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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application for
Establishment of a Reasonable
Arrangement between Eramet
Marietta, Inc. and Columbus Southern
Power Company.

Case No. 09-516-EL-AEC

PUCO

REPLY OF ERAMET MARIETTA, INC. TO OCC'S MEMORANDUM
CONTRA MOTION FOR PROTECTIVE ORDER

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CONTRA MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION

Pursuant to Rule 4901-1-24, Ohio Administrative Code (O.A.C.), Eramet Marietta, Inc. ("Eramet") replies to the Memorandum Contra Motion for Protective Order of Eramet ("Memo Contra") filed by the Office of the Ohio Consumers' Counsel ("OCC") on August 9, 2010.

II. ARGUMENT

A. OCC's Memo Contra Is Out of Time.

Because OCC's Memo Contra is out of time, it should be disregarded altogether. Rule 4901-1-12(B)(1), O.A.C., provides that memoranda contra must be filed within 15 days after the service of a motion. Rule 4901-1-07, O.A.C. provides that in computing any period of time prescribed or allowed by the Commission, the date of the event from which the period of time begins to run shall not be included. Rule 4901-1-07(C), O.A.C., states, in pertinent part, "Whenever a party is permitted or required to take some action within a prescribed period of time after a pleading or other paper is served upon him or her and service is made by personal, facsimile transmission, or electronic message

(email) service and is completed after five-thirty p.m., one day shall be added to the prescribed period of time."

Eramet filed its Motion for Protective Order on July 22, 2010 and provided same day service via email at five-eleven p.m. in accordance with Rule 4901-1-5, O.A.C. Pursuant to Rule 4901-1-03, O.A.C., OCC indicated its willingness to accept service by email by including the email address on its prior pleadings in this case.¹ Thus, pursuant to the Public Utilities Commission of Ohio's ("Commission") rules, any memoranda contra Eramet's Motion for Protective Order was required to be filed no later than August 6, 2010. OCC did not file its Memo Contra until August 9, 2010. OCC has not sought leave to file its Memo Contra out of time and was not otherwise authorized by the Legal Director or Attorney Examiners presiding over this case to file out of time. Accordingly, the Commission should disregard OCC's Memo Contra.

In spite of the fatal defect in OCC's Memo Contra, Eramet responds to the arguments raised in OCC's defective pleading.

B. The Reasonable Arrangement Reports Are Not Public Records That Can Be Divulged.

1. The Commission has no records.

Eramet received a notice via email on July 19, 2010 from Counsel for the Commission that the Commission received a public records request from OCC that includes "records" provided by Eramet and that the Commission intended to "release these records to the requestor unless you file a motion for a protective order, pursuant to OAC §4901-1-24, within three business days following receipt of this letter. Should

¹ See, for example, OCC's Motion to Intervene filed by Gregory Poulos on June 26, 2009, and OCC's Notice of Additional Counsel filed by Maureen Grady on July 24, 2009.

you desire to file such a motion, it should be filed in the docket for Case No. 09-516-EL-AEC."

Eramet complied with the Commission's request to file a Motion for Protective Order in order to protect its proprietary information. However, as argued in its Motion for Protective Order, Eramet does not agree with the Commission that it has any "records."

Eramet again points out that the confidential, proprietary information contained in its reports on the reasonable arrangement were submitted to Staff, not the Commission, pursuant to Section 4901.16, Revised Code. Thus, there are no records in the Commission's possession.

Pursuant to Section 4901.16, Revised Code, information obtained by Staff in its investigatory power may only be divulged by Staff through a report to the Commission or when called on to testify in any court or proceeding of the Commission. To the best of Eramet's knowledge and belief, Staff has not drafted a report to the Commission.

Section 4901.16, Revised Code also provides that whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the Commission.

As the information provided by Eramet was submitted only to Staff and not the Commission, Eramet believes that the release of the information violates Section 4901.16, Revised Code.²

² Section 1333.62, Revised Code, provides for an injunction process to prevent the release of protected information.

