

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT  
NO. SJC-10722

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PSY-ED CORP. AND JOSEPH VALENZANO, JR.,  
Plaintiffs/Defendants-in-Counterclaim/Appellants,

v.

STANLEY D. KLEIN AND KIMBERLY SCHIVE,  
Defendants/Plaintiffs-in-Counterclaim/Appellees,

v.

STANLEY D. KLEIN  
Third-Party Plaintiff/Appellee,

v.

DAVID HIRSCH, ROBERT STRIANO,  
DONALD CHADWICK AND C. KENNETH MEHLING,  
Third-Party Defendants/Appellants.

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ON APPEAL FROM JUDGMENTS  
OF THE MIDDLESEX SUPERIOR COURT  
CIVIL ACTION NOS. 99-6140 AND 02-5213

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REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT  
STANLEY D. KLEIN

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**ISSUES PRESENTED IN REPLY**

1. Whether it was error to order summary judgment against cross-appellant Stanley D. Klein on his claims of retaliation under G.L. c. 151B §§ 4(4) and 4(4A), on the ground that he was not an employee at the time of the adverse action?

2. Whether it was error to order judgment against cross-appellant Stanley D. Klein on his claim of unfair and deceptive trade acts and practices under G.L. c. 93A on the ground that the transactions between the parties were private, and not in trade or commerce?

3. Whether cross-appellant Stanley D. Klein should receive an award of appellate attorneys' fees and costs?

**DISAGREEMENT WITH STATEMENTS OF FACTS**

As this litigation approaches its tenth anniversary, those who instituted and perpetuated it -- Psy-Ed Corporation ("Psy-Ed"), its President Joseph Valenzano, Jr. ("Valenzano"), and its Directors David Hirsch, Donald S. Chadwick, Robert Striano and C. Kenneth Mehrling<sup>1</sup> (collectively "Directors") --

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<sup>1</sup> Director C. Kenneth Mehrling is sometimes referenced as "Mehrling." References to the Directors' briefs

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continue even in their Reply Briefs to misstate or deny the obvious.

One example makes the point. Continuing to attack the abuse of process judgment against them, Psy-Ed and Valenzano argue that the Superior Court's finding that "it appears that Psy-Ed and Valenzano brought suit against Klein for ulterior purposes" is not enough -- even if supported by facts including complete groundlessness of their claims from the outset, and five (5) years of their aggressively pursuing those claims thereafter without revealing their lack of any proof of money damages. (Psy-Ed/Valenzano Reply Brief,<sup>2</sup> at 16, 20-21).

This argument they now support by including in an "Introduction"<sup>3</sup> to their Reply Brief the lofty contention that abuse of process cases pose the danger of chilling free exercise of the First Amendment right to seek judicial redress, "if a factfinder rejects a plaintiff's claim, [and] he will all too easily reach

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are not intended to include Mehrling, whose appellate counsel has filed separate briefs.

<sup>2</sup> The parties' first, principal briefs are referenced as "Brief" and their second briefs are referenced as "Reply Brief."

<sup>3</sup> Unlike the Directors and Mehrling, Psy-Ed and Valenzano do not include a denominated "Disagreement with Statement of Facts" section in their Reply Brief.

the further conclusion that the claim was also groundless and improper." (Psy-Ed/Valenzano Reply Brief, at 1).

Perhaps there are such cases, and such risks. The point is inapposite here, where plaintiffs brought and used this case in tandem with their defense of proceedings before the Massachusetts Commission Against Discrimination ("MCAD"), which had been filed by one of the defendants with the affidavit testimony of the other. No "conclusion" by a factfinder here was reached "all too easily" or with lack of deliberation -- the lengthy docket and the long series of decisions against Psy-Ed and Valenzano and their prior counsel establish this beyond dispute.<sup>4</sup>

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<sup>4</sup> Details of some of this history are set out in Klein Brief, at 2-10. Some of the findings adverse to Psy-Ed and Valenzano or their counsel by at least two Superior Court Justices before trial (in 2003-2005) are: allegations "made in bad faith for the sole purpose of delaying this case and increasing . . . costs", tactics reflecting a "pattern of recalcitrance in violation of court orders", "outrageous conduct", "bringing and continuing a lawsuit without actual damages", and "continued and blatant discovery violations . . . despite [court] order." *Id.* It was for such persistent misconduct, not a mere lack of proof as they now suggest (Psy-Ed/Valenzano Reply Brief, at 20 n. 18), that nearly all of Psy-Ed's and Valenzano's claims were rejected well before trial. [A001293-94, A001300-01].

