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Nothing raised in Debtor Pegasus' contempt motion requires the Court's immediate attention. It is simply a rehash of previously rejected arguments and red herrings. The conduct complained of, if true, is trivial in nature and amounts to some anomalous training errors and technical glitches that have already been fixed. DIRECTV has been reasonable and accommodating in addressing any concerns Pegasus has regarding its subscriber information files, but Pegasus still insists on menacing the Court with a false emergency. The Court should either deny the motion or allow DIRECTV to respond on a regular noticed motion basis.

DIRECTV has diligently and in good faith complied with this Court's Order of June 10, 2004. DIRECTV has not accessed or utilized the subscriber information in Pegasus' files in any manner inconsistent with Pegasus' ownership interests. Since June 10, DIRECTV has put in place numerous safeguards to ensure that subscriber information in Pegasus' files is not accessed or utilized by DIRECTV's customer service representatives ("CSRs"). In a cautious effort to comply with the June 10 Order, DIRECTV has even truncated its access to certain Pegasus-related subscriber information where it has historically and traditionally had access.

Pegasus' "evidence" of purported misuse of subscriber information is grossly exaggerated and misleading and does not warrant an emergency hearing on the serious charge that DIRECTV is in contempt of this Court's Order:

- Pegasus asserts that the broadcast of Channel 205 is a violation of the Court's Order, even though Pegasus made this argument before and the Court did not make a finding that broadcasting such messages violated the automatic stay. Indeed, DIRECTV is able to broadcast Channel 205 and on-screen display messages ("OSDs") to subscribers in Pegasus territory without using any subscriber information in Pegasus' files and without interrogating the billing

system period. Rather, DIRECTV broadcasts messages nationwide over open view channels and then blocks authorization to view such channels in DIRECTV territories and in non-Pegasus NRTC territories based on zip code information that is known from the geographic limitations in contracts – information that is, in fact, a matter of public record.

- Allegations that DIRECTV CSRs have engaged in a campaign to convert existing Pegasus’ subscribers through use of the shared billing system are flat wrong. In fact, since June 10, 2004, DIRECTV has explicitly instructed its CSRs to *not* view information to which these CSRs otherwise have historically had “read-only” access.² For the past ten years, DIRECTV’s CSRs have had “read-only” access to the NRTC/Pegasus side of the shared billing system in order to facilitate customer service inquiries. Also, as further implemented on June 14, 2004, any Pegasus territory callers who call 1-800-DIRECTV to request transition of their service to DIRECTV are forwarded to a specific group of CSRs who have no access whatsoever to the main shared billing system and who therefore cannot view customer information on the NRTC/Pegasus side of that billing system.
- DIRECTV has not initiated an effort to breach the “firewall” by deleting Pegasus’ new “pending” accounts. Pegasus makes this vague and misleading allegation without fully knowing or investigating the facts. (See Brosnahan 2d Decl. ¶ 9 (“I have not been able to determine why these pending accounts are being voided, or whether they are re-entered as DIRECTV accounts.”).) The action complained about is nothing more than a bugaboo in the Order Management System – just

² “Read-only” access means that the CSR can view but can change or delete information in a customer account.

part of the anomalies that arise in the course of servicing 12.6 million subscribers and fulfilling 40,000 work orders on average per day. Since learning about this glitch in Pegasus' emergency contempt motion, DIRECTV has taken steps to fix the problem. Nevertheless, Pegasus insists on pressing forward with its unnecessary motion.

In Part I of this brief, we explain how Pegasus wildly overstates its ownership rights to so-called "Subscriber information" and completely ignores DIRECTV's rights to such information. In Part II, we respond to the flimsy evidence that Pegasus offers in support of its argument that DIRECTV violated the June 10 Order. Finally, in Part III, we apply the facts to the high standard for civil contempt, a standard that Pegasus cannot meet here.

