

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

BRK BRANDS, INC.,

Plaintiff,

v.

NEST LABS, INC.,

Defendant.

Civil Action No.:

**PLAINTIFF BRK BRANDS, INC.’S MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff BRK Brands, Inc. (“BRK”), through its attorneys, K&L Gates LLP, hereby submits its Motion for a Preliminary Injunction against Defendant Nest Labs, Inc. (“Nest”) to preclude Nest from making, using, selling, or offering to sell in the United States its Nest Protect (the “Accused Product”) in violation of 35 U.S.C. § 271.<sup>1</sup>

**INTRODUCTION**

Smoke and carbon monoxide alarms are found in virtually every home in the United States. To distinguish its products from the competition, BRK invests heavily in research and development and in licensing to develop its smoke and carbon monoxide alarms. Those efforts have been extremely fruitful, leading to the introduction of the first smoke and carbon monoxide alarm with a verbal alert indicating both the type and location of danger. BRK’s contributions to the home safety market do not end there. BRK also developed a patented smoke entry system, which helps to reduce the number of false alarms. These innovations have been highly successful and have created an exclusive niche market for premium smoke and carbon monoxide

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<sup>1</sup> This Motion is supported by the Declarations of Mark Devine (“Devine Decl.”) and Dr. Richard A. Blanchard (“Blanchard Decl.”), submitted concurrently.

alarms.

Nest is a manufacturer of thermostats and has never competed in the smoke and carbon monoxide alarm market. When Nest decided to enter this market, rather than develop its own technology like it should have, Nest took BRK's patented voice and location technology. This voice and location technology was developed by Dr. Gary J. Morris, a professor of mechanical and aerospace engineering at West Virginia University. BRK, recognizing the value of Dr. Morris' patents, exclusively licensed that technology and brought it to the market. Despite this, Nest's current marketing campaign incredibly attempts to take credit for Dr. Morris' and BRK's innovations, claiming that "there has been no innovation in the market for years." *See* <http://news.yahoo.com/nest-labs-gets-talking-smoke-detectors-130131563.html> (last visited Oct. 31, 2013). Nest further specifically touts the advantages of BRK's revolutionary technology as the primary selling feature of Nest Protect. Had Nest actually participated in the smoke and carbon monoxide alarm market over the last ten years, it would know that the innovations that Nest is taking credit for are in fact BRK's patented technology. Thus, Nest is seeking to take BRK's hard-earned market share using BRK's own innovations.

Nest is already accepting pre-orders for its Nest Protect product and, based on information currently available, it intends on releasing that product into the marketplace sometime in November of 2013. To protect its intellectual property rights and its years of research and development in this field, BRK seeks this injunction.

## **FACTUAL BACKGROUND**

### **I. The Patents-In-Suit**

BRK brought this case against Nest for infringement of U.S. Patent Nos. 6,144,310 ("the '310 patent"); 6,600,424 ("the '424 patent"); 6,323,780 ("the '780 patent"); 6,784,798 ("the '798 patent"); 7,158,040 ("the '040 patent"); and 6,377,182 ("the '182 patent") (collectively, "Patents-

in-Suit”).<sup>2</sup> The ‘310 patent, the ‘424 patent, the ‘780 patent, the ‘798 patent, and the ‘040 patent (collectively, “Morris Patents”) are related patents, invented by Dr. Morris. The Morris Patents generally disclose “an environmental condition detector using both tonal pattern alarms and pre-recorded voice messages to indicate information about the environmental condition being sensed.” *See* ‘310 patent at Abstract. Additionally, “[t]he pre-recorded voice messages describe the type of environmental condition detected or the location of the environmental condition detector sensing the condition, or both, in addition to the tonal pattern alarm. Provisions are made for multilingual pre-recorded voice messages.” *Id.*

A home owner can define the location of the alarm and the pre-recorded voice then functions according to that specific selection. An example of an alarm would be “smoke in basement” between the beeps of the tonal alarm. The alarms can also be used together in a system such that all of the alarms emit the identical pre-recorded verbal message at all locations throughout the home.

