UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

DTM CORPORATION

Respondent

and **Case 16-CA-27094**

SECURITY, POLICE, FIRE PROFESSIONALS OF AMERICA, LOCAL 48

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

To the Honorable Members of the National Labor Relations Board:

COMES NOW, Becky Mata, Counsel for the General Counsel, and files this Answering Brief with the National Labor Relations Board to Respondent's Exceptions to the Decision of the Administrative Law Judge, (JD(ATL)—11—10, dated June 30, 2010). In his decision, the Honorable William N. Cates, Associate Chief Administrative Law Judge, herein Judge, correctly found that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule in its collective bargaining agreement restricting an employee's ability to handbill, leaflet and engage in any other work action that has the purpose or effect of slowing down or interfering with work.

Respondent filed Exceptions contesting many of the Judge's factual findings and most of the Judge's legal conclusions, as well as the Judge's recommended remedy and order. Counsel for the General Counsel submits that the Judge's findings of facts and conclusions of law are

correct and should be affirmed. All of Respondent's exceptions lack merit and must be denied. Accordingly, the Board should adopt the Judge's Decision and Recommended Order, except as modified by the points raised in Counsel for the General Counsel's limited cross-exceptions.

I. FACTS

Respondent provides security services throughout the United States, including the Federal Aviation Administration Air Traffic Control Center site in Fort Worth, Texas. [JD slip op. at 2, LL. 37-38] On September 21, 2009, Respondent and the International Security, Police, Fire, Professionals of America (the International) ratified a collective bargaining agreement (CBA) that established a bargaining relationship, effective until September 30, 2012. [JD slip op. at 2, LL. 44-43; GC Exh. 2] The terms of the CBA are binding upon Local 48 (the Union), which represents a bargaining unit consisting of eleven employees at the Fort Worth facility. [JD slip op. at 3, LL. 4-5; Tr. 24] The Union did not participate in the CBA negotiations with Respondent or the International. [Tr. 25] In the CBA, the International and Respondent agreed to Article IX, entitled No-Strike and No Lockout, which states that employees may not take part in any strike, including sympathy strike, picketing, leafleting, informational picketing or any other work action that has the purpose or effect of slowing down or interfering with work. [JD slip op. at 5, LL. 38-46; GC Exh. 2]

In late October 2009, the Union notified Respondent that it was going to conduct an informational picket in front of the Respondent's Fort Worth facility on public property on November 2, 2009. [JD slip op. at 3, LL. 10-27; Tr. 58-59] Lloyd Tyson (Tyson), the Union's Vice President, also notified his supervisor, Captain Chad Riley, that the Union was organizing an informational picket and that the picket would occur on public property. [JD slip op. at 3, LL. 29-38; Tr. 27-28] At no time did the Union intend to strike at the facility nor did it inform

Captain Riley that it was planning or conducting a strike. [JD slip op. at 3, LL. 30-35; Tr. 45] Although the Union's notice to Respondent stated that it would be performing an informational picket and/or strike, the Union was aware that the agreement prohibits striking and therefore did not intend to institute a strike. [Id.] Respondent also distributed a letter, dated October 21, 2009, reminding employees about the CBA in place. [JD slip op. at 5, LL. 40-47; Tr. 59]

On October 27, 2009, Respondent instituted a plan of action in case the Union engaged in an informational picket. [JD slip op. at 5, LL. 5-9; Tr. 26-27, 57; GC Exh. 6] The Union learned of this plan and upon further examination of the CBA, the Union also learned that it prohibited picketing, leafleting, informational picketing or any other work action that has the purpose or effect of slowing down or interfering with work. [JD slip op. at 5, LL. 5-9; GC Exh. 2, Tr. 25, 28-29] The rule, on its face, was not limited in its application. [JD slip op. at 7, LL. 38-44; Tr. 28-29] No time or place restrictions in the rule notified employees that they could conduct leafleting or an informational picket on their own time such as their day off or during their lunch break or during any other scheduled break. [Id.] Likewise, the rule did not describe nonworking areas in which employees were permitted to picket or distribute literature. [JD slip op. at 8, LL. 22-25; Tr. 28-29] Because the rule was broad and did not contain any limitations as to when or where employees could conduct an informational picket and unit employees considered their job as their primary source of employment, the employees, fearing terminations, cancelled plans to picket. [JD slip op. at 4, LL. 30-31; Tr. 29] According to Tyson, he and other employees understood that immediate termination would result if they conducted an informational picket. [JD slip op. at 4, LL. 30-31; Tr. 28-29]