I. PEGASUS OVERSTATES ITS OWNERSHIP INTEREST IN SUBSCRIBER INFORMATION.

Pegasus has taken a radical view as to the extent of its ownership rights to subscriber information. Pegasus overstates its rights and understates DIRECTV rights. First, Pegasus' Member Agreement – which is with NRTC, not DIRECTV³ – states nothing about an *exclusive* ownership interest in "Subscriber information":

Subscriber Information. NRTC acknowledges that Member has *substantial* proprietary interests and rights to Subscriber information and agrees to maintain all Subscriber information on a strictly confidential basis. NRTC and Member each further covenant that except as provided in Section 4(h) [Suspension of Services for Non-Payment] and Section 14 [Breach by Member] under no circumstances will it use or allow others to use the Subscriber information for any reason other than to verify amounts due under the terms of this Agreement and for purposes as are approved in advance and in writing by the other party. In the event [DIRECTV] distributes Non Select Services to a Subscriber,

³ (See Debtors' No. 2 ¶ 26 (DIRECTV "is not bound by or liable to NRTC or Member under the provisions of this Agreement").)

NRTC and Member recognize that *[DIRECTV] shall also have proprietary interests in such Subscriber's information.*

(Debtors' No. 2 § 20(b) (emphasis added).)

Indeed, Pegasus' rights cannot be *exclusive* when DIRECTV is expressly recognized to have overlapping proprietary rights in certain subscribers' information. Namely, DIRECTV owns subscriber information related to Non Select Services (*id.*), which are services, such as NFL Sunday Ticket™, where Pegasus selects not to participate in sharing DIRECTV's upfront costs of carrying such programming. (*Id.* § 2(b).) DIRECTV also has proprietary interests in Pegasus territory subscriber information where the customer subscribes to programming not transmitted over the "HCG Frequencies." The Member Agreement only provides Pegasus with rights "to market, sell and retain revenue from Programming . . . transmitted over the HCG Frequencies." (*Id.* § 2(a).) Thus, for DBS services transmitted over non-HCG Frequencies, such as premium movie channels, advanced services such as TiVo®, and foreign language programming, Pegasus markets and sells such services as a sales agent for DIRECTV, and DIRECTV maintains an ownership interest in the information collected for such subscribers. In all, DIRECTV has a proprietary ownership interest in a substantial portion of Pegasus territory subscriber information.

Pegasus' asserted "*exclusive*" right to subscriber information is further belied by NRTC's board policies, which are expressly incorporated by reference into the Member Agreement (Debtors' No. 1 § 7(d) ("Member shall comply with and be bound by the provisions of the Articles of Incorporation and Bylaws of NRTC and by such policies as NRTC may adopt from time to time.")):

The Association and the DBS Participant shall be entitled to deal with and use any of the Subscriber information under the Marketing Agreement free and clear of any claim of interference with or misappropriation of proprietary interests

(Pilmer Decl. Ex. A, NRTC's DBS Bd. Policies at CSATT 182-83.) The cover memo to these Board policies is likewise telling:

The Marketing Agreement currently recognizes that a DBS participant has "a substantial proprietary interest" in subscriber information. It does not state, however, that a DBS participant has an "exclusive" proprietary interest in such subscriber information.

(Id. at CSATT 155; see also NRTC CEO Phillips Decl. Opp'n TRO ¶ 65 ("NRTC has never agreed with Pegasus' claims that it has the sole 'ownership' of subscriber information. NRTC has always understood that its DBS Participants, NRTC and DIRECTV each have certain substantial proprietary rights to some information about subscribers.")) Thus, while acknowledging the Members' proprietary interests in subscriber information, NRTC does not disavow its own proprietary interest in or right to use such information.

Moreover, NRTC's DBS Board Policy No. 9, which addresses the use of subscriber information, specifically deals with what happens upon termination of the Member Agreement:

If DBS Participant ceases to be a Member or Associate of NRTC for any reason whatsoever other than in conjunction with a transfer of its Marketing Agreement to another Member or associate (whether due to voluntary withdrawal from the Association, termination for cause or otherwise), then:

1. Termination of DBS Services: all rights, title and interest of the DBS Participant with respect to the Marketing Agreement shall terminate and revert to the Association which shall be entitled to immediately cease delivery of DBS Services to or for such DBS Participant's account

(Pilmer Decl. Ex. A at CSATT 182.) Thus, upon termination, all of Pegasus' rights, title, and interest in the Member Agreement, including its subscriber information, are transferred to NRTC. This is consistent with Pegasus' obligation under its Member Agreement to not use or disclose the subscriber information it collected in connection with marketing and selling to DBS customers for a period of five years following the termination of the Member Agreement.