2. **If Eramet's reasonable arrangement reports are records that are in the Commission's possession (which they are not) they fall under an exception to the requirement for disclosure under Ohio's public records law.**

OCC is correct that the Commission is subject to public records law. However, OCC misquotes Section 4901.12, Revised Code, as stating that ***all*** proceedings of the Commission and all documents and records in its possession are public records. Memo Contra at 7. In fact, Section 4901.12, Revised Code, provides, "Except as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49]," all proceedings and records of the Commission are public. OCC similarly leaves the quoted caveat out of its description of Section 4905.07, Revised Code, which OCC asserts requires ***all*** facts and information in the Commission's possession to be public. *Id.*

In fact, Section 149.43, Revised Code, states that public records are NOT "[r]ecords the release of which is prohibited by state or federal law." There are two statutes that prohibit the release of Eramet's reasonable arrangement reports: Sections 4901.16 and 1333.61, Revised Code.

- a. **Section 4901.16, Revised Code, applies and prohibits disclosure of Eramet's information.**

OCC argues that Section 4901.16, Revised Code, does not apply because it relates to utility information, not customer information. Memo Contra at 8. OCC is incorrect. Section 4901.16, Revised Code, states that, except as otherwise provided, Staff may not divulge, "***any*** information acquired by him in respect to the transaction, property, or business of any public utility." Eramet points to "any", not to make a sweeping claim that all information provided to Staff is protected, but to demonstrate

that Section 4901.16, Revised Code, does not limit the information to utility information.³ Even if it did, surely the specific kilowatt hours ("kWh") sold to a specific customer could be considered utility information.

Nonetheless, Eramet understands and is mindful that the Commission must balance the public's need for information and transparency and Staff's, customers' and utilities' needs to protect proprietary information. Eramet did not claim that all information submitted to Staff is exempt from disclosure. However, as in the CG&E case previously referenced by Eramet,⁴ Eramet's information was only submitted to Staff as part of a long-term and on-going investigation within the confines of the Commission's rules, Ohio law and the Commission-approved Stipulation and Recommendation ("Stipulation") in this case. OCC's claim that "the Staff's investigation appears not to be ongoing"⁵ is factually incorrect and contrary to the plain language of Rule 4901:1-38-06, O.A.C., and the annual reporting requirements set forth in the Stipulation⁶ that continue for the duration of the reasonable arrangement.

OCC also claims that by accepting Eramet's arguments, the Commission would be "writing into certain statutes (R.C.149.43, 4901.12 and 4905.07) an exception (an act that is the province of the General Assembly and not of the PUCO)." Memo Contra at 11. OCC even goes as far as claiming that there are no exceptions to public records

³ OCC's reliance on *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.* (2007), 113 Ohio St.3d 180,192, is misplaced as the question before the Court was not whether Section 4901.16, Revised Code, applied to customer information.

⁴ *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry on Rehearing at 5 (July 28, 2004).

⁵ Memo Contra at 10-11.

⁶ See pages 8-9 of the Stipulation (August 5, 2009).

statutes in Revised Code Title 49 for materials subject to Section 4901.16, Revised Code. OCC "supports" its claim by demonstrating that the General Assembly did in fact create an exception. As OCC points out, the General Assembly modified Sections 4901.12 and 4905.07, Revised Code, from requiring that *all* information and proceedings before the Commission be public to requiring that all information and proceedings ***except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code*** be public. As already discussed above, the exception includes information that is statutorily prohibited from disclosure.

If the Commission determines that Eramet's reports are public records in the Commission's possession, it should find that they are, nonetheless, protected from disclosure pursuant to Section 4901.16, Revised Code.

b. Section 1333.61, Revised Code, applies and prohibits disclosure of Eramet's information.

If the Commission determines that Eramet's reports are public records in the Commission's possession, they are protected from disclosure pursuant to Section 1333.61, Revised Code, as trade secrets.

