IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-LAW DIVISION

HORIZON GROUP MANAGEMENT, LLC,	§	
An Illinois limited liability company,	§	
Plaintiff,	§	**No. 2009 L 008675**
	§	
vs.	§	**CALENDAR B**
	§	
AMANDA BONNEN,	§	
Defendant.	§	

MEMORANDUM OF LAW
IN SUPPORT OF
2-615 MOTION TO DISMISS

Defendant Amanda Bonnen (Ms. Bonnen) files this her Memorandum of Law in Support of her motion to dismiss Plaintiff's Verified Complaint pursuant to 735 ILCS 5/2-615.

This case concerns one "tweet" posted by Ms. Bonnen (Complaint ¶7) on Twitter, a social networking site on the Internet (Complaint ¶4). Plaintiff (as noted herein it is unclear whether Plaintiff is Horizon Group Management, LLC or Horizon Realty Group, LLC) asserts that the tweet constitutes defamation *per se* (Complaint ¶10). For the reasons set forth in this Memorandum, the tweet is not defamation *per se* as a matter of law, and this case should be dismissed with prejudice.

I. Plaintiff Fails to Plead Defamation *Per Se* with the Required Level of Precision and Particularity.

Illinois is a fact-pleading jurisdiction that requires a plaintiff to present a legally and factually sufficient complaint. *Kumar v. Bornstein*, 354 Ill. App. 3d 159, 165 (2d Dist. 2004). "A plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." *Vernon v. Schuster*, 179 Ill. 2d 338, 343 (1977). When ruling on a 2-615 motion to dismiss, the trial court should "disregard legal and factual conclusions that are

unsupported by allegations of fact." *Kumar* at 165. Moreover, a defamation *per se* claim "must be pled with a heightened level of precision and particularity. This higher standard is premised upon an important policy consideration, namely, that a properly pled defamation *per se* claim relieves the plaintiff of proving actual damages." *Green v. Rogers*, 2009 Ill. LEXIS 1303 at *24 (2009).

Plaintiff fails to present a legally and factually sufficient complaint, let alone meet the heightened standard for defamation *per se* claims, and should be dismissed for several reasons:

- The Complaint fails to precisely identify the Plaintiff. The Complaint at times alleges that Plaintiff is "Horizon Group Management, LLC" and, at other times, that Plaintiff is "Horizon Realty Group, LLC."
- When properly analyzed in its social context, the "tweet" is mere opinion under the innocent construction rule and is nonactionable as defamation *per se*.
- The "tweet" does not contain verifiable facts or a factual context but rather expresses mere opinion and does not constitute defamation *per se*.
- The "tweet" lacks precise meaning and does not constitute defamation *per se*.

Ms. Bonnen requests that the court dismiss the Complaint with prejudice because Plaintiff has not met, and cannot meet, its heightened burden to sustain a cause of action for defamation *per se*.

II. The Complaint Improperly Intermingles Two Separate Companies as One Plaintiff, Leaving the Plaintiff's Identity Unclear.

As a threshold matter, Plaintiff's identity is unclear is in this case. In the caption for the case and the introductory paragraph to the Complaint, Plaintiff is identified as "Horizon Group Management, LLC." However, the prayer for relief states that Plaintiff is "Horizon Realty

Group, LLC." (Complaint at Page 3.) The attorneys also signed the Complaint on behalf of "Horizon Realty Group, LLC" (Complaint at Page 3), and an authorized agent for "Horizon Realty Group, LLC" verified the Complaint (Complaint Verification at Page 4.) This is significant for two reasons. First, the contradictions contained in the Complaint make it impossible to ascertain Plaintiff's legal identity. Second, because Plaintiff's identity is unclear, it is impossible to tie the statement at issue directly to the Plaintiff and is therefore impossible for Plaintiff to meet an essential element of the cause of action.