(Debtors' No. 1 § 20(c).) In addition, prior to Pegasus' bankruptcy, NRTC transferred all rights, title, and interest in subscriber information to DIRECTV. Thus, Pegasus' rights to "Subscriber information" are immaterial following the termination date of the Member Agreement.

II. DIRECTV HAS NOT USED PEGASUS' SUBSCRIBER INFORMATION FILES IN VIOLATION OF THE COURT'S JUNE 10 ORDER.

A. DIRECTV does not use Pegasus' subscriber information files in broadcasting Channel 205.

Since DIRECTV began delivering DBS services to households in 1994, it has broadcasted free informational channels and OSD messages to households in both DIRECTV and NRTC territories. (Pacek Decl. ¶ 3.) In addition, DIRECTV has a long history of broadcasting free informational channels and OSD messages that are available in limited geographic areas. (*Id.*) For example, DIRECTV is currently broadcasting a message over Channel 246 urging consumers in Kentucky and Arizona to fight satellite taxes; customers in other states are unable to view Channel 246. (*Id.*) DIRECTV's recent broadcast of messages on Channel 205 is no different than its broadcast of similar limited "freeview" channels over the past ten years. (*Id.*)⁴

Likewise, the process for delivering programming to customers is much the same as it was ten years ago. At the point of activation, a customer provides his or her zip code, cable status, and access card number – in addition to other information – to a CSR. (*Id.* ¶ 5.) The CSR enters that information into the billing system. (*Id.*) The billing system then informs the Conditional Access Management Center ("CAMC") that a particular access card is to receive whatever programming the customer purchased. (*Id.*) The CAMC links the customer's

⁴ Indeed, if such conduct constituted misappropriation or conversion of proprietary information, then the statute of limitations ran out long ago. In fact, in 2000, Pegasus sued DIRECTV on the same misappropriation theory it asserts here, and Pegasus later dismissed those claims. (Pilmer Decl. Ex. B, Stip. Dismissal re Trade Secret Claims.) Too much time has now passed for Pegasus to resurrect such claims. *See* Cal. Civ. Code § 3426.6 (2004) (3-year statute of limitations under the Uniform Trade Secrets Act).

programming package, zip code, and cable status to the customer's access card number and then authorizes certain channels to be delivered via satellite to the customer's television screen at home. (Id.)

In delivering freeview channels and OSD messages (referred to as "crawls" by Pegasus), no actions are required by CSRs in the billing system. (Id. ¶ 6.) DIRECTV is able to authorize the delivery of such channels and messages through the CAMC without interrogating the billing system. (Id.)

DIRECTV is also able to target channels and OSD messages to customers in limited geographic areas by running applications in the CAMC to either (i) allow only certain territories to view certain channels and messages or (ii) block access to otherwise open view channels and messages in certain territories. (Id. ¶ 7.) The latter case is what occurs with Channel 205, as well as with the recent OSD message: "See Channel 205 for important news!" (Id.) The only access card numbers flagged in the CAMC are those for non-Pegasus territory customers. (Id.) The criteria used to flag access cards in this instance were DIRECTV ownership and non-Pegasus NRTC territory definitions. (Id.)

The broadcast of Channel 205 cannot constitute a use of subscriber information from Pegasus' files in violation of the June 10 Order.⁵ If it were, then the delivery of all programming to Pegasus territory subscribers would be a violation of the June 10 Order. After all, DIRECTV necessarily must use access card information in the CAMC in order for the delivery of programming services to customers to work. (Id. ¶ 8.) Certainly, any action by DIRECTV that is consistent with ten years of pre-petition practice cannot be deemed "inconsistent" with Pegasus' post-petition rights in violation of the automatic stay.

⁵ Moreover, Channel 205 is transmitted over a non-HCG Frequency, i.e., a frequency not covered by Pegasus' contract rights. (Pacek Decl. ¶ 4; Debtors' No. 2 § 2(a).)

B. DIRECTV CSRs have not used information from Pegasus' subscriber information files in a manner inconsistent with Pegasus' ownership rights.

