UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CALDWELL WHOLESALE COMPANY, L.L.C., Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY, Defendant.	Case No. 5:17-CV-200-SMH-MLH Judge S. Maurice Hicks, Jr. Magistrate Judge Mark L. Hornsby

REPLY IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS THE AMENDED COMPLAINT

Dated: May 16, 2017

Scott L. Zimmer, No. 26151
KEAN MILLER, LLP
333 Texas Street, Suite 450
Shreveport, Louisiana 71101
Telephone: 318.562.2655
Facsimile: 318.562.2751
scott.zimmer@keanmiller.com

Mark A. Marionneaux, No. 21743
James R. Chastain, Jr., No. 19518
KEAN MILLER LLP
P.O. Box 3513 (70821)
11 City Plaza
400 Convention Street, Suite 700
Baton Rouge, Louisiana 70802
Telephone: 225.387.0999
Facsimile: 225.388.9133
mark.marionneaux@keanmiller.com
sonny.chastain@keanmiller.com

Thomas Demitrack – Trial Attorney
(admitted *pro hac vice*)
Tracy K. Stratford
(admitted *pro hac vice*)
Emmett E. Robinson
(admitted *pro hac vice*)
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: 216.586.3939
Facsimile: 216.579.0212
tdemitrack@jonesday.com
tkstratford@jonesday.com
erobinson@jonesday.com

Attorneys for Defendant

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Caldwell's opposition brief mishandles nearly every point of Louisiana law it touches. Entire sections of Caldwell's argument lack even a single citation supporting Caldwell's positions, and for good reason—those positions are legally deficient. Caldwell does not point to a single case, for example, supporting its arguments (1) that LUTPA's one-year peremptive period can be overcome by recasting an ancient breach-of-contract claim as a *continuing* decision not to enter into a new agreement; (2) that the absolute right to refuse to deal is really only absolute if the refusal has no negative economic impact; or (3) that a plaintiff can survive dismissal of its tortious interference claim even though it has not pled any contact between the defendant and any identifiable customers as required by Louisiana law. None of Caldwell's arguments are sufficient to overcome the clear legal deficiencies in its Amended Complaint.

The case, in the end, reduces to this: (1) RJR had an absolute right to decide to stop doing business with Caldwell in 2004; (2) RJR is not legally required to continually revisit that decision or to now start doing business—whether on the same or modified terms—with Caldwell again; and (3) even if this were not the case, Caldwell's stale claims are time-barred. The Amended Complaint should be dismissed with prejudice.

I. ARGUMENT

A. Caldwell's LUTPA Claim Is Time-Barred.

Caldwell concedes that a one-year limitations period applies to its LUTPA claim. Caldwell also explicitly pleads that RJR terminated its contract with Caldwell in 2004, resulting in Caldwell's loss of buydown status. And it has explicitly alleged that all of its purported damages are attributable to this lack of a buydown relationship with RJR. Caldwell also admits that its relationship with RJR has been static for the last 12-plus years. Those conceded facts require dismissal.

As expected, *see* Mem. in Supp. of Mot. to Dismiss ("Br."), ECF No. 17-1, at 6, Caldwell tries to sneak its 12-year-old claim past this absolute bar by asserting that RJR's "violation" of LUTPA has been an "ongoing" and "continuous" one. But Caldwell *does not cite a single case in support of its position*.[1] Caldwell, instead, relies on a semantic sleight-of-hand, pretending that RJR's decision to end its contractual relationship with Caldwell, leading to Caldwell's loss of buydown status, really did not result in Caldwell's alleged injury. Caldwell instead claims injury as a result of RJR's "ongoing decision"—presumably, in Caldwell's telling, monthly, daily, even minute-by-minute—"to deny buydown . . . payments." Opp. at 2. Stated plainly, Caldwell's theory necessarily means that RJR's decision on a date certain in 2004 to cease doing business with Caldwell created multiple legal wrongs that run in perpetuity unless RJR reestablishes some form of business relationship with Caldwell.

No legal principle supports Caldwell's theory, which would gut LUTPA's one-year time bar. Caldwell's artful rephrasing could apply to virtually *any* contract or tort case, or for that matter to *any* decision by one business not to deal with another. Almost any contract termination case, for example, could be repackaged as an ongoing, day-after-day decision by the defendant not to enter into a new agreement with the plaintiff. And a tort case is just as easy to recast—as a continuous refusal to ameliorate the forward-looking damages that stem from the decision not to do business. Not only does this stand the purpose of the peremptive period on its head, it also has been explicitly rejected by the Louisiana Supreme Court: A "breach of the duty to right a wrong and make the plaintiff whole simply cannot be a continuing wrong which suspends the

[1] The section does cite to *Miller v. ConAgra* and *Crump v. Savine River Authority* but only in an attempt to convince the Court that they *don't* apply to this case. The only other case cite is a one-sentence snippet from *South Central Bell Telephone v. Texaco*, for the generalized proposition that a continuous tort stays the running of prescription. Opp. at 3.

running of prescription, as that is the purpose of any lawsuit and the obligation of every tortfeasor." *Crump v. Sabine River Authority*, 737 So. 2d 720, 729 (La. 1999).