Moreover, Captain Riley testified that employees have scheduled break times during their shifts and their activities during break times are not regulated. [JD slip op. at 4, LL. 38-46]

Furthermore, according to Captain Riley, employees are free to discuss and distribute union-related materials. [Id.] There is also no restriction on employees distributing union literature in the parking lot. [Id.]

As noted above, on June 30, 2010, the Judge found that Respondent promulgated and maintained an unlawful rule in its CBA that restricted employees' ability to handbill, ability to leaflet and ability to engage in work actions that constitute protected, concerted activities.

II. ARGUMENT

A. THE JUDGE CORRECTLY FOUND THAT THE RULE CONTAINED IN ARTICLE IX IS OVERLY BROAD BECAUSE IT CONTAINS NO LIMITATIONS OR EXPLANATIONS AND THEREFORE RESPONDENT'S EXCEPTIONS 1, 4 AND 7 SHOULD BE DENIED.

Respondent's Exceptions contest many of the Judge's findings of facts and conclusions of law. Counsel for the General Counsel submits that the Respondent's exceptions should be denied as the Judge correctly applied Board law and determined that Article IX was overly broad and ambiguous with respect to handbilling, leafleting or engaging in any other work actions that constitute protected concerted activities. [JD slip op. at 7, LL. 37-39; JD slip op. at 9, LL. 21-24] The judge correctly applied *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322 (1974).

In the present case, the rule has no limitations, explanations or exceptions regarding the circumstances under which the rule will be applied. [JD slip op. at 7, LL. 37-39] It is well settled that an overly broad and ambiguous rule that prohibits solicitation or distribution of literature coerces employees in exercising their Section 7 rights. *Magnavox Co.*, 415 U.S. at 325. In *Magnavox,* the Court stated that an employee's right to choose a bargaining representative would be impaired if the union could bargain away its right to distribute literature. Id. The Court further stated a union could not bargain away the employees' right to distribute literature because

banning of such solicitation might seriously dilute Section 7 rights. Id. Thus, *Magnavox* not only applies with respect to an employee's choosing of a bargaining representative but also to an employee's Section 7 rights, which includes engaging in other protected concerted activities for mutual aid or protection. Id.

Moreover, a rule is overly broad on its face if it does not restrict its prohibitions to work areas. *Mead Corp.*, 331 NLRB 509 (2000) (an employer's rule maintaining no-solicitation and/or distribution rule during working hours must convey a clear intent to permit solicitation during break time or other periods when employees are not actively working or show that it knowingly tolerates distribution in non-work areas).

In the instant case, nothing in Article IX shows employees that the rule is limited in its application or that exceptions exist as to when the rule can be applied. [JD slip op. at 7, LL. 37-39] As such, the Judge correctly found the rule creates a blanket prohibition against any and all forms of picketing, leafleting or informational picketing. See *Ichikoh Mfg., Inc.*, 312 NLRB 1022, 1022 (1993) (an employer must clearly communicate to all employees that a presumptively invalid rule, which was disseminated did not mean what it said and that employees could in fact engage in the actions that were prohibited by the rule's text). For example, Respondent did not clarify to employees that they were free to engage in solicitation in the cafeteria or parking area. [Tr. 28-29] Respondent also failed to indicate in Article IX or at any other time that employees may solicit or distribute literature when they are off duty. [Tr. 28-29] Respondent also neglected to make any allowances for employee solicitation while they were on a break before or after regular duty hours. [Tr. 28-29]

