**IN THE SUPERIOR COURT**
**FOR THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| **THE WASHINGTON TRAVEL CLINIC, PLLC, *et al.*,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**JOHN KANDRAC,**<br><br>**Defendant.** | **Case No.: 2013 CA003233 B**<br>**Judge Laura A. Cordero**<br>**Next Court Date: Jan. 31, 2014**<br>**Event: Initial Scheduling Conference** |

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR RECONSIDERATION**

Defendant John Kandrac respectfully submits this Reply Memorandum of Points and Authorities in Support of Defendant's Motion for Reconsideration, and states as follows:

1. Plaintiffs concede that they are required to demonstrate a likelihood of success of their claim for damages with respect to the one remaining statement. Despite this, they have offered no evidence – whether in their Opposition to Kandrac's anti-SLAPP Motion, or in their Opposition to Kandrac's Motion for Reconsideration – that the publication of that one statement for only a matter of a few days caused them any injury.[1] Rather, Plaintiffs advance three legal arguments: (a) that they need not offer evidence of actual injury and are entitled to presumed

[1] Plaintiffs' contention that they were deprived of the "opportunity to rebut the defendant's legal and factual arguments" raised "only" in his Reply, Opp. at 4-5, is without merit. Under the Anti-SLAPP statute, Kandrac was required to show only that the matter "arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502. Once he did so, to avoid dismissal *Plaintiffs* were required to demonstrate a likelihood of success, including on damages. Plaintiffs recognized their assigned burden and argued in their Opposition to Kandrac's anti-SLAPP Motion, at 25-26, that the review was libel *per se*. If Plaintiffs believed that a further response was warranted, they could have moved for leave to file a surreply or proffered actual evidence of injury in their opposition to this motion (rather than general statistics about Yelp readership as a whole for a later time period, Opp. Ex. 2).

damages because they have pled libel *per se*, (b) that they need not offer evidence of actual malice to obtain such presumed damages because this case does not involve a matter of public concern, and (c) that this Court is prohibited from reconsidering its earlier ruling. As demonstrated below, each of these arguments is demonstrably without merit.

**A. Libel *Per Se* Requires a Crime of Moral Turpitude.**

2. Plaintiffs seek to avoid the need to offer evidence of special damages by contending that the challenged statement constitutes libel *per se*. However, it is well settled in the District of Columbia – including in many of the cases Plaintiffs themselves cite – that to constitute libel *per se* a statement must impute the commission of a *criminal offense* involving *moral turpitude*. *See* Opp. at 6 (citing *Farnum v. Colbert*, 293 A.2d 279, 281 (D.C. 1972) (to constitute libel *per se*, statements must "impute to [plaintiff] the commission of some criminal offense for which he may be indicted and punished, if the charge involves moral turpitude"); *Harmon v. Liss*, 116 A.2d 693, 695 (D.C. 1955) (same)). *See also Weaver v. Grafio*, 595 A.2d 983, 988 (D.C. 1991) (letter accusing appellants of passing a bad check was libel *per se* because it accused them of committing felony); *Johnson v. Johnson Publ'g Co.*, 271 A.2d 696, 697-98 (D.C. 1970) (article accusing a husband of beating his family was libel *per se* because the words used charged crime of assault); *Shipe v. Schenck*, 158 A.2d 910, 911 (D.C. 1960) (statements held not slanderous *per se* because words "cannot reasonably be construed, as [plaintiff] contends, to charge him with [a] crime"); *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 934 F. Supp. 2d 204, 218 (D.D.C. 2013) ("A statement is defamatory *per se* if it falsely imputes a criminal offense"); *Bannum, Inc. v. Citizens for a Safe Ward Five, Inc.*, 383 F. Supp. 2d 32, 40 (D.D.C. 2005) ("Libel *per se* requires the actual imputation of a criminal offense"); *Washburn v. Lavoie*, 357 F. Supp. 2d 210, 214 (D.D.C. 2004) (plaintiff's argument for *per se* defamation fails because

