to Individual Defendant, it is not subject to discharge under the Bankruptcy Code pursuant to 11 U.S.C. § 523(a)(7).

28. In accordance with 31 U.S.C. § 7701, Defendants are hereby required, unless they have already done so, to furnish to the Federal Trade Commission ("FTC" or "Commission") their taxpayer identifying numbers (social security number or employer identification number), which shall be used for purposes of collecting and reporting on any delinquent amount arising out of their relationship with the government.

29. In the event of default on the payment required to be made under this

Paragraph, the entire unpaid civil penalty, together with interest computed under 28 U.S.C. § 1961 (accrued from the date of default until the date of payment) shall be immediately due and payable.

30. Defendants shall cooperate fully with Plaintiff and the Commission and their agents in all attempts to collect the amount due pursuant to this Paragraph if Defendants fail to pay fully the amount due at the time specified herein. In such an event, Defendants agree to provide Plaintiff and the Commission with their federal and state tax returns for the preceding two (2) years, and to complete new standard-form financial disclosure forms fully and accurately within ten (10) business days of receiving a request from Plaintiff or the Commission to do so. Defendants further authorize Plaintiff and the Commission to verify all information provided on their financial disclosure forms with all appropriate third parties, including, but not limited to, financial institutions.

RIGHT TO REOPEN

31. **IT IS FURTHER ORDERED** that

- A. The Commission's agreement to this Order is expressly premised upon the truthfulness, accuracy, and completeness of the individual and business financial statements submitted to the Commission by the Defendants and signed and dated July 25, 2010 and Individual Defendant's Sworn Addendum to the Individual Financial Statement submitted to the Commission and signed and dated on July 28, 2010.

Defendants stipulate that all of the materials that Defendants submitted are truthful, accurate, and complete. These documents contain material information upon which the Commission relied in negotiating and agreeing to the terms of this Order.

- B. If, upon motion by the Commission, a Court determines that Defendants made a material misrepresentation or omitted material information concerning Defendants financial conditions, then the Court shall lift the suspension described in the section of this Order entitled "CIVIL PENALTY" and reinstate the full civil penalty against Defendants and for Plaintiff in the amount of fifty thousand dollars (\$50,000), less any amount already paid by or on behalf of Defendants to Plaintiff as net proceeds of the automobile sale described in Paragraph twenty-four (24) of this Order, *provided, however,* that in all other respects this Order shall remain in full force and effect unless otherwise ordered by the Court; and *provided,* further, that proceedings instituted under this provision would be in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including but not limited to contempt proceedings, or any other proceedings that the Commission may initiate to enforce this Order.

COMPLIANCE MONITORING

32. 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 Defendants' 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. having its representatives pose 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 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 and 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)).

COMPLIANCE REPORTING

33. **IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this Order be monitored:
- A. For a period of five (5) years from the date of entry of this Order,
1. Individual Defendant shall notify the Commission of the following:
- a. Any changes in such Defendant's residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

- b. Any changes in such Defendant's employment status (including self-employment), and any change in her ownership of 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 such 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 such Defendant's duties and responsibilities in connection with the business or employment; and
- c. Any changes in such Defendant's name or use of any aliases or fictitious names within ten (10) days of such change;

- 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 such 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 it 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 Individual Defendant:
 - a. Such Defendant's then-current residence address, mailing addresses, and telephone numbers;
 - b. Such Defendant's then-current employment status (including self-employment), including the name, addresses, and telephone numbers of each business that

such Defendant is affiliated with, employed by, or performs services for; a detailed description of the nature of the business; and a detailed description of such 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 and the Compliance Guides entitled, *The Contact Lens Rule: A Guide for Prescribers and Sellers* and *Complying with the Contact Lens Rule* (collectively, the "Compliance Guides"), attached hereto as Attachments B and C, obtained pursuant to the Section titled "Distribution of this Order;"
- b. Any other changes required to be reported under Subsection A of this Section;
- c. A statement describing in detail the process for obtaining copies of contact lens prescriptions for orders obtained through all sales channels, including,

- but not limited to, telephone sales and Internet sales;
- d. A statement describing the process for verifying contact lens prescriptions for orders obtained through all sales channels, including, but not limited to, telephone sales and Internet sales;
 - e. A sample copy of each different type of communication used to request prescription information from consumers, including, but not limited to, any online form, email message, telephone script, web page, or screen;
 - f. A sample copy of each different type of communication used to submit verification requests to prescribers, including, but not limited to, any fax form, email message, or telephone script;
 - g. A statement describing Defendants' procedure for maintaining the records required by the Rule, including, but not limited to, contact lens prescriptions directly presented to Defendants, prescription verification requests submitted to prescribers, and direct communications received from prescribers; and

- h. A list of persons or employees who are responsible for collecting and maintaining compliance-related information.
- 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 (not the U.S. Postal Service) all reports and notifications to the Commission that are required by this Order to:

Associate Director for Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
RE: US v. Gothic Lens, LLC

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.