The ‘182 patent was developed by BRK engineers and is unrelated to the Morris Patents. The ‘182 patent discloses a smoke alarm where the smoke sensor(s) are located near the mounting surface, which allows the smoke to flow unimpeded to the sensor, thereby reducing the occurrence of false alarms.

## **II. BRK’s Implementation Of The Patents-In-Suit**

BRK has invested millions in research and development just on the various First Alert® line of smoke and carbon monoxide alarms that practice the Patents-in-Suit. Devine Decl. at ¶6. These products include BRK’s patented voice and location technology, as well as BRK’s

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<sup>2</sup> The Patents-in-Suit are attached as Exhibits A-F of BRK’s Complaint (Dkt. No. 1). For purposes of this Motion, BRK is only asserting claims 8 and 38 of the ‘424 patent; claims 4 and 13 of the ‘780 patent; and claims 8, 20, and 30 of the ‘182 patent (collectively, “PI Asserted Claims”).

patented smoke vent system.

BRK first introduced its exclusive voice and location alarm in 2003. The device was an immediate success and garnered several industry awards. *Id.* at ¶14. Since its introduction, no other manufacturer has offered this combination of features. *Id.* at ¶16.

That same year, BRK again revolutionized its smoke and carbon monoxide alarms, introducing its patented smoke entry system. *Id.* at ¶20. BRK’s patented smoke entry system limits the amount of false alarms, and reduces the likelihood that a home owner would disable the alarm. *Id.* at ¶19. As a direct result of its innovations, BRK had instant success and maintained its status as the market leader in the area of smoke and carbon monoxide alarms. *See id.* at ¶¶17, 21.

The importance of the patented features is highlighted by BRK’s smoke and carbon monoxide alarm packaging. *Id.* at ¶15. For example, BRK’s PC900V model prominently features that it has “Voice & Location Technology” to “[h]elp quickly identify the danger,” as well as the “Patented Smoke Entry System,” which results in “Fewer False Alarms”:



*Id.* at ¶15. BRK has expended considerable resources investing in research and development, marketing, and sales related to its patented smoke and carbon monoxide alarms to ensure maximum safety for its customers. *Id.* at ¶¶6, 8, 12, 19.

BRK's products have also been extraordinarily successful in the market and instrumental in helping BRK maintain its position as the market leader. *Id.* at ¶17. For example, BRK has sold over 1,800,000 units of the voice and location alarm products since the company introduced that product into the market generating substantial revenue. *Id.* BRK's patented smoke entry system has also garnered commercial success, selling over 10,900,000 units and generating over \$100 million in revenue. *Id.* at ¶21.

### **III. Nest's Infringing Nest Protect Alarm**

Nest recently began advertising the Accused Product, the Nest Protect, on its website, which is advertised as a smoke and carbon monoxide alarm:



Importantly, Nest's advertisements for its Nest Protect tout BRK's patented innovations to convince consumers to pre-order the product. Devine Decl. at ¶26. For example, Nest specifically advertises BRK's patented voice and location technology: "In addition to an alarm sound, Nest Protect speaks to you with a human voice. It tells you *what the problem is and where it is*. And if you have more than one Nest Protect, they connect so they can speak up at

the same time . . .” *Id.* (emphasis added). Nest is also using BRK’s patented smoke entry system to claim its Nest Protect can help reduce false alarms: “Burned the toast? Nest Protect won’t just start yelling at you.” *Id.* at ¶27. And incredibly, Nest claims not only that Nest Protect includes these features, but also that Nest is responsible for these revolutionary innovations. *See* <http://news.yahoo.com/nest-labs-gets-talking-smoke-detectors-130131563.html> (last visited Oct. 31, 2013). A video demonstrating Nest’s use of BRK’s patented voice and location technology is even available on its website here: <https://nest.com/#meet-the-nest-protect>.