defendants' words "do not impute to him the commission of a criminal offense involving moral turpitude"), *aff'd*, 369 U.S. App. D.C. 336, 437 F.3d 84 (D.C. Cir. 2006); *Wiggins v. Philip Morris, Inc.*, 853 F. Supp. 458, 465 (D.D.C. 1994) (same); *Raboya v. Shrybman & Assocs.*, 777 F. Supp. 58, 60 (D.D.C. 1991) ("libel *per se* requires an actual imputation of a criminal offense" and "[i]t is precisely because the law draws distinctions between libel and libel *per se* actions that the Court should not liberally permit a Plaintiff to assert a libel *per se* claim").[2]

3. In response, Plaintiffs rely on passages from a few 19th and early 20th century cases to contend that under current law libel *per se* includes statements allegedly causing injury to one's trade or profession. Opp. at 5-8. In fact, many of Plaintiffs cases themselves limit defamation *per se* to accusations of a "crime of moral turpitude." *See* Opp. at 6 (citing *Harmon*, 116 A.2d at 695 ("in order to be actionable *per se*," words must "impute to him (plaintiff) the commission of some criminal offense . . . if the charge involves moral turpitude") (citation and internal quotations omitted); *Caldwell v. Hayden*, 42 App. D.C. 166, 169, 914 WL 21746, at *2 (D.C. Cir. Apr. 6, 1914) (statement not actionable as defamation *per se* where "there is nothing from which the commission of a crime or moral turpitude can be inferred"); *Friedlander v. Rapley*, 38 App. D.C. 208, 212, 1912 WL 19505, at *2 (D.C. Cir. 1912) ("words falsely spoken of another must, to be actionable *per se* in this jurisdiction, impute to him the commission of some criminal offense for which he may be indicted and punished, if the charge involves moral turpitude.").[3] While Plaintiffs also rely on the 1875 decision in *Pollard v. Lyon*, 91 U.S. 225

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[2] As this authority confirms, while there may have been significant distinctions between "libel" and "slander" at common law, those once separate categories are now typically treated together as "defamation." *Prins v. IT&T Corp.*, 757 F. Supp. 87, 90 (D.D.C. 1991) (outlining identical elements that a "plaintiff bringing a defamation action (libel or slander)" must show).

[3] Plaintiffs neglect to advise the Court that *Friedlander* was overruled in part on other grounds by *White v. Central Dispensary & Emergency Hospital*, 69 App. D.C. 122, 99 F.2d 355 (D.C. Cir. 1938).

(1875), that entire opinion analyzed whether a statement that a woman had engaged in fornication accused her of an indictable offence and therefore constituted defamation *per se*, finding that it did not.

4. Plaintiffs' argument – that libel *per se* extends to statements causing injury to one's trade or profession – is also undercut by numerous cases involving just such an injury where courts nevertheless refuse to treat the claim as libel *per se* (or to authorize an award of presumed damages) unless the challenged statement imputes to the plaintiff a crime of moral turpitude. For example, in *Baldi v. Nimzak*, 158 A.2d 915, 916 (D.C. 1960), a horse trainer was fired after one of his employer's horses died, following which the employer stated that the trainer had "given [the] horse something to make him sick" and "neglected his horse and caused his horse to die." *Id.* at 916. Even though these statements directly addressed the trainer's trade and profession, the Court analyzed the question of whether the plaintiff had properly pled defamation *per se* solely with reference to criminal law. *Id.* Referencing the "Maryland statute which makes the willful and malicious injury to a race horse a felony," the Court found that the statement "fail[ed] to charge in clear and unambiguous language the commission of any crime for which [the trainer] could be indicted and punished." *Id. See also id.* at 917 (analyzing second statement accusing trainer of crime of theft). Because the employer's allegations would not "have subjected [the trainer] to indictment and punishment for crimes involving moral turpitude," the trainer could not obtain a "general recovery . . . without the necessity of pleading or proving special damages." *Id.* at 916.[4]

[4] Although the Court in *Baldi* cited to both *Pollard* and *Friedlander*, 158 A.2d at 916 n.1 (citing *Pollard*, 91 U.S. at 225; *Friedlander*, 38 U.S. App. D.C. at 208), two of the outdated cases on which Plaintiffs rely, it nevertheless limited its analysis to whether the statement imputed the commission of a crime, despite the obvious injury to a horse trainer's trade to say that he had deliberately given a horse something to make it sick and cause its death.