Psy-Ed and Valenzano had six days of trial to make their case. They have had full and free exercise (and more) of their rights to judicial redress, and the Superior Court's finding of ulterior purpose was well-founded and without error.

The Reply Briefs of the Directors and Mehrling also attempt to distance those parties from the record and from the misconduct of Psy-Ed and Valenzano, as well as their own. The Directors claim not to have been "personally sanctioned" (Directors' Reply Brief, at 2) -- but the record shows that discovery was ordered from them in July 2002, and by February 2003 was found still not to have been provided, and was compelled. [A000364-67, A000383-85]. The further question of sanctions, and the entry of adverse judgment, against the Directors as well as Psy-Ed and Valenzano, was reserved at that time. *Id.*

The only germane aspect of this issue is that Psy-Ed, Valenzano and the Directors -- who now seek to escape blame for various parts of the proceedings below -- were represented by common counsel and pursued a common strategy and common tactics from the filing of the complaint in December 1999, through trial in June 2006, and into the post-trial period

until March 6, 2007. [A0001451-52]. The Directors, personally involved in the operative decisions in 1999, and thereafter parties to this case, certainly were charged with knowledge of, and participation in, all that ensued.<sup>5</sup>

Mehrling, as his Reply Brief (at 2) notes, became a named party only in April 2005 [A000029], some fourteen months before trial [A000014] - but the motion to substitute him was served upon his counsel more than two years before trial, in February 2004. [A000685-88]. The sole reason was that Psy-Ed had wrongly omitted him from the list of directors provided in 2000. Id. Mehrling cannot be heard to complain of Klein at this late date because of Psy-Ed's misfeasance.<sup>6</sup>

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<sup>5</sup> Two other factual misfires in the Directors' Reply Brief require mention: there was no order of bifurcation of trial between liability and damages (Directors' Reply Brief, at 13; *cf.* A000017, A000031); and it was not "apparent that . . . the parties expected there to be an evidentiary hearing" on damages after trial (Directors' Reply Brief, at 14 (emphasis supplied)). In fact, the Superior Court neither ordered nor suggested such. [A0001444].

<sup>6</sup> Mehrling also asserts without citation that he "had no personal history with Klein and no reason for personal animus against him." (Mehrling Reply Brief, at 10 . . . There is no such evidence, and Mehrling elected not to testify or even attend at trial. [Tr. . . .]

As the evidence ultimately proved, Mehrling was a very active director of Psy-Ed from the time in 1999 when the relevant misconduct against Klein occurred. It was he whose September 1999 response to Klein's affidavit "given in the Kim Schive case before the MCAD in Boston by Stan Klein" was a Board motion to terminate mediation, offer nothing in settlement, and "litigate this matter aggressively." [A001429]. Three months later, when the complaint in this case had just been filed against Klein and Schive, Mehrling voted to dishonor the Psy-Ed promissory note to Klein. Id. There is no injustice in grouping Mehrling with the others.

One last disagreement with Appellants' statements of facts unfortunately cannot be avoided. Mehrling's Reply Brief resurrects the assertion earlier made by all Appellants that Klein's attorneys' fees evidence was submitted late, and Mehrling now even argues that he "was never provided an opportunity to contradict the two affidavits" submitted after trial. (Mehrling Reply Brief, at 13).

This is nonsense. Klein's Brief pointed out that the dates of the two affidavits in July 2006 were contemporaneous with his Proposed Findings and Rulings

filed and served after trial. (Klein Brief, at 45 and n. 26)<sup>7</sup> Apparently because the docket reflects filing of the Proposed Findings and Rulings but does not show a separate entry for the affidavits, Mehrling continues to suggest that something was awry.