And though Caldwell tries to avoid them, *Miller* and *Crump* are directly on point here. Caldwell acknowledges that this case and *Miller* are "similar[]" in that both originated from "a terminated contract between the parties," but nonetheless argues *Miller* is "not apposite" because "there was no material, ongoing conduct by the defendant to be complained of" in that case. Opp. at 4. That purported distinction, of course, is not accurate: there was at least nominally some ongoing conduct in the form of renewed allegations of chicken theft and continued threats to pursue prosecution in that case, but it was not relevant to the Court's analysis there. And, just as Caldwell here tries to repackage this case as one centering on RJR's "ongoing" and "continuous" decision not to re-enter into a buydown relationship with Caldwell, one could also have recast *Miller* as based, not on the termination of the chicken production agreement, but rather on ConAgra's "ongoing" and "continuous" decision not to reaffirm the agreement or establish a new agreement with Mr. Miller. But the Louisiana Supreme Court rejected the argument in *Miller* that "the [limitations] period has not begun to run because ConAgra's unfair practices have persisted to this day."[2] *Miller v. ConAgra, Inc.*, 991 So. 2d 445, 456 (La. 2008).

The same is true of *Crump*. Rather than seeing the injury for what it was, *i.e.*, an injury arising from the digging of a canal that eliminated the plaintiff's access to the waterways at issue, the plaintiff or the Court there could have easily rebranded it as a series of month-by-

[2] Caldwell's attempt to distinguish *Miller* on the grounds that Mr. Miller "had ceased doing business and filed for Chapter 7 [bankruptcy] relief" prior to filing suit is misguided. *See* Opp. at 4. It is unsupported by the *Miller* opinion, and Caldwell cites no other case law to support it either. It is also logically untenable, given that the "continuing" damages could still accrue to the bankruptcy estate or Mr. Miller. Further, it is absurd to argue that ancient conduct that allegedly continues to harm, but does not extinguish, another's business creates a continuing tort, while conduct that ultimately forces the other out of business would get a pass.

month decisions by the defendant to refuse to remove the canal or as an ongoing decision to permit the waterways to flow in a way that benefitted others rather than the plaintiff. But, again, the Louisiana Supreme Court explicitly rejected these sorts of verbal and logical gymnastics: "The continued presence of the canal and the consequent continuous diversion of water . . . [were] simply the continuing ill effects arising from a single tortious act" and did not transform the alleged violation of rights into a continuous one. *Crump*, 737 So. 2d at 727-28.

"'A continuing tort is occasioned by unlawful *acts*, *not* the continuation of the ill effects of an original, wrongful act.'" *Miller*, 991 So. 2d at 456 (emphasis added). The "continuous" absence of a business relationship between RJR and Caldwell is not an act, let alone a series of continuing acts. It is instead a "continuation of the ill effects of [the] original . . . act": termination of the contractual relationship in 2004.[3] As a result, Caldwell's invocation of supposed "ongoing injury," Opp. at 5, and its related argument that "[t]he cause of injury alleged in this case is plainly continuous" because "[e]ach time Caldwell sells, or attempts to sell, RJR products," Opp. at 3, are unavailing. The law is clear that such "continuing damages. . . do[] not present successive causes of action accruing because of a continuing tort." *In re Med. Review Panel for Claim of Moses*, 788 So. 2d 1173, 1183 (La. 2001).

Finally, Caldwell says it waited 12 years to sue RJR because the "2015 acquisition of

[3] Caldwell's opposition makes much of the allegation that it no longer seeks to reinstate the former contract in its entirety but instead now seeks to regain only one subset of the benefits it enjoyed thereunder: buydown status. Opp. at 4 ("Caldwell does not even ask that RJR reinstate [the contract]; it has requested only that RJR honor its invoices for buydown[s]"). But it offers no case law or argument explaining why seeking to reinstate only some, rather than all, of the benefits enjoyed under the prior contract should transform the case into a continuing tort.

Similarly, Caldwell's invocation of the buydown arrangements RJR has with certain other distributors gets Caldwell nowhere. While Caldwell argues that RJR issues these on a "continuing basis," Opp. at 5, that "fact" (not alleged in the Amended Complaint) is neither here nor there. There is nothing nefarious about those payments, and they cause no injury (and are not alleged in the Amended Complaint to cause any injury) to Caldwell.