According to Nest’s website, the Accused Product is not yet available to the public. However, the Nest website indicates that a customer can reserve one and will be charged (\$129) when the product actually becomes commercially available. A press release from early October indicates that Nest expects the Accused Product to go on sale in November, both on its websites and through retailers, including Amazon.com, Home Depot, and Target. Devine Decl. at ¶25.

## **ARGUMENT**

To succeed in its request for a preliminary injunction, BRK must establish that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in its favor; and (4) an injunction is in the public interest. All four factors are satisfied here.

### **I. BRK Is Likely To Succeed On The Merits Of Its Patent Infringement Claims**

In a patent infringement case, “reasonable likelihood of success on the merits” means that a patentee must show: (1) it will likely prove infringement; and (2) its infringement claim will likely withstand challenges to the patent’s validity and enforceability. *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1363 (Fed. Cir. 2001). Even at this stage, the Court considers the evidence in light of the presumptions and burdens that will apply at trial.

*Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1376 (Fed. Cir. 2009).

**A. Nest Protect Infringes BRK's Patents**

BRK only needs to demonstrate that *at least one claim* in one asserted patent is infringed. *Abbott Labs. v. Andrx Pharms., Inc.*, 473 F.3d 1196, 1213 (Fed. Cir. 2007). Generally, an infringement analysis requires two steps: first, the court must construe the asserted claims; and second, the court must compare the properly construed claims to the accused product to determine if the plaintiff is likely to meet its burden of proving infringement by a preponderance of the evidence. *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 429 F.3d 1364, 1372-73 (Fed. Cir. 2005). The Court, however, need not arrive at a final and conclusive claim construction. *See Ill. Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 681 (Fed. Cir. 1990).

**i. The PI Asserted Claims Do Not Present Any Terms Requiring Construction At This Time**

For purposes of this Motion, Nest is alleged to be directly infringing only the PI Asserted Claims. BRK is not aware that any claim terms of the PI Asserted Claims will be disputed. The PI Asserted Claims use common everyday English words whose understanding is clear and unambiguous. Thus, the Court does not need to ascribe any particular meaning to the claim terms, particularly at this early stage of the proceedings.

In the absence of an express intent to impart a novel meaning to a claim term, a “heavy presumption” exists that the term carries its ordinary meaning to one of ordinary skill in the art. *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1369 (Fed. Cir. 2003). Thus, each claim limitation means “what one of ordinary skill in the art at the time of the invention would have understood [it] to mean.” *Id.* “In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent . . . , and claim construction in such cases involves little more than the application of widely accepted meaning of commonly

understood words.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc). Thus, for purposes of assessing BRK’s likelihood of success on the issue of infringement, the Court need only compare the claim language as commonly understood and explained in the specification to the accused infringing device.

**ii. The Accused Product Meets Each And Every Limitation Of The PI Asserted Claims**

Once the claims have been properly construed, the Court must compare the claims to the accused infringing product—the Nest Protect. Literal infringement is established if the infringing product contains each limitation of the asserted claims. *See Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241 (Fed. Cir. 2000). Here, based on the detailed analysis performed by BRK’s expert, Dr. Blanchard, it is clear that Nest infringes at least the PI Asserted Claims. *See* Blanchard Decl. at ¶¶36-38; *see also id.* at Exs. E-G. Indeed, upon review of the claim charts for each of the PI Asserted Claims, it is apparent that the Nest Protect infringes. *See id.* at Exs. E-G. In view of the above, BRK has established a clear likelihood of succeeding on the merits of proving infringement of at least the PI Asserted Claims.

**B. BRK Is Likely To Prevail On Patent Validity At Trial**

In addition to demonstrating a likelihood of success of infringement, BRK must also demonstrate that its asserted claims are likely withstand challenges to the patent’s validity and enforceability. *Purdue Pharma*, 237 F.3d at 1363.