The record shows otherwise. Klein's Proposed Findings and Rulings contain numerous specific dollar-amount and other references to his accompanying affidavit evidence, showing that the affidavits were provided with the July 26, 2006 package. (See, e.g., A001912, para. 78; A001922, para. 10; A001926, para. 17). The Superior Court's decision dated August 18, 2006 includes at least one such specific reference as well. (See Decision at A0001431 ("Klein's claimed damages . . . include . . . attorneys fees of \$453,400.33"); compare with Gilleran affidavit of July 26, 2006 at A001935 ("I conclude that the total award of attorneys' fees and costs should be \$453,400.33")).

Perhaps tellingly as to their current position, prior counsel for Mehrling and all other Appellants

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<sup>7</sup> Klein's Proposed Findings and Rulings [only an unexplained partial copy of which is included at A001909-27] were docketed on July 26, 2006. [A000031]. Klein's accompanying affidavits supporting his claims for attorneys' fees and costs were dated July 22, 2006 [A001945] and July 26, 2006 [A001936].

filed Proposed Findings and Rulings dated August 9, 2006 -- two weeks after the service of Klein's papers -- which did address Klein's claimed attorneys' fees, but only by arguing that under the "American rule" no agreement or statute allowed their recovery.

[A001415].<sup>8</sup>

Mehrling and the others had ample further opportunity to address Klein's claimed attorneys' fees and costs. As Appellants themselves have detailed, proceedings ensued before a successor judge in the Superior Court between August 2006 and March 2009 [A000032-36] before any award of attorneys' fees and costs was made. Neither Mehrling nor any other party was deprived of "an opportunity to contradict" Klein's evidence.

#### REPLY ARGUMENT

**I. It was error to order summary judgment against Stanley Klein on his claims of retaliation under G.L. c. 151B §§ 4(4) and 4(4A), on the ground that he was not an employee at the time of the adverse action.**

Klein's argument on this issue of his cross-appeal is straightforward, and has been presented

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<sup>8</sup> This potentially high-risk strategy was the same one persistently used at trial by then-counsel for all Appellants. (See discussion at Klein Brief, at 43-46).

simply: a motion judge in the Superior Court wrongly held that Klein had failed to show an adverse employment action, or an employment relationship at the time of any adverse action against him, as required by G.L. c. 151B, and he was thus wrongly precluded from proving that Psy-Ed and Valenzano had discriminated against and interfered with him under G.L. c. 151B, §§ 4(4) and 4(4A) for his participation in Schive's MCAD proceeding. (Klein Brief, at 64-67).

As Klein has pointed out, the statute as he has alleged it in his claims, contains no requirement of an adverse employment action, or an employment relationship at the time of any adverse action, but simply sanctions discrimination against "any person" because he has "testified or assisted in any proceeding under [G.L. c. 151B, §5]" (in the case of Section 4(4)), and simply sanctions interference with an "other person" for having "aided or encouraged any other person in the exercise or enjoyment of any" right granted or protected by [G.L. c. 151B]" (in the case of Section 4(4A)).

Klein's pretrial proof tying the misconduct of Psy-Ed and Valenzano to such retaliatory discrimination and interference was highly persuasive, if not

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conclusive. (See Klein Brief, at 66-67). At trial, Valenzano admitted that his and Psy-Ed's actions against Klein were at least partly motivated and in reaction to the Schive proceedings at the MCAD and Klein's role in them as a witness. (Id.)

Similar trial evidence adduced by Schive led to the Superior Court's correct finding and ruling that Psy-Ed and Valenzano brought this case against Schive in retaliation for her reasonable efforts in petitioning the MCAD. [A001443]. In fact, the same parties brought this case against Klein (and dishonored his promissory note), in retaliation for his testifying, assisting, aiding and encouraging Schive in her reasonable efforts at the MCAD.