For ten years, DIRECTV CSRs have had “read-only” access to customer account information for subscribers in NRTC/Pegasus territories. (Id. ¶ 12.) That is, DIRECTV’s CSRs can view but are unable to modify or delete information for Pegasus customer accounts in the parties’ shared billing system, which is known as STMS-1.⁶ (Id.) STMS-1 provides this read-only access by using a software firewall that segregates information based on whether the customers are in DIRECTV or NRTC territory. (Id.) The firewall and the read-only access have served useful purposes in ensuring territorial integrity, protecting customers from duplicative billing, and facilitating customer service by allowing DIRECTV CSRs to direct NRTC territory customers to their local providers. (Id.)

The STMS-1 firewall is still in effect today. In fact, none of the declarations submitted by Pegasus’ witnesses state that DIRECTV CSRs ever changed or deleted their subscriber information. (Kassab Decl.; Magee Decl.; Thomas Decl.; Shaver Decl.) This is because the firewall has always prevented such changes. At most, Pegasus’ witnesses say that DIRECTV CSRs looked at their addresses in order to answer their questions or to confirm where to send the transition packets they requested. (Kassab Decl. ¶¶ 7-15; Magee Decl. ¶¶ 5-9; Thomas Decl. ¶¶ 2-12; Shaver Decl. ¶¶ 3-7.) The end result of this conduct? Nothing happened to the customers other than that they were sent some materials that they requested.

Despite the fact that this viewing of subscriber information is not inconsistent with the DIRECTV CSRs’ historical read-only access, DIRECTV still, in an abundance of caution,

⁶ “STMS” stands for Subscriber Transaction Management System. (Id. ¶ 9.) The “-1” denotes that this is the original and primary billing system used by DIRECTV. (Id.)

emphasized to its CSRs immediately after the June 10 hearing that they are prohibited from viewing this information:

IMPORTANT DIRECTV POLICY REMINDER: If an NRTC customer is trying to get information about their NRTC account, DO NOT access, review, use or provide ANY information from their NRTC account, no matter how persistent the customer may be. All inquiries MUST be referred back to the NRTC for response. The Court handling Pegasus' bankruptcy on 6/10/04 reinforced that DIRECTV and its ECs may not access, use, or provide, in ANY fashion, subscriber information in Pegasus files. Compliance is mandatory.

(Johnson Decl. ¶ 9 & Ex. B.) In the following days, DIRECTV issued several similar reminders and retrained all CSRs in the new policy. (*Id.* ¶¶ 9, 10, 16.) Thus, the incidents described in Pegasus' declarations, if they occurred at all, were examples of where DIRECTV's training and policy was not followed.

Also, starting on or about June 2, 2004, all incoming calls from persons who have accounts with Pegasus have been routed to a specialized group stationed in Miami, Florida (the "Florida Group"), rather than to the over 8,000 CSRs in the general pool. (*Id.* ¶ 6.) In this way, DIRECTV has been able to better control actions and provide more specialized quality control and training to a smaller group focused on incoming calls from Pegasus subscribers. (*Id.*) Calls from potential or new DIRECTV-platform subscribers, on the other hand, are not handled by the Florida Group, which is specially trained to deal only with customers who are interested in switching their Pegasus accounts to DIRECTV. (*Id.* ¶¶ 5-6)

As of June 14, 2004, two business days after the Court's order and the day DIRECTV first learned of Pegasus' complaints with the Florida Group CSRs, the Florida Group stopped having access to any portion of the shared STMS-1 billing system. (*Id.* ¶ 6-8.) Thus, DIRECTV has further isolated the Florida Group from other CSRs. (*Id.* at 15.) Even if a Florida Group

CSR has the inclination to disregard DIRECTV's policies and training in order to use STMS-1 information to assist a Pegasus customer, it is impossible for that CSR to do so. (Id.)