Although the Board and Courts have long held that an employer does not violate the Act if it can show special circumstances exist that require it to limit an employee's Section 7 rights

during their working time, *Pay'n Save Corp. v. NLRB*, 641 F.2d 697, 700 (9th Cir. 1981), the Judge herein correctly found that Respondent failed to demonstrate any such special circumstances existed in the instant matter. [JD slip op. at 8, LL. 34-38]

B. THE JUDGE CORRECTLY FOUND THAT THE RULE DID NOT CLEARLY IDENTIFY THAT EMPLOYEES COULD ENGAGE IN INFORMATIONAL PICKETING WHILE OFF DUTY AND ON PUBLIC PROPERTY AND THEREFORE RESPONDENT'S EXCEPTIONS 2 AND 3 SHOULD BE DENIED.

The Judge correctly determined that if an employee reads Article IX, an employee would find that it failed to clearly indicate that employees were free to engage in informational picketing, even while off duty and on public property. [JD slip op. at 8, LL. 4-7] As the Board held in *Ichikoh Mfg., Inc.*, the employer must effectively communicate to employees the limitations and scope of an overly broad rule. 312 NLRB at 1022. Without such clarification, employees cannot decipher when or where an overly broad rule is prohibited or the limitations of the rule. [Id.]

Here, the Judge correctly determined that Respondent failed to communicate to employees that its rule was limited in application. [JD slip op. at 8, LL. 22-24] For this reason, employees decided that they should not conduct an informational picket on public property. [Tr. 29] The record reflects that employees were afraid to picket because they did not want to lose their jobs. [Tr. 32]

Moreover, as the Judge correctly found, Article IX's broad provisions chilled employees' exercise of their Section 7 rights. [JD slip op. at 7, LL. 45-46] The Judge relied on *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), enf'd. 987 F.2d 1376 (8th Cir. 1993), inter alia, in which a violation of the Act is "not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce

employees in the exercise of fundamental rights protected by the Act." Therefore, the mere presence of such a rule is chilling. Id. [JD slip op. at 6, LL. 45-49] Likewise, in *Awrey Bakeries, Inc.*, 335 NLRB 138 (2001), enf'd. 59 Fed. Appx. 690 (6th Cir. 2003), the Board found that the employer violated the Act by maintaining an unlawful provision in its CBA even though the provision was included in the agreement for over thirty years and was not enforced because it discouraged employees from engaging in protected conduct at work.

As noted above, Tyson testified that the CBA did not state times or places when and where the employees could conduct informational picketing, leafleting or handbilling. [JD slip op. at 7, LL. 24-27; Tr. 28-29] As a result, employees declined to participate in protected activities in a public forum during non-working time. [Tr. 29] Based on this evidence, the Judge correctly determined that employees could not reasonably understand that they could engage in an informational picket even while off duty and on public property without violating the rule. [JD slip op. at 7, LL. 45-46; JD slip op. at 8, LL. 1-2] Thus, the rule chilled employees' exercise of their protected Section 7 rights as demonstrated by the cancelling of the planned informational picket. [JD slip op. at 7, LL. 45-46; JD slip op. at 8, LL. 1-2]

C. THE JUDGE CORRECTLY FOUND THAT ARTICLE IX'S LIMITATIONS ON LEAFLETING AND HANDBILLING ARE NOT PART OF A LAWFUL NO-STRIKE PROVISION AND THEREFORE RESPONDENT'S EXCEPTION 5 SHOULD BE DENIED.

The Judge was correct in deciding that the limitation on leafleting and handbilling is not exclusive to the no-strike provision in the challenged rule. [JD slip op. at 9, LL. 4-5] The Board has long held that in interpreting a no-strike clause, it must evaluate the parties' intent and whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole or by extrinsic evidence. *Electrical Workers IBEW Local 1395 v. NLRB*,

797 F.2d 1027 (1986). As has long been held, "ambiguities must be resolved against the promulgator of the rule rather than the employees who are required to obey it." *J.C. Penney Co., Inc.*, 266 NLRB 1223, 1224 (1983).