The only argument that Psy-Ed and Valenzano have advanced against Klein on this issue is the same one made in conclusory fashion by the motion judge: their actions against Klein cannot have been an adverse employment action, as they occurred "more than two years after Klein's employment had terminated." (Psy-Ed/Valenzano Reply Brief, at 29). This argument should be ignored, as it is (among other defects) an example of the logical fallacy of *petitio principii*, or "begging the question" - it assumes as true what is

to be proved. See Ruggero J. Aldisert, *Logic for Lawyers, a Guide to Clear Legal Thinking* (Clark Boardman 1989), at 201-07.<sup>9</sup>

Appellants have presented no compelling argument on this issue. But for the motion judge's erroneous ruling of law, Klein's claims under G.L. c. 151B, §§ 4(4) and 4(4A) would have prevailed at trial, and the record is sufficiently clear that those claims should be sustained now. Judgment should enter in Klein's favor on his claims of retaliation by Psy-Ed and Valenzano.

**II. It was error to order judgment against Stanley Klein on his claim of unfair and deceptive trade acts and practices under G.L. c. 93A, on the ground that the transactions between the parties were private, and not in trade or commerce.**

As all three Reply Briefs of Appellants argue, ample case law establishes that c. 93A does not apply to an "employer-employee" relationship or to a "private" transaction. However, even a cursory review of the cases cited by Appellants reveals critical differences from the character of Klein's relationship with Psy-Ed and Valenzano, and from Klein's own

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<sup>9</sup> Among Judge Aldisert's entertaining examples of this fallacy is Yogi Berra's "You know you can see a lot by merely looking." Id. at 202.

commercial or business status vis-à-vis Psy-Ed and Valenzano.

Appellants' cases involve either an alleged breach of some aspect of an employment agreement itself, conduct during the employer-employee relationship, or both.<sup>10</sup> The undisputed evidence here is that Klein's employment was unilaterally and summarily terminated by Psy-Ed in August 1997 [A001423]. Thus Klein had ceased to be an employee

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<sup>10</sup> Informix, Inc. v. Rennell, 41 Mass. App. Ct. 161, 161, 163 (1995) (c. 93A did not apply to a breach of a non-competition and non-disclosure agreement entered into at the commencement of a employer-employee relationship); Falmouth Ob-Gyn Assoc., Inc. v. Abisla, 417 Mass. 176, 177-78 & n.1 (1994) (same); Manning v. Zuckerman, 388 Mass. 8, 9-10 (1983) (c. 93A did not apply to a breach of an employment agreement that limited an employee's status to a consultant, but maintained the terms of the employee's insurance and pension benefits); Dorfman v. TDA Industries, Inc., 16 Mass. App. Ct. 714, 720-21 (1983) (employee's claims that employer breached his employment agreement by removing him as manager and lessening his responsibilities was outside the scope of c. 93A); Sargent v. Tenaska, 914 F. Supp. 722 (D. Mass. 1996) (employee's claims that employer failed to tender certain interests earned pursuant to employment agreement were outside scope of c. 93A); Powderly v. Metrabyte Corp., 866 F. Supp. 39, 41, 44 (D. Mass. 1994) (plaintiff's claim for unpaid bonuses was not actionable under c. 93A because the right to the bonus rested in the plaintiff's employment agreement); Evans v. Certified Engineering & Testing Co., 834 F. Supp. 488, 491-94, 499-500 (D. Mass. 1993) (plaintiff's claims for breach of agreement, calling for the repurchase of employee's shares in the company upon termination, and entered into during plaintiff's employment, was outside the scope of c. 93A).

for more than two years when Appellants took the challenged actions against him in late 1999.

As to the promissory note from Psy-Ed with respect to which all Appellants acted wrongly, it was not an employment-related obligation, but one that arose in April 1998, at least eight (8) months after Klein's employment ended, in connection with the purchase of Klein's twenty-one-percent shareholder interest in Psy-Ed. [EX0023-34, EX0043-48].