C. DIRECTV is not deleting Pegasus' new pending accounts.

Contrary to Pegasus' vague insinuation, DIRECTV is not involved in a clandestine effort to breach the "firewall" and sabotage Pegasus' new "pending" accounts or convert them to DIRECTV accounts. (Id. ¶ 17.) It should come as no surprise that given the enormous volume of customers being serviced through the billing system, certain anomalies or errors might occur. (Id. ¶¶ 16-18.) And there is a logical and well-known explanation for why non-Pegasus Login IDs are found in Pegasus' side of STMS-1. Historically, there are certain instances, taking place with the knowledge and consent (and often at the request) of NRTC and Pegasus, where (i) DIRECTV personnel override the billing system firewall to fix certain errors in customer accounts, (ii) automated batch changes to the billing system are required to make mass adjustments, (iii) DIRECTV agents supporting national commercial accounts also support NRTC commercial accounts and therefore have access to manage those accounts in the billing system, (iv) DIRECTV personnel provide "emergency" 24/7 customer troubleshooting and account maintenance support, and (v) equipment retailers use the Order Management System ("OMS") to place or cancel work orders at the point of purchase. (Id. ¶ 15.)

As regards the situation complained of in the Second Declaration of Gary W. Brosnahan, filed in connection with the instant contempt motion, it appears that a certain customer's requested cancellation of an order for service resulted in a Pegasus account being voided. (Id. ¶ 16.) DIRECTV's investigation of this matter determined that the cause of this voiding was a temporary flaw in the OMS. (Id. ¶ 17.) And DIRECTV promptly took measures to correct the error once it was identified. (Id. ¶ 16.) Normally, such a matter is resolved through an orderly and established business process. (Id.) Here, however, Pegasus chose to ignore that process and

go straight to the Court with a hastily-filed contempt motion. (Id.) Moreover, this particular problem was miniscule⁷ and its financial impact inconsequential – so far, DIRECTV has only found only three (3) instances of improper voiding out of approximately 1.1 million accounts. (Id. ¶ 18.) By the June 18, 2004, the OMS software bug is expected to be corrected.

III. PEGASUS FAILS TO MEET THE HIGH STANDARD FOR PROVING CONTEMPT.

A complainant must prove civil contempt by *clear and convincing evidence*. AccuSoft Corp v. Palo, 237 F.3d 31, 47 (1st Cir. 2001). Contempt may only be established if the order allegedly violated is “clear and unambiguous” and the party enjoined is “able to ascertain from the four corners of the order precisely what acts are forbidden.” Id. (quoting Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16-17 (1st Cir. 1991)). Courts are to construe ambiguities and omissions in court orders as redounding to the benefit of the person charged with contempt. Id.

A finding of contempt should not issue where diligent, good faith efforts result in substantial compliance with the underlying order. Id. (citing Langton v. Johnson, 928 F.2d 1206, 1220 (1st Cir. 1991)). “The determination of whether substantial compliance has been achieved will ‘depend on the circumstances of each case, including the nature of the interest at stake and the degree to which noncompliance affects that interest.’” Id. (quoting Fortin v. Comm’r of Mass. Dep’t or Pub. Welfare, 692 F.2d 790, 795 (1st Cir. 1982)). “For this reason, a court may decline to find a party in contempt despite the failure to achieve ‘letter perfect compliance’ with the order at issue.” Id. (quoting Langton, 928 F.2d at 1222).⁸

⁷ All that apparently happened here was that a customer wanted to cancel their account and the wrong person granted the request.

⁸ Accord Go-Video, Inc. v. Motion Picture Ass’n of Am., 10 F.3d 693, 695 (9th Cir. 1993) (holding that substantial compliance with a court order is a defense to civil contempt and is not vitiated by a “few technical violations” where every reasonable effort has been made to comply; no contempt order should issue where actions “appear to be based on a good faith and reasonable interpretation of the court’s order”); Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1516 (11th Cir. 1990) (“Conduct that evinces substantial, but not

(Continued...)

Here, DIRECTV has exhibited diligent, good faith efforts in complying with the June 10 Order. With regard to Channel 205, Pegasus previously made the argument that showing such messages violated the automatic stay, and the Court made no finding that Channel 205 was a violation. A contempt order cannot issue when the conduct complained of was not even deemed wrongful in the underlying order. With regard to CSRs viewing read-only access of Pegasus account information in STMS-1 – something they have historically had the ability to do – DIRECTV has taken the extreme step of cutting off all STMS-1 access by CSRs who are dedicated to handling incoming calls from current Pegasus subscribers interested in switching service providers. Before taking this draconian measure, DIRECTV had instituted new restrictive policies and had retrained its thousands of CSRs in these policies. DIRECTV's actions demonstrate exceedingly diligent efforts to comply with the June 10 Order. Finally, a contempt order should not issue where Pegasus has hastily asserted vague allegations and fears that DIRECTV is deleting "pending" Pegasus accounts and switching them to DIRECTV, particularly when the complained of act was only a technical glitch that has already been fixed. These allegations do not satisfy the heightened standard of clear and convincing evidence of a Court Order violation.