Guided by these principles, the Judge evaluated the limitations on leafleting and handbilling and found that these two actions were not "inextricably intertwined with the no-strike portion of the challenged rule." [JD slip op. at 9, LL. 4-9]

Here, the Judge examined the entire CBA, including Article XXI Miscellaneous, Section 4 and Article XXIII Access. Upon analyzing these provisions in conjunction with Article IX, no explanation or clarification existed to justify Respondent's promulgation and maintenance of the challenged overly broad rule. [JD slip op. at 9, LL. 4-9] Respondent's assertion that both these additional Articles provide clear guidance as to when Article IX applies is misguided because both these Articles *only* address when employees can conduct union-related business. The Articles fail to provide any guidance on when *other protected concerted activities* are restricted or allowed. Thus, the Judge correctly determined that additional Articles in the CBA failed to provide clarification of the challenged rule or additional rights or privileges provided under Section 7 of the Act. [JD slip op. at 8, LL. 43-47; JD slip op. at 9, LL. 1-2]. Because Respondent failed to present any evidence that leafleting or handbilling was only prohibited with regards to striking, the provision is unlawfully broad. See *Our Way, Inc.*, 268 NLRB 394 (1983).

D. THE JUDGE CORRECTLY DETERMINED THAT RESPONDENT HAS NO DEFENSE THAT EMPLOYEES COMMUNICATE WITH ONE ANOTHER IN THE WORKPLACE AND THEREFORE RESPONDENT'S EXCEPTION 6 SHOULD BE DENIED.

The Judge correctly determined that Respondent's approval of employee communication at work, either written or verbal, was not sufficient to provide notice to employees that they were

free to leaflet or picket. [JD slip op. at 9, LL. 17-19] As noted above, the Board requires that if an employer enacts a no-solicitation and/or distribution rule that restricts employees' ability to engage in Section 7 activity, it must clarify when the rule is applicable. *Our Way, Inc.*, 268 NLRB at 394; *Mead Corp.*, 331 NLRB at 509. Respondent failed to provide any clarification as to when or under what circumstances Article IX applied. [JD slip op. at 8, L. 22]

Simply because Respondent allows employees to communicate with one another over union related matters is not sufficient to find clarification under Article IX. [JD slip op. at 4, LL. 38-46] Employees do not know that they are free to engage in solicitation or distribute literature after their shifts on public property. [JD slip op. 7, LL. 24-26] If such was the case, employees would not have cancelled their scheduled informational picket. [Tr. 29] Because Respondent has not conveyed a clear intent to employees that its rule is limited in application, it has violated the Act. See *MTD Products, Inc.*, 310 NLRB 733 (1993).

Moreover, Respondent's brief contends that it is a "union-friendly employer" as demonstrated by its allowance of union related discussions and other union related business at work as long as it does not interfere with the employees' work while on duty. Respondent's assertions fail to take into account that employees have other Section 7 rights that are not exclusive to their bargaining representative. Specifically, this argument misses the point that Section 7 rights are broader than participating in union activities. Because employees' rights to express their views about a bargaining representative as well as their working conditions, either through soliciting or distributing literature, is so basic under the Act, such a ban disturbs Section 7 rights and thereby violates the Act. *Magnavox Co.*, 415 U.S. at 325.

E. RESPONDENT'S EXCEPTION 8 SHOULD BE DENIED BECAUSE IT IS IMMATERIAL WHETHER THE INTERNATIONAL UNION WAS A PARTY IN THE PROCEEDING.

Respondent cites no authority for its view that the International Union was a necessary party to these proceedings nor does it indicate by what criteria a party is deemed "necessary." The Supreme Court stated in *National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940) that, because Board unfair labor practice proceedings are "narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing joinder of parties in litigation to determine private rights." Furthermore, even if the Board applied Rule 19 of the Federal Rules of Civil Procedure, that rule would not support a finding that the International was necessary and indispensable to this case. In *Expert Electric, Inc.*, 347 NLRB 18 (2006), the Board found that employer-members were not necessary parties under Rule 19 because the Board could accord full relief to the parties without joinder of each employer-member.