Lorillard by RJR's parent company further exacerbated the damage" wrought by the lack of a business relationship between RJR and Caldwell. Opp. at 3 n.1. Setting aside the fact that even a claim arising in 2015 would be time barred, it is still the case that "the existence of continuing damages to a plaintiff, *even progressively worsening damages*, does not present successive causes of action accruing because of a continuing tort." *In re Med. Review Panel for Claim of Moses*, 788 So. 2d at 1183 (emphasis added). The LUTPA claim is incontrovertibly time-barred.

B. Caldwell Has Failed to State a LUTPA Claim.

Though it does not dispute that LUTPA sets a very high bar for plaintiffs and encompasses only truly egregious behavior,[4] Caldwell is unable to point to any such behavior by RJR. Instead of pointing to material in the Amended Complaint overlooked by RJR in its opening brief (there is none), Caldwell's opposition doubles down on its "Smith Litigation" theory, resting its entire case on the argument that RJR ended its business relationship with Caldwell (and subsequently chose not to reinitiate a business relationship with Caldwell) because Caldwell joined as a tag-along plaintiff in a case brought by twenty different distributors against RJR over 14 years ago.

But Caldwell is obligated to plead allegations with enough factual "heft" to plausibly "sho[w] that [it] is entitled to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (citation omitted). And even if this Court were to credit Caldwell's implausible retaliation

[4] In its opening brief, RJR pointed out that Lousiana case law states that (1) "LUTPA, a penal act, calls for strict construction; it reaches only egregious actions involving elements of fraud, deception, or other unethical conduct," Br. at 11 (citation omitted); (2) "[t]he range of prohibited practices under LUTPA is extremely narrow," *id.* (citation omitted); (3) "[t]he statute covers only unfair or deceptive trade practices that have been 'declared unlawful,'" *id.* (citation omitted); and (4) "LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions," *id.* (citation omitted). Caldwell, in its opposition, contests none of these points, and thereby concedes them.

allegations,[5] the LUTPA claim still fails. The allegations that RJR, in retaliation for Caldwell's participation in the Smith Litigation, terminated its contract with Caldwell in 2004 and thereafter has not done business with Caldwell still fail to plead a cognizable LUTPA claim. Under Louisiana law, Reynolds, "regardless of . . . motive, has an absolute right to refuse to deal with" plaintiff. *Int'l Bhd. of Elec. Workers v. BE & K Gov't Grp., Inc.*, No. 05-CV-6629, 2007 WL 781354, at *7 (E.D. La. Mar. 12, 2007) (emphasis added); *Muslow v. A.G. Edwards & Sons*, 509 So. 2d 1012, 1020 (La. 2d Cir. 1987) (same).

Attempting to avoid this reality, Caldwell conflates the distinct concepts of (1) an individual or business's absolute right to refuse to deal with another, and (2) an individual or business's more-limited right to interfere with that other's dealings with a *third party* so long as one has a legitimate interest in doing so. The Opposition, at 7, quotes the following from *McCoin v. McGehee*, 498 So. 2d 272, 274 (La. 1st Cir. 1986) (emphasis added):

> **[1]** An individual, regardless of his motive, has an absolute right to refuse to deal with another; **[2]** however, his right to influence others not to deal is not as broad. A businessman is protected from malicious and wanton interference, and only interference designed to protect legitimate interests of the actor is permitted.

RJR is protected in the present circumstances by the absolute right articulated in part [1]. But Caldwell seeks to conflate parts [1] and [2], arguing that "RJR cannot credibly argue" that its decision, under part [1], to terminate its business relationship with Caldwell (and/or not initiate a new business relationship), "advances a legitimate business interest." Opp. at 7. But the "legitimate interest" qualifier applies only to RJR's "not as broad" "right to influence others not

[5] Caldwell does not dispute that the Amended Complaint contains no plausible allegations as to why Caldwell might have been singled out. Rather, Caldwell offers a new allegation—that not just Caldwell, but other Smith Litigation plaintiffs, too, were "targeted by RJR." Opp. at 8. But it is axiomatic that Caldwell may not "use a Memorandum in Opposition to the Motion[] to Dismiss to add new allegations to [its] Amended Complaint." *Marchman v. Crawford*, No. 16-CV-515, 2017 WL 663246, at *18 (W.D. La. Feb. 17, 2017) (Hicks, J.).

to deal" with Caldwell under part [2], not to RJR's "absolute right" to itself "refuse to deal with" Caldwell.[6] The latter right is unqualified.[7] Moreover, even if Caldwell's reimagining of the law were appropriate (it, of course, is not), the retaliation theory would still fail to state a claim.[8]

C. Caldwell Lacks Standing to Bring its LUTPA Claim.

Caldwell does not dispute that, under Fifth Circuit precedent, only direct consumers and business competitors have standing to bring LUTPA claims. *E.g.*, *Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 327 F. App'x 472, 480 (5th Cir. 2009). Nor does it dispute that it is neither a direct consumer nor a competitor to RJR. Further, it even concedes that *Cheramie* is a "plurality opinion" that "is not, itself, binding." Opp. at 11.