Under 35 U.S.C. § 282, an issued patent comes with a statutory presumption of validity at every stage in litigation, including at the preliminary injunction stage. *Id.* The accused infringer also bears the burden to present evidence of invalidity. Thus, only if Nest raises a “substantial question” regarding validity must BRK establish that Nest’s defense lacks merit. *Sciele Pharma Inc. v. Lupin Ltd.*, 684 F.3d 1253, 1263 (Fed. Cir. 2012); *see also Tech. Licensing Corp. v.*

*Videotek, Inc.*, 545 F.3d 1316, 1319-27 (Fed. Cir. 2008). At this stage, where Nest has yet to present *any* evidence of invalidity, BRK's burden is satisfied by the mere *existence* of the patent. *See, e.g., Canon Computer Sys., Inc. v. NuKote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998).

Moreover, the United States Patent and Trademark Office ("USPTO") allowed the Patents-in-Suit over a large number of prior art references. Dr. Blanchard has reviewed the prior art cited considered by the USPTO, and agrees that the patents are valid over that art. *See* Blanchard Decl. at ¶¶39-47.

## **II. BRK Will Suffer Irreparable Harm Without A Preliminary Injunction**

The Federal Circuit has repeatedly held that threatened loss of market share and goodwill supports a finding of irreparable harm in patent cases. *See, e.g., Abbott Labs.*, 544 F.3d at 1362 (finding irreparable harm from lost market share); *AstraZeneca*, 633 F.3d at 1063 (affirming preliminary injunction where infringement would cause "incalculable harm to [the patent holder's] goodwill"). Nest's sales of its Accused Product cause both of these types of harm and more. Additionally, "the mere possibility of future monetary damages does not defeat a motion for a preliminary injunction." *Celsis in Vitro, Inc. v. Cellzdirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012).

### **A. Loss Of Market Share**

"[L]oss of market share" can itself be irreparable harm. *Robert Bosch LLC v. Pylon Mfg. Co.*, 659 F.3d 1142, 1151 (Fed. Cir. 2011); *see also Purdue Pharma*, 237 F.3d at 1368. That is particularly true here where BRK is not only the leader in the market of smoke and carbon monoxide alarms, but has also created its own exclusive, niche market for premium alarms. Devine Decl. at ¶28. As the market leader, BRK enjoys a preeminent position, to which other companies aspire.

Nest copied the key patented features in order to directly compete with BRK's First Alert® smoke and carbon monoxide alarms. Indeed, Nest advertises Nest Protect as having the exact same features as BRK's patented products. Devine Decl. at ¶25. BRK and Nest are already head-to-head competitors. *Id.* This head-to-head competition has even been acknowledged by independent organizations that review smoke alarm products. *See* <http://www.consumerreports.org/cro/news/2013/10/nest-labs-launches-nest-protect-smoke-and-carbon-monoxide-alarm/index.htm> ("Maker of the Nest Learning Thermostat challenges Kidde, First Alert"). Further, Nest's website makes clear that it intends to sell the Accused Products using the same retailers as First Alert, including Amazon.com, Home Depot, and Target. *See* <http://nest.com/press/nest-protect-the-smoke-carbon-monoxide-alarm-reinvented/> (last visited Oct. 30, 2013).

Additionally, the market for smoke and carbon monoxide alarms is unique in that they are not an item that people frequently purchase, so competition for new customers is fierce. Devine Decl. at ¶23. By way of example, the average consumer purchases approximately three to four smoke alarms and those alarms are designed to last at least ten years, with many consumers waiting even longer than ten years to replace smoke alarms. *Id.* Similarly, the average carbon monoxide alarm lasts approximately seven years. *Id.* So once a new customer relationship is formed, another competitor will not have another opportunity to compete for that consumer for at least seven years. *Id.* Moreover, as a matter of design choice and aesthetics, most consumers do not want different brands, and different looking models of smoke and carbon monoxide alarms throughout their homes. *Id.* Thus, once a new customer has committed to another competitive product, it is very difficult to get them to change. *See, e.g., Broadcom Corp. v. Emulex Corp.*, -- F.3d --, 2013 WL 5508730, at \*11 (Fed. Cir. Oct. 7, 2013).