In the instant case, the Judge found that Respondent engaged in an unfair labor practice by promulgating and maintaining an unlawful rule and therefore ordered that Respondent rescind the unlawful portions of the rule. Thus, full relief can be accorded to the parties without the International and the unlawful provisions in Article IX can be rescinded. See *Awery Bakeries, Inc.*, 355 NLRB at 140. In Article XXII, *Separability and Savings Clause* of the collective bargaining agreement, the parties agreed to sever any unlawful provision:

> . . . held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any article or section should be retrained by such tribunal pending a final determination as to its validity, the remainder of this agreement and of any rider thereto, or the application of such article or section to persons or

circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been retrained, shall not be affected thereby.

[GC Exh. 2, p. 23]

When a portion of the collective bargaining agreement is unlawful and the agreement contains a "savings clause," as in Article XXII, the remainder may be given effect without difficulty if the invalid portion is stricken. *In re W.R. Mollohan, Inc.*, 333 NLRB 1339, 1340 and 1347 (2001). Based on the foregoing, Respondent has no basis to require the International to have been deemed a necessary party because the remedy is unaffected by the International's presence or lack thereof.

F. RESPONDENT'S FURTHER ARGUMENTS AND CASE LAW ARE DISTINGUISHABLE FROM THE FACTS OF THE PRESENT CASE AND THUS HAVE NO BEARING.

Respondent argues in its brief in support of its exceptions that Article IX is not overly broad or ambiguous. In support of its argument, it cites several cases. Respondent's reliance upon these cases is misplaced because they are clearly distinguishable from the instant case.

First, Respondent relies on *U.S. Steel Corp. v. NLRB*, 711 F.2d 772 (7th Cir. 1983) for the proposition that a no-strike clause is lawful even if it forbids a wide range of strike related activity. In *U.S. Steel Corp.*, the court ultimately addressed whether a no-strike clause constituted a clear and unmistakable waiver of an employee's right to participate in a sympathy strike. Id. at 780 The court found that an express no-strike clause that prohibited sympathy strikes was lawful because the company and union specifically agreed not to strike in order to achieve uninterrupted plant operations, to promote continuity, efficiency and stability in operations and to avoid foreign competition taking over their market. Therefore, the strike clause was a clear and unmistakable

waiver by both parties to maintain operations at the facility even though "sympathy strike" was not explicitly listed in the broad no-strike clause.

The principles in *U.S. Steel Corp.*, supra, do not apply to the facts in the present case. First, General Counsel notes that the employees' right to engage in a sympathy strike is not at issue in this case. The primary issue in dispute concerns the other portions of the rule that restrict an employee's ability to engage in picketing, leafleting or informational picketing. Even though *U.S. Steel Corp* states that a no-strike clause including a sympathy strike is valid when the parties' share a common interest in maintaining operations and the waiver is clear, it does not address the lawfulness of a blanket waiver of employees' ability to engage in picketing, leafleting or informational picketing.

Next, Respondent cites *Bethlehem Steel Corp v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982) for the premise that a no-strike clause is lawful where it explicitly states that neither the employer nor the union can interfere with work to create a slowdown or other stoppage. Respondent's view of *Bethlehem Steel Corp.,* does not apply to the facts of the present case. In *Bethlehem Steel Corp.*, a union official was disciplined, inter alia, for violating a no-strike provision by taking affirmative action to encourage strikers. The Court held that the no-strike waiver did not violate the Act because the company and union entered into a CBA that waived the rights of employees to engage in strikes during the contract term. However, the no-strike clause did not prohibit employees from picketing, leafleting or informational picketing, which are at issue in the present case. As such, *Bethlehem Steel Corp.* does not support Respondent's arguments.

Respondent cites *Renal Care of Buffalo*, 347 NLRB 1284 (2006), in support of its argument that a no-strike, no lockout clause was lawful and, in doing so, again ignores the relevant issues of the present case. In *Renal Care*, one of the issues centered on whether the

employer engaged in surface bargaining when it insisted, inter alia, on a no-strike, no lockout proposal that would prohibit employees from engaging in protected concerted activity, including handbilling. The administrative law judge's discussion of the clause arose only through the discussion of the surface bargaining, not whether the provision was lawful. Id. at 1291-1292. *Renal Care* therefore is inapplicable to the present case.