While the Complaint alleges that "Plaintiff does business under the name [sic] 'Horizon Realty Group,' 'Horizon Group,' and 'Horizon'" (Complaint ¶1), it is unclear if "Horizon Group Management, LLC" or "Horizon Realty Group, LLC" uses these aliases. If it is "Horizon Group Management, LLC," there is no allegation or factual statement that Horizon Realty Group, LLC—an apparent separate legal entity—assigned or otherwise transferred any potential cause of action to Horizon Group Management. Additionally, if the plaintiff is "Horizon Management Group, LLC," then the complaint is fatally flawed because the tweet does not identify Horizon Group Management, LLC, and the general rule in Illinois is that "where a libelous article does not name the plaintiff, it should appear on the face of the complaint that persons other than the plaintiff and the defendant must have reasonably understood that the article was about the plaintiff and that the allegedly libelous expression related to her." *Bryson v. News America Publications, Inc.,* 174 Ill. 2d 77, 96 (1996). On the other hand, if the Plaintiff is Horizon Realty Group, LLC, this entity is not the named Plaintiff in the lawsuit. In either situation, the Complaint is fatally flawed.

By intermingling two different names as the one "Plaintiff," the Complaint not only fails to meet the basic fact-pleading requirements in Illinois, *Kumar*, 354 Ill. App. 3d at 165, but also

fails to meet the "heightened level of precision and particularity" required in defamation *per se* complaints. *Green,* 2009 Ill. LEXIS at *24. "Precision and particularity are also necessary so that the defendant may properly formulate an answer and identify any potential affirmative defenses." *Id.* at *19. Ms. Bonnen is left to guess the identity of the real plaintiff in the case and how that particular plaintiff acquired an interest in this lawsuit. Without this basic and fundamental information, Ms. Bonnen cannot adequately respond to the allegations and present any affirmative defenses. (In the initial paragraph of the Complaint, Ms. Bonnen also is misnamed as "Amanda Bobben.") Because Plaintiff has failed to properly plead who the real plaintiff is in this case, for this reason alone, the complaint should be dismissed.

III. Complaint Fails to State a Cause of Action for Defamation *Per Se.*

Even without really knowing who the true plaintiff is in this case, the Complaint fails to state a case for defamation *per se*. (Plaintiff calls the cause of action "liable [sic] per se." Complaint ¶10.) Because defamation *per se* "relieves the plaintiff of proving actual damages," the plaintiff's claim "must be pled with a heightened level of precision and particularity." *Green,* 2009 Ill. LEXIS at *23. Plaintiff fails to meet the required level of precision and particularity.

Illinois recognizes five categories of defamation *per se*. They are: (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession, or business; and (5) falsely using, uttering or publishing words to charge a person with being guilty of fornication or adultery. *Bryson v. News American Publications, Inc.,* 174 Ill. 2d 77, 88-89 (1996).

Four of the five categories of defamation *per se* can quickly be eliminated as not being relevant in this case. The tweet does not impute the commission of a criminal offense. (The crime must be an indictable one, involving moral turpitude and punishable by imprisonment or death. *Gardner v. Senior Living Systems, Inc.*, 314 Ill. App. 3d 114, 118 (1st Dist. 2000).) The tweet does not impute infection with a loathsome communicable disease, does not impute an inability to perform or want of integrity in office or employment, and does not falsely utter or publish words to charge a person with being guilty of fornication or adultery. Thus, the only category into which the tweet arguably could fall is prejudicing a party in his profession or business. For a corporate plaintiff, "an alleged defamation must assail the corporation's financial position, business methods, or accuse it of fraud and mismanagement." *Harris Trust and Savings Bank v. Phillips,* 154 Ill. App.3d 575, 579 (1st Dist. 1987). However, "[e]ven where a statement falls into one of the recognized defamation per se categories, it will not be actionable as defamatory if it is reasonably susceptible of an innocent construction. The innocent construction rule . . . requires that an allegedly defamatory article must be read as a whole and words therein that are capable of being read innocently must be so read and declared nonactionable as a matter of law." *Harrison v. Chicago Sun*-Times, 341 Ill. App. 3d 555, 569 (1st Dist. 2003).

A. A statement is nonactionable as a matter of law if it does not state fact, but rather is capable of innocent construction as mere opinion.