As a functional matter, several of BRK's models with the voice and location feature are able to communicate with one another in the home to allow a home owner to get a coordinated alert. *Id.* at ¶24. These models of BRK voice and location alarms are not compatible with the Nest Protect alarm. *Id.* Thus, a lost opportunity for a new customer seeking this coordinated alert feature—now offered exclusively by BRK—will result in the loss of multiple smoke and carbon monoxide device sales, not just one sale. *Id.*

Sales of the Nest Protect, as a replacement for BRK's First Alert® products, would undoubtedly reduce BRK's market share and jeopardize its position as the market leader. Because of the unique nature of the smoke and carbon monoxide alarm industry, this would injure BRK in ways that cannot be compensated through an award of money damages and supports BRK's request for a preliminary injunction. *Bosch*, 659 F.3d at 1151; *Purdue Pharma*, 237 F.3d at 1368.

#### **B. Injury To BRK's Goodwill And Reputation**

As with a loss in market share, the Federal Circuit has held that a threatened loss of goodwill and damage to one's reputation supports a finding of irreparable harm in patent cases. *See, e.g., AstraZeneca*, 633 F.3d at 1063. Here, the harm that BRK will face extends beyond lost customer relationships and includes a loss of goodwill and damage to its reputation as an innovator. Devine Decl. at ¶29.

BRK enjoys a hard-earned reputation as the leading provider of smoke and carbon monoxide alarms. Indeed, according to market research, the FirstAlert® brand is the most recognized and trusted brand in the smoke alarm business. *Id.* This is largely because BRK has been a market-leader in technological innovation in this field since it introduced the very first battery powered smoke alarm in 1964. *Id.* BRK's technological advancements in the field of

smoke and carbon monoxide alarms have continued since then and include, among many others, developing the first dual photoelectric/ionization alarm (in 1978), smoke alarms with a ten-year battery (in 1995), and the first combination smoke and carbon monoxide alarm (in 1997). *Id.* Given BRK's long history of innovation in this field, its reputation as an innovator would be damaged if Nest is permitted to claim credit for and use its own patented designs against it in the market.

The damage to BRK's goodwill and reputation because of Nest's infringement simply cannot be quantified and supports BRK's request for a preliminary injunction.

**C. Loss Of Revenues For Research And Development Efforts**

The Federal Circuit has also recognized that a reduction in revenues for research and development activities is another type of irreparable harm. *Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1566 (Fed. Cir. 1996). Specifically, if Nest is permitted to take sales of customers looking for the patented voice and location and smoke entry features that otherwise would have gone to BRK, then BRK will be deprived of revenues it could otherwise re-invest back in its research and development to develop new products. Devine Decl. at ¶30. The resulting harm to BRK is impossible to quantify. *Id.*

Moreover, BRK's investment in its research and development has created countless jobs. *Id.* at ¶31. A reduction in research and development spending could mean a reduction in BRK's research and development staff. *Id.* Once these employees are discharged, institutional knowledge and know-how are irretrievably lost, and BRK's ability to compete in the market would be significantly impaired. *Id.*

**D. Loss Of The Right To Exclude**

Sales of Nest Protect also will deprive BRK of the principal value of the patents, *i.e.*, the

right to exclude infringers. *Celsis*, 664 F.3d at 931; *Black & Decker, Inc. v. Robert Bosch Tool Corp.*, 2006 WL 3446144, at \*3 (N.D. Ill. Nov. 29, 2006) (quoting *Reebok Int'l, Ltd. V. J. Baker, Inc.*, 32 F.3d 1552, 1557) (Fed. Cir. 1994) (the “nature of the patent grant weighs against holding that monetary damages will always suffice to make the patentee whole”). This is vital to the Court’s analysis because “[e]xclusivity is closely related to the fundamental nature of patents as property rights [and] is an intangible asset that is part of a company’s reputation.” *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1345 (Fed. Cir. 2013); see also Devine Decl. at ¶32.<sup>3</sup>