A finding of contempt is further unwarranted because the June 10 Order does not define Pegasus' "Subscriber information" other than to say "as defined under the Member Agreements." The Member Agreement's definition of "Subscriber information," if there is one, is not a model of clarity. (See Debtors' No. 2 § 20(b).) See Fonar Corp. v. Deccaid Servs., Inc., 983 F.2d 427, 429-30 (2d Cir. 1993) (finding that district court's simple order prohibiting

complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance."); Drywall Tapers, Local 1974 v. Local 530, 889 F.2d 389, 394 (2d Cir. 1989) ("A court may hold a party in civil contempt only if . . . 'the defendant has not been reasonably diligent and energetic in attempting to accomplish what was ordered.'" (citation omitted)).

defendants from using plaintiff's "Maintenance Software" was "insufficient notice to justify a sanction as harsh as contempt"). And Pegasus' overly broad and ambiguous definition of "Subscriber information" is different from what is actually written in the Member Agreement. See supra Part I. As such, DIRECTV can only interpret the June 10 Order in a manner that is reasonable based on historical practices in handling subscriber information. In that regard, DIRECTV has gone above and beyond what is necessary to comply with the Order.

Pegasus cannot meet the high standard for contempt, but even if it could, the relief sought by Pegasus is far overreaching. "[I]n levying contempt sanctions, the court must exercise the least possible power suitable to achieve the end proposed." Project B.A.S.I.C., 947 F.2d at 16 (citing Spallone v. United States, 493 U.S. 265, 280 (1990)). Furthermore, attorney fees should not be awarded based on civil contempt unless there has been willful disobedience. See Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 130 (2d Cir. 1979). If any relief at all is warranted, it is only that the Court should clarify its definition of "Subscriber information" and should do so after the parties have had adequate time to present arguments to the Court, not two days after Pegasus filed an emergency motion.

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For the foregoing reasons, DIRECTV respectfully requests that the Court deny Pegasus' Motions for an Emergency Hearing and for an Order Holding DIRECTV in Contempt. Pegasus' contempt motion is not an emergency and does not warrant immediate consideration. In any event, Pegasus has not established by clear and convincing evidence any violation of the Court's June 10 Order. To the contrary, DIRECTV has substantially, if not fully, complied with the Court's Order in good faith.

Dated: June 18, 2004

Respectfully submitted,

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DECLARATION OF R. ALEXANDER PILMER

I, R. Alexander Pilmer, declare as follows:

1. I am a partner at the law firm Kirkland & Ellis LLP, counsel for DIRECTV, Inc. in connection with the bankruptcy proceedings in In re Pegasus Satellite Television, Inc., Case No. 04-20878, pending in the United States Bankruptcy Court, District of Maine. I submit this declaration in support of “DIRECTV’s Opposition to Motion of the Debtors and Debtors in Possession for an Emergency Hearing on their Motion for the Entry of an Order Holding DIRECTV, Inc. in Contempt.” Unless otherwise stated, I have personal knowledge of the facts stated in this declaration, and I can testify competently to them if called upon to do so.

2. Attached as Exhibit A to this declaration is a true and correct copy of the Memorandum re DBS Board Policies from Steven T. Berman, NRTC General Counsel, to DBS Members and Affiliates dated March 18, 1998, attached to which are the NRTC’s Board Policies. This document was produced during discovery and marked as a deposition and trial exhibit in the case NRTC v. DIRECTV, Inc., Master File No. CV-99-5666-LGB (CWx), in the United States District Court, Central District of California (the “NRTC Case”), for which I was counsel to DIRECTV, Inc.

3. Attached as Exhibit B to this declaration is a true and correct copy of the “Stipulation of Dismissal of Plaintiffs’ Trade Secret Misappropriations Claims” filed in the NRTC Case on November 8, 2002.

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

Executed this 18th day of June, 2004.

R. Alexander Pilmer