Whether the allegedly defamatory statement falls under the innocent construction rule is properly considered as part of a 2-615 motion to dismiss. *Becker v. Zellner,* 292 Ill. App. 3d 116, 123 (2d Dist. 1997). In a 2-615 motion to dismiss in a defamation *per se* case, the court accepts as true the facts alleged in the complaint, including the publication of a statement. "The

court is not, however, required to accept the plaintiff's *interpretation* of the disputed statement as defamatory *per se*. The meaning of the disputed statement is not a fact that can be alleged and accepted as true." *Tuite v. Corbitt,* 224 Ill. 2d 490, 510 (2006) (emphasis in original).

"In determining whether a statement is mere opinion under the innocent construction rule, rather than a fact protected from defamation, the court is guided by several factors: "(1) whether the statement has a precise and readily understood meaning, (2) whether the statement is verifiable, and (3) whether the statement's literary or social context signals that it has factual content. The statement is evaluated from the perspective of an ordinary reader." *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 398 (2008) (finding ad calling competitor "cheap imitators," "shameless owners of Empire rags Center," and "flea market style warehouse" along with ads having the "transparency of a hooker's come on" nonactionable because they were not factual claims).

B. Ms. Bonnen's "tweet" is properly construed as mere opinion, void of factual content, when viewed in its social context.

Ms. Bonnen made her statement in a social context where the average reader would understand that the statement was Ms. Bonnen's opinion, not an objectively verifiable fact. The statement at issue occurred as part of a post on her personal Twitter page. Complaint ¶7 and Exhibit A. Based on the context of the "tweet," the statement can be innocently construed and does not constitute defamation.

"A written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted . . . it cannot be actionable *per se.*" *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982). The court must review the total context of the

statement and a statement is not actionable if it "was not made in any specific factual context." *Dubinsky v. United Airlines Master Executive Council,* 303 Ill. App. 3d 317, 329 (1st Dist. 1999) (where calling plaintiff a "crook" at a meeting of pilots was nonactionable because those present did not have the necessary factual context). "In considering allegedly defamatory statements under the innocent construction rule, we reemphasize that courts must interpret the words 'as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader.'" *Tuite*, 224 Ill. 2d at 512. "[T]he court must focus on the predictable effect the statement had on those who received the publication or heard the broadcast." *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 339 (1st Dist. 1998). "The court considers the statement from the perspective of an ordinary reader of the statement." *Brennan v. Kander*, 351 Ill. App. 3d 963, 969 (1st Dist. 2004). Thus, the *Brennan* court found that a columnist's statement that a person used the United States mail to perpetrate a fraud was not defamation *per se* because it "was made in the literary context of a 'regularly featured column by a journalist who regularly expressed his personal opinions on a wide range of public and social issues'" and, therefore, the statement was not a factual assertion because "a reasonable reader would not have taken the statement as a literal assertion that plaintiff had actually committed mail fraud." *Brennan*, 351 Ill. App. 3d at 970. "If a statement is reasonably capable of a nondefamatory interpretation, given its context, it should be so constructed, and there is no balancing of reasonable constructions." *Harte v. Chicago Council of Lawyers,* 220 Ill. App. 3d 255, 278 (1st Dist. 1991).

The alleged defamatory *per se* statement in this case formed part of a "tweet" that stated, "You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's okay." (Tweet No. 46, Exhibit A to Complaint.) A tweet is a post on

the Twitter.com website, a social networking site. (Complaint ¶4.) Each tweet appears on the author's profile page and can be no more than 140 characters in length. (Complaint ¶4).