Respondent also incorrectly relies on *Englehard Corp.*, 342 NLRB 46 (2004) to support its position that parties may negotiate a CBA that waives employees' rights to conduct an informational picket. In *Englehard Corp.*, supra, the Board held that the company violated the Act when it disciplined employees for picketing even though there was a no-strike, no lockout clause that prohibited picketing that interfered with the company's business. The Board found the employees' action did not violate the clause because their picket was 70 miles from the company's business, directed towards the company's shareholders and no employees were absent from work without proper authorization. As such, the employees did not engage in a work stoppage reflecting the parties' intent in executing its no-strike, no lockout clause.

Englehard Corp., supra, is distinguishable from the facts in the instant case. The parties in *Englehard Corp.* executed a CBA with the purpose of preventing any work stoppages and explicitly defining the context in which strikes and picketing were prohibited. In contrast, Article IX did not define the parameters of the rule's reach. The rule contains no specificity as to when picketing, leafleting or informational picketing are prohibited. The only information that can be adduced from the Article IX is that *all* conduct that includes picketing, leafleting, informational picketing or any other work action is prohibited. Moreover, in *Englehard Corp.*, the parties' intent was established by the language of the clause itself, unlike in the instant case where the parties' intent is so broad that it contains no specifics as to when or where employees can engage

in Section 7 activity. See *MTD Products, Inc.*, 310 NLRB at 733 (employer violated the Act because it maintained an overly broad rule against solicitation and distribution that was not restricted to working time and the employer never conveyed a clear intent to employees that the rule was limited in its application).

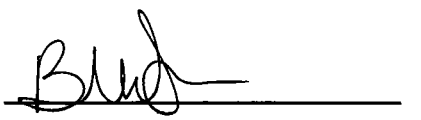
Finally, Respondent relies on *Lafayette Park Hotel*, 326 NLRB 824 (1998), enf'd. 203 F.3d 52 (D.C. Cir. 1999), for the proposition that employees' Section 7 rights were not violated by the employer's rule that prohibited employees from "being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives." Clearly, the facts of *Lafayette Park* are distinguishable from those of the instant case. First, the rule at issue does not expressly prohibit protected activity unlike Article IX that explicitly prohibits leafleting and picketing. Next, in *Lafayette Park*, there was no evidence that employees were restrained from exercising their rights protected under Section 7. Here, Respondent's promulgation of Article IX prohibited employees from engaging in a planned informational picket on public property. Moreover, in *Lafayette Park*, the Board found that the employer had a valid business justification for its rule. The Board further concluded that when the rule was read in its entirety, it did not chill employees' Section 7 rights. In contrast, Article IX chilled employees' exercise of their protected Section 7 rights because they chose not to engage in an informational picket. [JD slip op. 8, LL. 1-2] The judge also correctly found that the mere existence of such restrictions inherently chills Section 7 rights. In addition, in reading Article IX, it clearly and explicitly prohibits leafleting and picketing without limitation. [JD slip op. at 8, LL. 4-5] Here, Respondent failed to indicate any restrictions on its rule thus making it unclear to employees under what circumstances the rule applied. [JD slip op. 7, LL. 37-39] Therefore, Respondent's reliance upon these cases is meritless.

III. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully requests the Honorable Members of the National Labor Relations Board deny Respondent's Exceptions in their entirety, affirm the Judge's findings of fact and conclusions of law and adopt the Judge's recommend Order, except as modified by the requested relief sought in Counsel for the General Counsel's limited cross-exceptions. Counsel for the General Counsel also requests the Board to grant any further relief it deems appropriate.

DATED at Fort Worth, Texas this 11th day of August 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of General Counsel's Motion to the Members of the National Labor Relations Board to Reject Respondent's exceptions was electronically served on the 11th day of August 2010, on the following parties:

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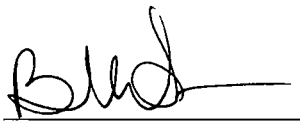

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