OCC does not argue that Eramet has failed to demonstrate that it has taken reasonable efforts to maintain the secrecy of its information. Memo Contra at 15. However, OCC argues that Eramet has failed to demonstrate that the information derives independent economic value from not being generally known. *Id.* OCC is incorrect.

Eramet described the nature of the confidential information as including confidential financial information related to the specific projects on which Eramet has or

will make capital investments and the timing of the investments and projects. Additionally, the reports include Eramet's actual kWh usage and the actual prices paid for electricity based upon the actual usage.

As OCC should know from its opposition to the reasonable arrangement in this case, Eramet does not have very many competitors (only one in the United States at present), but all would be interested to find out more about Eramet's processes and power consumption. As OCC should also already know, and as Eramet's Chief Executive Officer testified, "electricity is Eramet's lifeblood - without it we could not function." Direct Testimony of Frank Bjorklund at 7 (July 29, 2009). As Mr. Bjorklund also testified, Eramet's Ohio operations have reached a point in their economic life cycle that either requires capital investment to sustain the operations or puts the Ohio operations on a disinvestment path. If information about the capital upgrades and Eramet's actual electric usage is released, competitors can modify their own operations to improve their competitive positions and put Eramet out of business. Additionally, if information about the capital upgrades and Eramet's actual electric usage is compromised, it puts those investments in jeopardy.

While OCC has no experience in the competitive business environment, even OCC should be able to understand that, particularly in an industry where electricity is a significant portion of overall costs and the types of capital investments at issue will improve processes, that information is competitively sensitive and derives independent economic value from not being readily known.

OCC also argues that because OCC is not a competitor of Eramet, that there is no basis from withholding the confidential trade secret information from OCC.

Specifically, OCC argues that if the Commission provides the information requested by OCC through its public records request, "*in this case* under the terms of the Eramet/OCC protective agreement, then Eramet would have the protections of the protective agreement that it negotiated and signed with OCC." Memo Contra at 18, 15-16 (emphasis in original). This argument is nonsensical, contrary to other assertions made in the Memo Contra, and incorrect. In fact, OCC's argument that it can maintain the confidentiality of Eramet's confidential information is the best argument against releasing the information to OCC.

It is worth noting that OCC never requested any information from Eramet, let alone pursuant to the terms of the protective agreement, which OCC attached to its Memo Contra as Attachment 3 ("Protective Agreement"). Instead, prior to OCC submitting its public records request, OCC requested the information from Columbus Southern Power ("CSP"). In accordance with Rule 4901:1-38-05(E), O.A.C., which requires CSP to treat customer information as confidential, CSP contacted Eramet for permission to release the information and Eramet refused.

OCC never sought the information pursuant to the Protective Agreement for good reason. OCC does not have any legal vehicle by which it may lawfully obtain the information it seeks from Eramet.

The discovery phase of this case ended approximately a year ago. The Protective Agreement clearly and specifically applies to the discovery phase of the case. Specifically, the Protective Agreement states at page 1, "This Agreement is designed to facilitate and expedite the exchange with OCC of all information *in the discovery process* in this proceeding, as this 'Proceeding' is defined herein." (emphasis added).

More importantly, the Protective Agreement applies only to protected materials, not those in the public domain. Specifically, the Protective Agreement states that "Protected Materials shall not include any information or documents contained in the public files of any state or federal administrative agency or court and shall not include documents or information which at, or prior to, commencement of this Proceeding is or was otherwise in the public domain, or ***which enters into the public domain*** except that any disclosure of Protected Materials contrary to the terms of this Agreement shall not be deemed to have caused such Protected Materials to have entered the public domain." Protective Agreement at 2 (emphasis added).

Information released pursuant to a public records request is, by definition, in the public domain. OCC has not explained (because it cannot be done) how Eramet's confidential information would fall under the Protective Agreement if it is obtained through a ***public records request***, which is the only way OCC has sought the information.