In fact, the documents related to that transaction expressly provide that no part of the consideration paid by Psy-Ed to Klein was "as payment of past, present or future wages or other compensation in connection with Klein's former employment with" Psy-Ed. [EX00003]. All payments to Klein (including all payments under the Psy-Ed promissory note) were for "repurchase of [Klein's] shares" in Psy-Ed, or for "settlement of threatened litigation." Id.

Simply put, the argument that "it is undeniable that Klein's claims arose out of his employment relationship" (Psy-Ed/Valenzano Reply Brief, at 27) is wrong. Klein's claims have nothing to do with terms and conditions of employment, compensation or benefits

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as an employee, or the conduct of Appellants as employers. The parties' agreements prove as much.

The claims upon which Klein prevailed at trial, and the evidence that supported them, suggest c. 93A liability. Appellants can cite no authority for the proposition that abuse of process by a party to a post-employment contract, or tortious interference with such a contract, should be outside the scope of c. 93A. Nor, as established tortfeasors, ought they be able to escape the c. 93A prohibition against unfair acts in Massachusetts commerce, by arguing that wrongful conduct relating to a promissory note securing time payments for a stock purchase is "private" or not in a "business context."<sup>11</sup>

Faced with the difficulty of making such an argument, Appellants try to equate the sale of Klein's shares with an internal corporate dispute between family shareholders or members of a very small corporation, by citing to case law that is easily distinguishable. Appellants' cases involve either

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<sup>11</sup> There is no evidence that ownership of Psy-Ed shares was tied in Klein's case, or any other, to employment by Psy-Ed. In fact, the evidence is to the contrary, as Mehrling and his company, Sigma Tau Pharmaceuticals, negotiated for and appear to have completed the repurchase of Klein's former shares. [EX0252-56].

buyouts in joint ventures/partnerships having only two parties, or a close, family-held corporation - true "private" matters.<sup>12</sup> Here, Psy-Ed was not closely held at the relevant time [A000222; SA001-03], had more than forty investors, and maintained facilities in Massachusetts and New Jersey, publishing for national circulation. [A001420].

Appellants also incorrectly compare the misconduct here to situations in which the challenged acts occurred during pre-existing litigation, and were thus held not to be in trade or commerce.<sup>13</sup>

In sum, Appellants can avail themselves of no analogous case law. Their tortious misconduct toward Klein violated his rights to enforcement of his

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<sup>12</sup>See Massaro v. Walsh, 71 Mass. App. Ct. 562, 566 n.7 (2008) (breach of a buyout agreement for a two-person commercial real estate venture not within c. 93A); Szalla v. Locke, 421 Mass. 448 (1995) (c. 93A inapplicable to breach of a partnership agreement); Alperin v. Eastern Smelting and Refining Corp., 32 Mass. App. Ct. 539 (1992) (c. 93A inapplicable to breach of a stock repurchase agreement where all five shareholders in the business were members of the family that started the business).

<sup>13</sup>Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547 (2008) (c. 93A inapplicable to "intra-enterprise dispute" involving bankruptcy proceeding); First Enterprises, Ltd. v. Cooper, 425 Mass. 344, 347-48 (1997) (attorney could not be liable under c. 93A for commencing litigation where attorney had no commercial relationship with the parties and the filing of litigation does not constitute trade or commerce).

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promissory note (a negotiable instrument), and his rightful expectation that the "commercial transaction" in which he and Psy-Ed were "acting in a business context" would be conducted without unfairness and deception. Conduct such as that of Appellants, in disregard of known contractual arrangements and intended to secure benefits for the breaching party, constitutes an unfair act or practice for c. 93A purposes. Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451 (1991).

The Superior Court erred in ordering judgment against Klein on his c. 93A claims against Appellants. Klein should receive an award of attorneys' fees and not less than treble damages under that statute.

**III. Stanley Klein should receive an award of appellate attorneys' fees and costs.**

Much of Appellants' positioning on appeal seems based upon a misreading of the record and of Klein's arguments at least bordering on the intentional. Many of their more notable empty arguments have been

previously detailed and refuted by Klein.<sup>14</sup> Perhaps others will occur to this Court.