5. Numerous other decisions have similarly required a challenged statement to impute the commission of a crime of moral turpitude before treating the statement as libel *per se*, even where such a statement is also critical of a plaintiff's trade or business. *See, e.g.*, *Caldwell*, 42 App. D.C. at 169-170, 1914 WL 21746, at *2 (Opp. at 6) (defamation *per se* and finding that statement accusing union president of presenting false contract did not "impute to plaintiff the commission of the crime of forgery," and otherwise finding statement non-actionable even though it also caused injury to plaintiff's profession or trade, including specifically "the work performed for the union"); *Schoen v. Washington Post*, 100 U.S. App. D.C. 389, 390, 246 F.2d 670, 671 (D.C. Cir. 1957) (opinion by then-D.C. Circuit judge Warren Burger) (although plaintiffs expressly alleged that article describing police raid on dance studio caused "injury to [their] reputation and business," court analyzed in detail whether plaintiffs had alleged special damages with sufficient specificity, which would have been unnecessary had the alleged injury to their business constituted libel *per se*); *Washburn*, 357 F. Supp. 2d at 215-16 (rejecting claim of libel *per se* because challenged statements did not involve a crime of moral turpitude even while separately analyzing whether they were otherwise defamatory by injuring plaintiff in his "trade, profession, or community standing"); *Wiggins*, 853 F. Supp. at 465 (employer's statement that plaintiff had a felony cocaine conviction was libel *per se*, but other statements about plaintiff's job performance are not and the "elements . . . *must be plead with specificity*") (emphasis in original).[5]

[5] In that same vein, certain of the cases that Plaintiffs contend involve injury to a plaintiff's trade or profession actually involve statements accusing the plaintiffs of a crime. *See, e.g.*, *Cleveland Hair Co. v. Kiely*, 1988 WL 90199, at *1 (D.D.C. Aug. 4, 1988) (Opp. at 7) (allegation that hair clinic and its doctors "had stolen money and files and were subject to criminal prosecution"). Similarly, the one-page decision in *Holt v. Boyle Bros. Inc.*, 95 U.S. App. D.C. 1, 3, 217 F.2d 16, 17 (D.C. Cir. 1954) (Opp. at 7), concluded that a statement "that [the plaintiff] refused to pay a just debt, was plainly defamatory" and therefore "[n]othing more

6. Plaintiff's attempt to circumvent decades of more recent case law by relying on passages from hundred-year-old cases is particularly problematic given the substantial narrowing of claims for defamation in the intervening period, including (a) to limit substantially claims by public officials and public figures, (b) to reverse the traditional burden of proof, which previously recognized that "truth is a defense," so that plaintiffs bear the burden of proving falsity in most cases, (c) to require proof of actual malice to establish presumed and punitive damages in cases involving matters of public concern, (d) to limit claims of libel by implication, (e) to prevent creative pleading of other tort claims to circumvent these other requirements, and (f) to protect defendants against SLAPPs through the enactment of an Anti-SLAPP statute unanimously passed by the D.C. Council.[6] The instant case presents the perfect example of why the *per se* category is limited to such clear allegations of criminal conduct: otherwise, virtually all speech about a person could be said to be injurious in some respect to his or her trade or profession. Expanding libel *per se* to include all such speech would allow plaintiffs to sue even

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is necessary to make written or printed defamation actionable as libel." As this passage makes plain, *Holt* addresses whether the statement is capable of a defamatory meaning, not whether it is libel *per se* for purposes of proof of injury. *See also Edmond v. Am. Educ. Servs.*, 823 F. Supp. 2d 28, 35 (D.D.C. 2011) (citing *Holt* for proposition that such a statement is capable of a defamatory meaning), *aff'd*, 483 F. App'x 576 (D.C. Cir. 2012).