"Twitter is a privately funded startup with offices in the SoMa neighborhood of San Francisco, CA. Started as a side project in March of 2006, Twitter has grown into a real-time short messaging service that works over multiple networks and devices." *United States v. Fumo,* 2009 U.S. Dist. LEXIS 51581 at *184 (E.D. Penn. 2009). "[A] finite definition of Twitter is tricky. Its use varies greatly and depends a lot on the individual user." Matthews, Steve, "Technology: Lawyer Marketing with Twitter," 71 Tex. B. J. 450 (June 2008). "Think chat and discussion . . . Twitter is a big dinner table conversation with peers who *you get to choose.*" *Id.* "Looking at any one author's contributions, it is tough not to call it drivel. The turning point for many is to recognize Twitter for what it truly is—pure personal reaction. That reaction can run the gamut, from academic and insightful, to casual and silly, to at times drivel." *Id.* A study of Twitter by Pear Analytics in August 2009 found that 40.55 per cent of tweets were "pointless babble." Kelly, Ryan, "Twitter Study-August 2009, Twitter Study Reveals Interesting Results About Usage," San Antonio, Texas: Pear Analytics. http://www.pearanalytics.com/wp-content/uploads/2009/08/Twitter-Study-August-2009.pdf (last visited on November 4, 2009).

Exhibit A to the Complaint contains 60 tweets by Ms. Bonnen, including the allegedly defamatory tweet. (The numbers are in reverse chronological order.) The tweets consist of Ms. Bonnen's random, personal reflections and opinions about her day-to-day experiences from April 27 to July 13, such as: "Dunkin D's you are so good to me"; "My wardrobe malfunctions are way to [sic] frequent"; "I'll be downtown all day. Call me or else we're not friends. Tweet tweet"; "A dog smaller than a pigeon tried to attack me this morning"; "Just fell down the stairs & broke a heel. Nice job Amanda"; "Will you be gracing me with your presence this

weekend?"; "To run or not to run? The temp. says 93...I might die out there"; "Whoever designed the train with the bi-fold doors was a duche"; "All of these people eating at McDonalds is making me want to hurl"; "Top five of worst flights ever. Never Again spirit air"; and "I look like rudolph but except it just being my nose. It's all over. Wonderful. A good tan better come out of this."

Not only is each of Ms. Bonnen's tweets an off-the-cuff reflection or opinion, but many of the statements are also exaggerations ("Call me or else we're not friends"; "a dog smaller than a pigeon"; "All of these people eating at McDonalds is making me want to hurl"; "I look like rudolph but except it just being my nose. It's all over."). Ms. Bonnen posted the allegedly defamatory tweet in this social and "literary" context. Just as "a reasonable reader would not take as a literal assertion" the journalist's statement that the *Brennan* plaintiff has committed mail fraud, *Brennan*, 351 Ill. App. 3d at 970, any reasonable reader of Ms. Bonnen's tweets would not take them literally. Her readers can see immediately that her statements are rambling hyperbole. Statements that "can be reasonably construed as 'imaginative expressions' or 'rhetorical hyperbole' because the statements are obviously understood as exaggerations, rather than as statements of literal fact" are not defamatory *per se*. *Quinn v. Jewell Food Stores, Inc.*, 276 Ill. App. 3d 861, 869 (1st Dist. 1995). When one considers Ms. Bonnen's allegedly defamatory tweet in the social context and setting in which the statement was published, its nature as rhetorical hyperbole is readily apparent, and it is thus subject to an innocent construction that is nonactionable as defamation *per se*.

C. Ms. Bonnen's "tweet" does not contain verifiable fact and is thus at most mere opinion.

Ms. Bonnen's tweet is an expression of nonactionable opinion, not verifiable fact. "A statement will receive *first amendment* protection provided it does not state actual facts. Only factual statements capable of being proven true or false are actionable. The determination of whether an alleged defamatory statement is a statement of fact or opinion is a question of law." *Brennan,* 351 Ill. App. 3d at 969. In making this determination, "a court must evaluate the totality of the circumstances." *Dubinsky,* 303 Ill. App. 3d at 329. Courts have found that the "vaguer and more generalized the opinion, the more likely the opinion is non-actionable as a matter of law." *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 520 (1st Dist. 1998) (finding "fired because of incompetence" to be so ambiguous and indefinite that it cannot be verified and thus is mere opinion). "In this analysis, the court considers the statement from the perspective of an ordinary reader of the statement." *Brennan,* 351 Ill. App. 3d at 969.