By way of illustration, one of the more recent "straw men" introduced by Appellants is that Klein argues that this Court's decision in Blackstone v. Cashman, 448 Mass. 255 (2007), does not apply to his tortious interference claim - an argument he has never made. (Compare Directors' Reply Brief, at 4-5; Mehrling Reply Brief, at 3-4; with Klein Brief, at 32-33 ("[T]here are more than sufficient findings here . . . to satisfy the Blackstone standard."))

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<sup>14</sup> As detailed in Klein's Brief, Appellants falsely claim error in the Superior Court's not crediting affirmative defenses that they did not plead, prove or argue (at 48-55), in crediting testimony that they did not impeach or counter (at 41-46), and in deferring attorneys' fees evidence precisely as they requested at trial (at 43-44). They claim entitlement to a post-trial evidentiary hearing which was never ordered (at 36-41), despite that two post-trial hearings were held in which they aggressively participated (at 38-41). To the present, they insinuate to this Court that Klein and his counsel are misrepresenting the record as to when Klein's attorneys' fees affidavits were filed (Mehrling Reply Brief, at 12-14; see also Psy-Ed/Valenzano Brief, at 50; Directors' Brief, at 33; Mehrling Brief, at 15-18, 42-46, 49), despite that those affidavits are in the record and clearly dated (A001936, A001945), that precise data found in them are recited in the Superior Court's decision issued a few weeks after their dates (A001431), and despite the current concession that "the filing dates of the . . . affidavits are inconsequential to the Superior Court's error . . . ." (Mehrling Reply Brief, at 13).

Of course it is for this Court to determine in its discretion whether an award of double costs, interest, attorneys' fees, or more than one of these is appropriate on appeal. G.L. c. 211A, §15; Mass R. App. P. 25. Even where an appeal is not wholly frivolous, immaterial, or intended for delay, a party's ignoring written findings, arguing matters not raised at trial, and misreferencing the record may be grounds for sanctions. Avery v. Steele, 414 Mass. 450 (1993).

Klein respectfully submits that much of the substance of this appeal is frivolous, and that much of the tone and content brought here by Appellants is reminiscent of the war of attrition they have been waging for ten years, against this now-73-year-old man whom they have castigated and punished in every way open to them, for telling what he saw as the truth.

Klein respectfully renews his request for appellate attorneys' fees and costs under the authorities cited above.

#### **CONCLUSION**

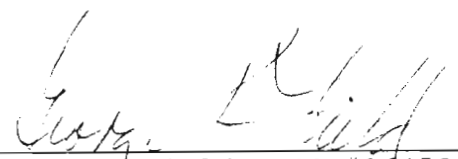
For all of the foregoing reasons, the Superior Court's judgment should be affirmed in all respects,

except that judgment should also be ordered for Stanley D. Klein: (1) against Psy-Ed Corporation and Joseph M. Valenzano, Jr. jointly and severally on his claims under G.L. c. 151B; and (2) against Psy-Ed Corporation, Joseph M. Valenzano, Jr., David Hirsch, Robert Striano, Donald Chadwick and C. Kenneth Mehrling jointly and severally on his claims under G.L. c. 93A.

In the event of remand, Stanley D. Klein should have the opportunity to be heard on his outstanding claim for attorneys' fees and costs under G.L. c. 231, § 6F.

Stanley D. Klein hereby renews his request for an award of his appellate attorneys' fees and costs.

Respectfully submitted,  
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**RULE 16(k) CERTIFICATION**

The undersigned hereby certifies that the foregoing brief complies with the rules of court that pertain to the contents, format, and filing of briefs, including those provisions referenced in Rule 16(k) of the Massachusetts Rules of Appellate Procedure.

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GEORGE P. FIELD

**CERTIFICATE OF SERVICE**

I hereby certify under the pains and penalties of perjury that two copies of the foregoing brief were served on counsel of record for each of the parties, by delivering such copies by hand to the persons listed below (but by overnight delivery to Mr. St. Clair) on this 1<sup>st</sup> day of June 2010:

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