[6] *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (protecting good faith statements about public officials even if false); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (requiring plaintiffs to prove falsity in most cases); *Gertz v. Robert Welch, Inc.*, 423 U.S. 323 (1974) (limiting presumed and punitive damages in libel cases); *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 909 F.2d 512 (D.C. Cir. 1990) (limiting claims for libel by implication); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (imposing similar protections in other tort claims arising out protected speech); D.C. Code § 16-5501, *et seq.* The notion that an 1875 Supreme Court case would wash away the Court's more recent line of speech-protective jurisprudence is further undercut by its protection in the last few terms of speech of far less value than is at issue here. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (invalidating conviction under Stolen Valor Act for falsely claiming to have received Congressional Medal of Honor); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (protecting picketing near military funeral); *United States v. Stevens*, 559 U.S. 460 (2010) (federal statute criminalizing depiction of animal cruelty facially invalid under First Amendment).

where they have experienced no real injury – including, as in the case here, where the challenged statement does not address Plaintiffs' skill or abilities as medical practitioners, where it was online for only a matter of days, where it was presented in a context of both favorable and unfavorable reviews, and where there is no evidence that anyone read it much less thought less of Plaintiffs as a result.

7. Thus, the law is clear that Plaintiffs are required to plead and to prove actual injury with specificity and, under the Anti-SLAPP statute, to demonstrate a likelihood of success of doing so. Because Plaintiffs have failed to offer *any* evidence supporting such an allegation – as the Court has so found in dismissing their tortious interference claim – the Court should dismiss with prejudice their defamation claim with respect to the one remaining statement.[7]

**B. Even If Damages Were Otherwise Presumed, Plaintiff Must Show Actual Malice.**

8. *Even if* the one remaining statement could be considered libel *per se*, Plaintiffs are also required to plead and prove actual malice in order to recover presumed damages and, in the context of an anti-SLAPP motion, must demonstrate a likelihood of success of doing so. In that regard, Plaintiffs concede that if the case involves a matter of public concern they would be required to show that Kandrac published the statement with actual malice in order to recover presumed damages – assuming *arguendo* that presumed damages are available at all. *See* Opp.

[7] Recycling their argument from their Opposition to Defendant's Anti-SLAPP motion, Plaintiffs argue again that they need "targeted discovery" aimed at "demonstrating that Plaintiffs 1) suffered; and 2) are likely to continue to suffer damages as a result of Defendant's defamatory statements alleging that Plaintiffs sent him other patients' receipts or information." Opp. at 12. This Court has already denied this request, held that they have set forth no evidence of damages (as they were required to do), and need not revisit it here. Moreover, as explained in Kandrac's Reply in support of his anti-SLAPP motion, the circumstances in which such targeted discovery is authorized prior to deciding an anti-SLAPP motion are very rare, and a request to expose the identities of anonymous Internet posters is expressly prohibited by another provision of the Anti-SLAPP Act. *See* D.C. Code § 16-5503(a). Finally, Plaintiffs' claimed need to take discovery regarding future damages, when the statement at issue was long ago removed, should not be credited.

at 9 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)). Plaintiffs' only response is that "Defendant's statements are not a matter of public concern." Opp. at 9. *See also id.* at 9-11. This too is flatly wrong.