The statement at issue here ("Who said sleeping in a moldy apartment was bad for you? Horizon realty thinks it's okay.") is not verifiable fact. Even if Ms. Bonnen's tweet were interpreted to mean that Horizon realty thinks it's okay to sleep in a moldy apartment, the statement merely reflects what Ms. Bonnen *thinks* "Horizon realty" *thinks*. A person's thoughts are not verifiable facts. The tweet is not "couched in terms of a factual assertion." *Brennan,* 351 Ill. App. 3d at 969. The tweet simply speculates as to what Horizon realty thinks.

The reader also has no factual context for the statement. While Ms. Bonnen's Twitter readers may know that her location is Chicago, Illinois (Complaint at Exhibit A), the tweet does not provide any precise address for Ms. Bonnen's residence, nor does her tweet note that she

lives in any property managed by Plaintiff. There is no way for a reader to be "completely apprised of all the developments" relating to the statement, and "in the absence of factual context, [it] is a statement of opinion, not objectively verifiable and devoid of factual content." *Dubinsky*, 303 Ill. App. 3d at 330.

Because the tweet does not contain verifiable facts or a specific factual context, it can only be Ms. Bonnen's personal opinion, which is not actionable as defamation *per se*.

D. Ms. Bonnen's tweet lacks precise meaning and thus is not factual and cannot constitute defamation *per se*.

The tweet at issue here lacks precise meaning. Rather, it is located in a setting void of factual context and is subject to multiple meanings. As such, it cannot constitute fact and is not actionable as defamation *per se*.

A statement does not contain a factual assertion if it does not have "a precise and readily understood meaning." *J. Maki Construction Co. v. Chicago Regional Council of Carpenters,* 379 Ill. App. 3d 189, 200 (2d Dist. 2008) (finding "houses were crappy" is not a precise fact for purposes of defamation *per se* since it is subject to multiple definitions and thus is an opinion). For a statement to be defamatory, it must have not only a "readily understood" meaning but also a "precise" meaning. *Green*, 2009 Ill. LEXIS 1303 at *14. A statement that is "broad, conclusory, and subjective" is not actionable. *Hopewell*, 299 Ill. App. 3d 513, 519 (finding a senator's statement to a newspaper that a campaign worker was "fired because of incompetence" was too broad in scope and "lacking the necessary detail for it to have a precise and readily understood meaning").

Ms. Bonnen's tweet lacks precise meaning because it is very broad in scope and lacks factual context. As noted *supra*, the tweet is situated within a running commentary consisting of

rambling hyperbole. The tweets immediately preceding Ms. Bonnen's allegedly defamatory comment are "My wardrobe malfunctions are way to [sic] frequent" and "I'll be downtown all day. Call me or else we're not friends." Complaint Exhibit A. In *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 762 (1st Dist. 2002), the court found nonactionable a promotional on-air announcement where an investigative reporter's confronted the target of her investigation by saying, "Let's sum this up for a second, the evidence seems to indicate that you're cheating the city." The court noted that the statement was not made in any specific factual context and that the reporter "did not explain the evidence that she was referring to, nor did she state why she thought [her target] was cheating the city, how he was cheating the city, or even what she meant by the term 'cheating.'" *Id.* Similarly here, Ms. Bonnen's tweet lacked a specific factual context to give her statement any precise meaning. She provides no background for her statement, nor does she accuse Plaintiff of any action. She simply speculates about "Horizon realty's" thoughts without any factual context. Her statement is thus imprecise and nonactionable.