- E. For purposes of compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with each Defendant.

RECORDKEEPING

34. **IT IS FURTHER ORDERED** that for a period of eight (8) years from the date of entry of this Order, Corporate Defendant and Individual Defendant, for any business entity for which they, individually or collectively, are the majority owner or directly or indirectly control, 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 or indirectly, such as through a third party,) and any responses to those complaints or requests;

- E. Copies of all sales scripts, training materials, advertisements, or other marketing materials for contact lenses; and
- F. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, a sample copy of every different type of communication used to request prescription information from consumers or to submit verification requests to prescribers, 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." Electronic copies shall include all text and graphic files, audio scripts, and other computer files used to present information to consumers and/or prescribers.

DISTRIBUTION OF ORDER

35. **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 this Order as directed below:

- A. Corporate Defendant: Corporate Defendant shall deliver a copy of this Order and the Compliance Guides 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 this 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 an Individual Defendant controls, directly or indirectly, or in which such Defendant has a majority ownership interest, such Defendant shall deliver a copy of this Order and the Compliance Guides 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 this 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 Individual Defendant is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, such Defendant shall deliver a copy of this Order and the Compliance Guides to all principals and managers of such business before engaging in such conduct.
- D. Defendants shall secure a signed and dated statement acknowledging receipt of this Order and the Compliance Guides, within thirty (30) days of delivery, from all persons receiving a copy of this Order and the Compliance Guides pursuant to this section, and shall maintain these statements in accordance with the Section of this Order entitled "Recordkeeping."

ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS

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

RETENTION OF JURISDICTION

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

JUDGMENT IS THEREFORE ENTERED pursuant to all the terms and conditions recited above.

Dated this 3 Day of February, 2011.



UNITED STATES DISTRICT JUDGE

**FOR THE PLAINTIFF:
FOR THE UNITED STATES OF AMERICA**

**TONY WEST
Assistant Attorney General
Civil Division
U.S. DEPARTMENT OF JUSTICE**

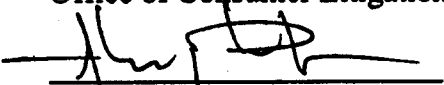
**SALLY QUILLIAN YATES
United States Attorney
Northern District of Georgia**



**MINA RHEE
Assistant U.S. Attorney
Northern District of Georgia
600 Richard B. Russell Federal Building
75 Spring Street, S.W.
Atlanta, GA 30303-3309
Phone: 404-581-6000
GA Bar No. 602047**

**EUGENE M. THIROLF
Director
Office of Consumer Litigation**

**KENNETH L. JOST
Deputy Director
Office of Consumer Litigation**



**ALAN PHELPS
Trial Attorney
Office of Consumer Litigation
U.S. Department of Justice
PO Box 386
Washington, D.C. 20044
Phone: 202-307-6154
Alan.Phelps@usdoj.gov**

FOR THE FEDERAL TRADE COMMISSION:

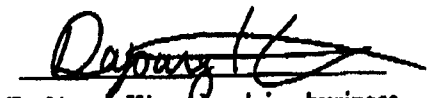


KAREN JAGIELSKI

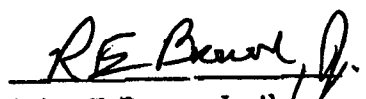
Attorney

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2509 (telephone)
(202) 325-3259 (facsimile)

FOR THE DEFENDANTS:



Da Young Kim, also doing business
as Gothic Lens and Kim Lens Sales,
individually, and in her official
capacity as managing member of
GOTHIC LENS, LLC



Robert E. Browne, Jr., Esq.
Troutman Sanders, LLP
55 West Monroe St., Suite 3000
Chicago, IL 60603
(312) 759-1923 (telephone)
(773) 877-3739 (facsimile)