9. As an initial matter, this Court has already settled this issue, finding that the statements Kandrac published on Yelp were on issues of public interest under the Anti-SLAPP statute. *See* Omnibus Order at 6-7 (defining an "issue of public interest" as "one that is 'related to health or safety environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the marketplace,'" and holding that statement was regarding an issue of public interest under the Anti-SLAPP Act because "Defendant's Yelp reviews were clearly his communication of views about Plaintiff Akl's practice to other members of the community and thus was related to a service in the marketplace."). Plaintiffs' Opposition to Defendant's anti-SLAPP motion did not contend otherwise. *See* Def.'s Reply in Support of Mot. to Dismiss at 3-4. *See also* Jones Aff. Ex. 17 (D.C. Committee Report and bill defining the term "issue of public interest" as "commenting on or sharing information about a matter of public significance"). This Court's determination that this case involves a matter of public interest should conclusively establish that the speech at issue involves a matter of public concern. *See, e.g., Boley v. Atlantic Monthly Grp.*, --- F. Supp. 2d ----, 2013 WL 3185154, at *2 (D.D.C. 2013) (recognizing protection under D.C. anti-SLAPP statute from lawsuits "challenging speech on matters of public concern").[8]

[8] Plaintiffs again erroneously rely on *El-Hadad v. Embassy of United Arab Emirates*, 2006 WL 826098 (D.D.C. 2006), *aff'd in part, rev'd in part*, 378 U.S. App. D.C. 67, 496 F.3d 658 (D.C. Cir. 2007). In that case, the court found that the alleged defamation was not a matter of public interest because it involved a purely private employment dispute. *Id.* at *15 n.16. Here, by contrast, Kandrac's Yelp review constitutes "advocacy on issues of public interest." Thus, *even if* Plaintiffs were entitled to presumed damages, they must offer evidence of "actual malice" to recover them.

10. Moreover, Plaintiffs' own authority also makes clear that their argument on public concern is wrong. *Ayala v. Washington*, 679 A.2d 1057 (D.C. 1996) (Opp. at 9-10), actually confirms that the statement at issue is indeed one of "public concern." There, the court found that a letter written to the plaintiff's employer detailing the plaintiff's alleged drug use as a pilot was a private matter, but then found that a separate letter written to the FAA, calling the agency's attention to the plaintiff's alleged drug use, involved a matter of public concern. 679 A.2d at 1067-68. The court made a specific distinction between private employment disputes that were not matters of "public concern" while other statements concerning government conduct, or any other "social issue" relevant to the public, which are considered matters of public concern protected by the First Amendment. *Id.* at 1068. Indeed, the Court in *Ayala* cited with approval to an earlier case – analogous to the one here – where a letter to a newspaper "falsely accusing [a] chiropractor of overcharging" was held to address a matter of public concern "because by adopting law regulating chiropractic practice, 'the legislature has implicitly stated that the quality of chiropractic services rendered . . . is a matter of public concern.'" *Id.* at 1066 n.6 (citation omitted).[9]

[9] In this regard, *Ayala* defined the category of matters of purely private concern based on the Supreme Court's plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which, as the *Ayala* court described it, involved a matter of "private concern related to the financial status of a small company, disseminated to the company's creditors for the purpose of informing their decisions in business dealings," and not the sort of posting to the general public at issue here. 679 A.2d at 1066. Subsequent Supreme Court case law has limited *Dun & Bradstreet*, emphasizing that, although "'the boundaries of the public concern test are not well defined,'" the Court has "articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors" – specifically, that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is . . . a subject of general interest and of value and concern to the public.'" *Snyder*, 131 S. Ct. at 1216 (citations omitted).

11. Plaintiffs have put forth no evidence of actual malice to controvert Kandrac's affidavit. The undisputed evidence is that Kandrac believed what he wrote which is, by definition, the absence of actual malice. *McFarlane v. Esquire Magazine*, 316 U.S. App. D.C. 35, 45, 74 F.3d 1296, 1306 (D.C. Cir. 1996) ("[T]he question of actual malice turns on [defendant's] subjective beliefs and purposes at the time of publication.").

**C. <u>The Court Has the Authority to Grant Kandrac's Motion.</u>**

12. This Court has broad authority to consider Defendant's motion under Rule 59, Rule 60 or Rule 54 of the D.C. Superior Court Rules, and Defendant's motion can and should be granted under any of the standards employed under these rules.