Finally, OCC's own assertions undermine its claims to maintain confidentiality of Eramet's information. For example, OCC asserts, "the public's interest in disclosure is great...." Memo Contra at 24. OCC has also not addressed or explained how it would protect the information if it had it in its possession if another party made a public records request of OCC to obtain the information.

In the unlikely event that the Commission determines that Eramet's reports are public records in the Commission's possession, it should find that they are, nonetheless, protected from disclosure pursuant to Section 1333.61, Revised Code.

3. The Commission precedent cited by OCC does not support disclosure of Eramet's information.

OCC refers to a host of mostly old telecommunications cases to support its proposition that Commission precedent does not support protecting Eramet's information. In every single case referenced by OCC, the information at issue belongs to a regulated utility. Moreover, in most, if not all of the cases, the regulated utility was required to publicly file the information – not submit it to Staff. Accordingly, the precedent referenced by OCC is inapplicable.

Specifically, OCC cites to Case No. 02-1668-GA-CRS,⁷ for the proposition that the Commission has found that “financial data, including basic financial arrangements, do not contain proprietary information worthy of trade secret protection.” Memo Contra at 16. This is a mischaracterization of the Commission's Entry in that case. In fact, the Attorney Examiner found that “sensitive financial information relating to this privately held applicant” is a trade secret and granted, in part, the request for protective treatment. The Attorney Examiner also held that a different exhibit was simply a “basic financial agreement” with no proprietary information.⁸ Accordingly, the Commission did not afford that exhibit protective treatment. The information at issue here is not a basic financial agreement. Rather, it contains information regarding company-specific and unique capital investment projects and customer-specific, actual electricity consumption data.

OCC cites to Case No. 96-483-TP-AEC for the proposition that the Commission has “determined that the details of business arrangements between utilities and third

⁷ *In the Matter of the Applications of Vectren Retail, LLC et al. for Renewal of Certification as a Competitive Retail Natural Gas Supplier and for Approval to Transfer that Certification*, Case No. 02-1668-GA-CRS, Entry at 3 (August 11, 2004),

⁸ *Id.*

parties do not qualify for protection from disclosure." Memo Contra at 16. Details of the business arrangements are not at issue here. Eramet's reasonable arrangement price and the terms and conditions under which it may continue to receive the reasonable arrangement price are already public. Moreover, OCC's reference is inapplicable. In that case, the Commission specifically found that "state and federal telecommunications policy, as set forth above, provides that a local exchange carriers' customer contracts will be available for resale by competing telecommunication providers. Permitting Cincinnati Bell and GTE to redact information regarding prices, quantities, contract length, customer locations, and performance standards would frustrate that regulatory policy."⁹ There is no state or federal policy for the resale of Eramet's reasonable arrangement.¹⁰

Additionally, OCC cites to Case No. 99-890-TP-ACE for the proposition that "financial statements of an inter-exchange carrier have likewise been found not to be a trade secret." Memo Contra at 16-17. In that case, at the adjudicatory stage, the Commission held:

In deciding whether to grant the motion for protective order, it is necessary to strike a balance between competing interests. On the one hand, there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open

⁹ *In the Matter of Cincinnati Bell Telephone Company for Approval of a Contract or Other Arrangement between Cincinnati Bell Telephone Company and Various Customers*, Case No. 96-483-TP-AEC, Entry at 4 (February 12, 1998).

¹⁰ OCC's use of *In the Matter of the Application of Ameritech Ohio for Approval of an Interconnection Agreement between Ameritech Ohio and Communications Buying Group, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 96-604-TP-UNC, Entry at 2-3 (July 10, 1996), is similarly inapplicable. In this case, the Attorney Examiner found that the party seeking protection failed to articulate why it believes the information in the agreement is proprietary and why that information should be treated as a trade secret, other than merely stating its desire to keep the information confidential. Eramet has set forth multiple times in this case why the information is proprietary, a trade secret and should be protected.

process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision.¹¹

This case is no longer in the adjudicatory stage at the Commission and, when it was, as OCC acknowledges, OCC had access to all information. OCC also states that "[e]ven detailed financial information such as balance sheets, plant, accumulated depreciation and amortization has been found to fail to meet the trade secret definition." Memo Contra at 17. On its face, this case relates to information of public utilities regulated by the Commission and is not applicable here.