### **III. The Balance Of Equities Weighs Heavily In BRK’s Favor**

The balance of hardships associated with issuing a preliminary injunction clearly favors BRK. BRK has demonstrated a reasonable likelihood of success in proving infringement of the PI Asserted Claims. BRK has invested substantial resources in developing, licensing, and commercializing its innovative technology. See Devine Decl. at ¶¶6-10. In contrast, Nest has simply copied BRK’s patented invention to jumpstart its entry into the market and to usurp BRK’s potential business opportunities.

Absent an injunction, Nest would be using BRK’s patented technology, without its permission, to compete with BRK and irreparably injure its business in at least the ways discussed above in Section II. Any harm Nest would face from an injunction is irrelevant because “[o]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.” *Bosch*, 659 F.3d at 1156 (quoting *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12

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<sup>3</sup> Moreover, unlike in some cases, BRK did not sit on its patent rights, but rather moved as promptly as it could to protect its intellectual property and years of investments in research and development.

(Fed. Cir. 1986)); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 863 (Fed. Cir. 2010) (“[N]either commercial success, nor sunk development costs, shield an infringer from injunctive relief. . . . [The infringer] is not entitled to continue infringing simply because it successfully exploited its infringement.”). This conclusion applies with particular force where, as here, the parties are direct competitors and denial of an injunction would “requir[e] [BRK] to compete against its own patented invention.” *Id.* That would put BRK in a position antithetical to the patent grant by “assist[ing] its rival with the use of proprietary technology.” *Novozymes*, 474 F. Supp. 2d at 613.

To the extent Nest incurs damages from ceasing its manufacturing and marketing efforts for the Nest Protect, that harm is self-inflicted and is the natural consequence of its infringing activity. By contrast, as explained above, the hardships to BRK from Nest’s infringing activity are substantial, threatening to cause irreparable harm to BRK if Nest continued to market and sell the Nest Protect as planned. In these circumstances, “there can be little doubt that the balance of hardships favors [BRK].” *Amgen Inc. v. F. Hoffmann-LaRoche Ltd.*, No. 05-cv-12237, 2008 WL 4452454, at \*48 (D. Mass. Oct. 2, 2008).

#### **IV. A Preliminary Injunction Serves The Public Interest**

The final factor—the public interest—also weighs heavily in favor of an injunction. As the Supreme Court has recognized, “[t]he patent laws promote . . . progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research and development” needed to create a new product and bring it to market. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974). Similarly, the Federal Circuit has “long recognized the importance of the patent system in encouraging innovation.” *Sanofi-Synthelabo*, 470 F.3d at 1383. Indeed, the ““encouragement of investment-based risk is the

fundamental purpose of the patent grant, and is based directly on the right to exclude.’’ *Id.* (citation omitted).

Nest, a non-innovating infringer in this case, is attempting to free-ride on the benefits of BRK’s patent investment. Failure to enjoin such conduct diminishes the incentives of BRK and other innovators to continue serving the public with beneficial technological contributions—especially in the field of home safety. In reality, the only harm that Nest will suffer if the injunction is granted is the loss of profits from the use and sale of its *infringing* product. Therefore, the public interest is served by enjoining Nest’s unlawful infringement.

### CONCLUSION

For the reasons set forth above, BRK respectfully requests that this Court enter a preliminary injunction barring Nest from selling or offering to sell the infringing Nest Protect.

Dated: November 4, 2013

Respectfully submitted,

/s/ Sanjay K. Murthy

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**ATTORNEYS FOR PLAINTIFF BRK  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on November 4, 2013, a true and correct copy of  
the foregoing was served to:

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/s/ Sanjay K. Murthy