13. As an initial matter, this court has broad, inherent authority to reconsider its interlocutory rulings prior to entry of final judgment. *See Schoen*, 100 U.S. App. D.C. at 392, 246 F.2d at 673 ("so long as the court has jurisdiction over an action, it should have complete power over interlocutory orders made therein and should be able to revise them when it is consonant with equity to do so") (citation and internal quotations omitted); *Blyther v. Chesapeake & Potomac Tel. Co.*, 661 A.2d 658, 662 (D.C. 1995) (Ruiz, J., concurring) ("Judges are constantly reexamining their prior rulings in a case on the basis of new information or argument, or just fresh thoughts . . . . No one will suggest that a judge himself may not change [her] mind and overrule [her] own order") (quoting, *inter alia*, *Dictograph Prods. v. Sonotone Corp.*, 230 F.2d 131, 134 (2d Cir. 1956) (Hand, J.)).

14. Furthermore, while the exact phrase "motion for reconsideration" does not appear as such in the Superior Court rules, courts in this jurisdiction routinely rule on motions to reconsider non-final orders under both Rules 59(e) and 60(b). *See, e.g., Callahan v. 4200 Cathedral Condominium*, 934 A.2d 348, 353-54 (D.C. 2007) (motion to reconsider interlocutory

order properly considered under either Rule 59 or Rule 60). Indeed, in the very context of an anti-SLAPP Motion, another judge in this Court recently entertained a motion (which was ultimately unsuccessful on the merits) seeking reconsideration under both Rules 59 and 60, even though the order was non-final. *See Mann v. Nat'l Review*, No. 2012 CA 8263 B (D.C. Super. Aug. 30, 2013).[10]

15. In addition, such motions are also routinely granted under the more flexible Rule 54(b), including "where justice requires" reconsideration of a prior order. *See, e.g.*, *Williams v. Vel. Ray Props.*, 699 A.2d 416, 419 (D.C. 1997) (recognizing trial court's "revisory power" to reconsider orders "prior to final disposition of the entire case") (citing D.C. Super. Ct. Civ. R. 54(b)); *Musick v. Salazar*, 839 F. Supp. 2d 86, 93 (D.D.C. 2012) (applying analogous Fed. R. Civ. P. 54 in holding that "justice requires" that the court reconsider its motion denying defendant's motion for summary judgment where "[u]pon further consideration, and having reviewed again the entire record in this case, the Court concludes there are in fact no genuine issues of material fact in dispute"); *Clark v. Feder, Semo & Bard, P.C.*, 736 F. Supp. 2d 222, 225-234 (D.D.C. 2010) (granting motion to reconsider interlocutory order in part under court's "broad discretion" where "justice [so] required").

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[10] Plaintiffs also argue that Rule 59 and Rule 60 apply only to "final" orders and that the Court's order is not a final order because it is not subject to appeal. *See* Opp. at 2-3 (citing, *inter alia*, *Newmyer v. Sidwell Friends Sch.*, No. 12-cv-847 (D.C. Dec. 5, 2012) (*per curiam*)). Plaintiffs rely on *Newmyer*, a non-precedential, unpublished order rejecting an appeal of an anti-SLAPP motion that was not timely filed and viewed as frivolous. But they neglect to cite to the Court of Appeals' subsequent order in *Mann*, in which the question of whether the denial of an anti-SLAPP motion *on the merits* is appealable under the collateral order doctrine was expressly left open. *See Mann v. Nat'l Review*, No. 2012 CAB 8263 (D.C. Dec. 19, 2013) (dismissing appeal as moot where plaintiff had filed an amended complaint and new anti-SLAPP motion was pending in Superior Court, but expressly holding that dismissal was "without prejudice to appellants filing new notices of appeal from orders denying a special motion to dismiss").

## CONCLUSION

Because Kandrac is statutorily immune where Plaintiffs fail to demonstrate a likelihood of success on each element of their claim, the Court should reconsider its decision with respect to the one remaining statement, and should dismiss the case based on Plaintiffs' ongoing failure to demonstrate either any injury or, even if damages could be presumed, any evidence of actual malice.

Dated: January 14, 2014

Respectfully submitted,

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