OCC cites to Case No. 89-360-AU-ORD to support its statement that even "detailed financial information such as balance sheets, plant, accumulated depreciation, and amortization has been found to fail to meet the trade secret definition." Memo Contra at 17. In that case, the company seeking protective treatment had to publicly **file** an annual report to the Commission and the Commission specifically stated:

At the time that CBLD was seeking authorization to operate as a public utility in Ohio, it should have known that an annual report would have to be filed with the Commission. If CBLD had any concerns about the information that was to be filed in the annual report, it should have participated in the meeting to discuss the staff's draft of the new annual report form. The Commission can see no need to address the concerns of CBLD at this time when it failed to raise them in a more timely manner.¹²

Eramet is not a public utility and each of the reporting requirements requires Eramet to **submit** the information to Staff, not file it with the Commission. Any time the same type of information was required to be filed, Eramet took timely and reasonable efforts to protect the information.

¹¹ *In the Matter of the Application of Rapid Transmit Technology, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, Entry at 2 (October 1, 1999).

¹² *In the Matter of the Filing of Annual Reports by Regulated Public Utilities*, Case No. 89-360-AU-ORD, Entry at 8 (August 1, 1989).

It is also worth noting that Chairman Schriber filed a dissenting opinion in that case. Specifically, Chairman Schriber stated that "if there is uncertainty among commissioners as to the appropriate course to follow in this Entry, it would be important to err on the side of USA Mobile II. By granting a Protective Order, not only would we be fulfilling our regulatory obligation to oversee the company, but also, we would not inadvertently upset a market that we wish to sustain as competitive."¹³

OCC also asserts that the Commission has found that sensitive business information may not be protected from disclosure and uses Case No. 89-221-TP-PEX for support. Memo Contra at 17. Again, this is misleading. In fact, the Commission held that the "company was not required to provide detailed information regarding the specific data which was considered in arriving at these figures. Due to the lack of detail in the information offered, the Commission cannot find that the information should be afforded protected status."¹⁴ Thus, there was not the type of specific information required to be included in the Eramet reports and, thus, it was not sensitive business information that the Commission did not protect.

Finally, OCC states that the Commission ruled that the fair market value and net book value of assets sought to be transferred need not be protected from disclosure and references Case No. 89-365-RC-ATC. What the Commission actually held was that in addition to failing to comply with an Attorney Examiner's request to raise specific arguments as to why each specific item warranted protective treatment by making one

¹³ *Id.* at Dissenting Opinion of Commissioner Alan B. Schriber (August 1, 1989).

¹⁴ *In the Matter of the Petition of Alvahn L. Mondell, et al. v. The Ohio Bell Telephone Company Relative to a Request for Two-Way, Non-Optional Extended Area Service Between the Salem Exchange and the Alliance and Sebring Exchanges of the Ohio Bell Telephone Company*, Case No. 89-221-TP-PEX, Entry at 3 (May 16, 1989).

generalized argument, "much of this information is already on the public record, or readily ascertainable through information on the public record."¹⁵ The same is not true for Eramet.

While Eramet agrees with OCC that the Commission has and should take a conservative approach to protecting information, OCC is incorrect that the cases it referenced provide any guidance or even apply in this instance.