Furthermore, it is not clear in the tweet what is meant by the term "moldy." That word has multiple meanings. While the dictionary offers as one meaning "of, resembling, or covered with a mold-producing fungus," it also defines moldy as "being old and moldering: crumbling" and "antiquated, fusty." *Webster's Ninth New Collegiate Dictionary* 764 (9th ed. 1991). In the context of the tweet in question, the expression moldy could thus mean different things. Ms. Bonnen does not indicate what she means by the expression, and the rambling commentary surrounding the tweet yields no insights into its meaning. Because the allegedly defamatory statement is imprecise, it cannot be defamation *per se.*

IV. Complaint Should Be Dismissed with Prejudice.

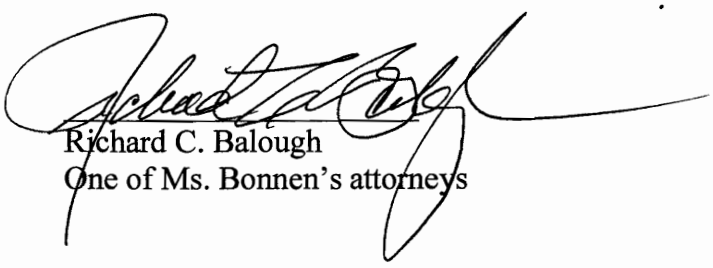
Plaintiff's Complaint alleges only a single count for defamation *per se*. The Complaint alleges that Ms. Bonnen's tweet "is liable [sic] per se. Damages are presumed." (Complaint ¶10). As demonstrated in this Memorandum of Law, the Complaint fails to state a cause of action because the tweet, which serves as the basis for the Complaint, is merely an opinion void of factual context and subject to innocent construction. Therefore, the Complaint should be dismissed.

Furthermore, the Complaint fails to meet the pleading requirements for defamation *per quod*. A defamation *per quod* claim is appropriate only when the plaintiff pleads and proves special damages. *Maag v. Illinois Coalition of Jobs, Growth and Prosperity*, 368 Ill. App. 3d 844, 854 (5th Dist. 2006). "Special damages are 'actual damage of a pecuniary nature.'" *Id.* "Special damages must be alleged with particularity, and general allegations as to damages are insufficient." *Bruck v. Cincotta*, 56 Ill. App. 3d 260, 267 (1st Dist. 1977). "Illinois courts have consistently stated that general allegations such as damage to one's health or reputation, economic loss, and emotional distress are insufficient to state a cause of action for defamation *per quod*." *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 695 (1st Dist. 2000). For example, allegations that an allegedly defamatory statement exposed "the bank to 'public hatred, contempt and ridicule and tended to deprive Harris Bank of public confidence and injured it in its business reputation' is descriptive of general damages, not special damages and are not actionable per *quod*." *Harris Trust and Savings Bank*, 154 Ill. App.3d at 586-87.

The Complaint at issue here does not allege any special damages. Rather, the Complaint merely states that "Plaintiff has been greatly injured in its reputation as a landlord in Chicago,"

Complaint ¶9, and that "[b]ecause the statement damaged the Plaintiff's reputation in its business, the statement is liable per se. Damages are presumed." Complaint ¶10. These statements are not only mere conclusions that must be ignored under *Kumar v. Bornstein*, 354 Ill. App. 3d at 165, but the conclusory statements fall far short of the requirements for special damages necessary to support a claim for defamation *per quod.* (Allegations that a customer "intended" to no longer do business does not allege special damages because "there is no damage if that person did not actually stop doing business with plaintiff. Since plaintiff does not allege that a customer stopped doing business, plaintiff's complaint fails to allege special damages" necessary for a defamation *per quod* claim. *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 531 (2d Dist. 1989).) Because Plaintiff has not alleged such damages, the Complaint must be dismissed with prejudice. There is no set of circumstances under which Plaintiff can amend the Complaint to allege any defamation, either *per se* or *per quod*, against Ms. Bonnen.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Richard C. Balough, do hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of the Motion to Dismiss the Verified Complaint has been served upon:

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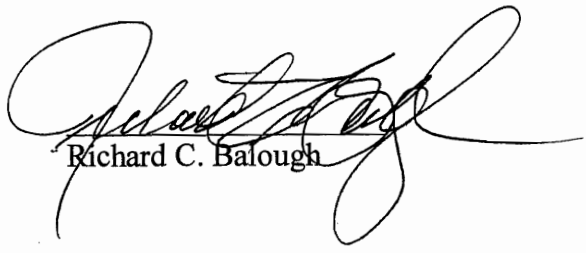
by electronic mail on this 10th day of November, 2009.



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