C. OCC Does Not Have Any Right or Authority to Regulate the Reasonable Arrangement.

OCC's main reason for wanting the information is to "review whether Eramet is complying with its end of the bargain." In other words, OCC seeks to put itself in the place of the Commission, the regulator, who has continuing jurisdiction to determine whether Eramet is complying with the terms of the reasonable arrangement. OCC is the residential consumer advocate – not the regulator. OCC has no right or authority to make determinations on whether Eramet is complying with the terms of the reasonable arrangement. Again, OCC had its opportunity to contest the reasonable arrangement proposal, including the ongoing reporting requirements, through the course of the litigation phase of this proceeding. That opportunity has ended. This is simply another installment in OCC's ambitions to become the regulator in addition to the residential consumer advocate. For example, the Commission recently denied requests from OCC to expand its role to that of regulator of natural gas utilities through its rulemaking

¹⁵ *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 3 (October 18, 1990).

process.¹⁶ Specifically, in response to OCC's request to include customer contacts with OCC in the definition of a "bona fide dispute" the Commission stated:

As the regulatory body authorized by statute to oversee and supervise the regulated gas companies, it is appropriate and necessary that bona fide disputes should be defined as those brought to the Commission, either informally through the Commission's call center or formally through a docketed case. As a residential consumer advocate, OCC is a party to Commission proceedings and OCC has no statutory authority to regulate the utilities.¹⁷

The Commission should again resist OCC's suggestion that it delegate authority to OCC to regulate by overseeing reasonable arrangements.

D. Public Policy Warrants Protecting Eramet's Information.

The Commission should be particularly cautious about releasing a non-regulated entity's proprietary information. The information that OCC seeks relates to capital expenditures and actual electricity usage at Eramet. There is a significant difference between releasing information belonging to and regarding a regulated public utility and releasing proprietary information belonging to and regarding a customer. Under any other circumstance, the Commission would not have authority to require Eramet to provide the information to OCC. It is only through the reasonable arrangement reporting requirements that the information is in the Staff's possession.

While OCC asserts that "many applications for reasonable arrangements have been filed that contain allegedly sensitive information which has been provided to the PUCO and OCC under controlled circumstances such as a protective agreement," that is not what is before the Commission here. Memo Contra at 24. OCC made a public

¹⁶ *In the Matter of the Commission's Review of Chapter 4901:1-13 of the Ohio Administrative Code, Case No. 09-326-GA-ORD, Finding and Order at 8 (July 29, 2010).*

¹⁷ *Id.*

records request. OCC did not and cannot make a discovery request in this case and made no reference in its public records request to maintaining confidentiality of the information. In fact, OCC stated that the public has a great interest in the information. *Id.*

If the Commission releases the reports to OCC, it may have the impact of discouraging customers and utilities from sharing information with the Staff for fear that it will be considered to be a public record that must be disclosed upon request (contrary to the likely purpose of Section 4901.16, Revised Code). Also, if the Commission requires disclosure of information in Staff's possession, it may result in a chill on companies like Eramet sharing information as openly in the future, which may result in less than adequate ability to develop Staff positions.

Finally, it is worth noting that three times in OCC's Memo Contra it states that now is a time when Eramet "should be engaging in a cooperative approach with the representative (OCC)... Eramet is instead expending funds on mounting legal efforts to keep its justification for the discount secret from the representative of the consumers who are paying for the discount." Memo Contra at 2, 19, 24.

Eramet could not be more infuriated by OCC's assertion that it has failed to be cooperative, particularly when made by the only party in the state that has actively opposed or declined to support every single economic development effort by mercantile customers like Eramet. In fact, OCC stated on the record that as a general proposition, OCC does not support economic development.¹⁸ It is OCC that has made every effort

¹⁸ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Tr. Vol. III at 702-703 (April 22, 2010).

to make Ohio unfriendly to business, including Eramet, rather than "engaging in a cooperative approach." OCC should be aware that if it succeeds in its efforts to harm industry in Ohio, the residential consumers for which it claims to be an advocate will not have the jobs that allow those consumers to maintain electric service.

III. CONCLUSION

For the foregoing reasons, Eramet respectfully requests that the Commission deny OCC's public records request, or, alternatively, grant Eramet's Motion for protective treatment.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply of Eramet Marietta, Inc. to the Office of the Ohio Consumers' Counsel's Memorandum Contra Motion for Protective Order* was served upon the following parties of record this 13th day of August 2010, via electronic transmission or first class mail, postage prepaid.


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