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[6] This distinction between the two concepts is obvious in other cases as well. *E.g.*, *Airline Car Rental, Inc. v. Shreveport Airport Auth.*, 667 F. Supp. 293, 302 (W.D. La. 1986) ("'An individual, regardless of his motive, has an absolute right to refuse to deal with another. The right to influence others not to deal, however, is not as broad. *In that situation*, Louisiana law protects the businessman from malicious and wanton interference, permitting only interferences designed to protect a legitimate interest of the actor.'" (emphasis added) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5th Cir. 1981)).

[7] Caldwell spends a full page of its opposition on *Monroe Medical Clinic, Inc. v. Hospital Corporation of America*, 522 So. 2d 1362, 1363 (La. 2d Cir. 1988), arguing that that case "demonstrates the sufficiency of Caldwell's allegations," Opp. at 8. Caldwell's characterization of the case would lead one to conclude that the claim was deemed sufficient to proceed merely because it alleged that the defendant hospital chose to affiliate with certain physician groups and not affiliate with others. In fact, the allegations went far beyond that—and far beyond Caldwell's allegations here. The *Monroe Medical* plaintiffs alleged, among other things, that the defendant hospital "obtain[ed] information from computers owned and operated by 'unfavored' health providers"; "encourage[ed] the breaking up of groups of physicians"; and "refus[ed] to call 'unfavored' health care providers when they [were] so requested by patients." *Id.* at 1364.

[8] Assuming, *arguendo*, that RJR had indeed decided to end its relationship with Caldwell because of Caldwell's participation in a lawsuit against RJR, a decision to deal with a less-litigious distributor rather than Caldwell would be an eminently reasonable one, and certainly no violation of LUTPA. *See, e.g.*, *Guillory v. Broussard*, 194 So. 3d 764, 778 (La. 3d Cir. 2016), *writ denied*, 210 So. 3d 806 (La. 2016) (finding that defendant breached contract "in order to coerce [plaintiff] to dismiss lawsuits pending against the defendants" "does not meet the criteria for . . . a . . . LUTPA violation").

Caldwell nevertheless argues that this Court should abandon Fifth Circuit precedent (as well as its own directly-on-point ruling that, barring a change is Fifth Circuit law or a binding decision by the Louisiana Supreme Court expanding the reach of LUTPA, LUTPA is still limited to consumers and business competitors, *Baba Lodging, LLC v. Wyndham Worldwide, Operations, Inc.*, No. 10-CV-1750, 2012 U.S. Dist. LEXIS 36891, at *10 (Mar. 19, 2012) (Hicks, J.)). Caldwell points out that a handful of other district court opinions have taken this route, but as explained by this Court in *Baba Lodging* and by RJR in its opening brief, Br. at 14 n.7, the correct path is for district courts to adhere to Fifth Circuit precedent until the Fifth Circuit itself, or a *majority* of the Louisiana Supreme Court, decides to expand LUTPA. *Accord Swoboda v. Manders*, No. 14-CV-19, 2015 WL 10985112, at *1 (M.D. La. Nov. 12, 2015) ("[T]he three-justice plurality opinion . . . in [*Cheramie*] is [insufficient] to warrant refusing to apply otherwise-binding Fifth Circuit precedent, and instead make a new *Erie* guess as to what a majority of the Louisiana's highest court would find if actually faced with the question [of expanding LUTPA beyond consumers and business competitors] today. . . . [T]he better course is to follow Fifth Circuit precedent, as the district court did in [*Baba Lodging*], and let the appellate court determine whether *Cheramie* is a sufficient basis to overturn its own precedent.").

D. Caldwell's Tortious Interference Claim Is Time-Barred.

Caldwell does not dispute that a one-year limitations period applies to this claim as well. And it raises no new substantive arguments here, instead relying on the "reasons previously set forth" in the LUTPA section of its opposition to support the contention that the tortious interference claim is not prescribed. As explained in RJR's opening brief, Br. at 6-10, 14-15, and above, at 1-5, however, these reasons are contrary to Louisiana law. "[P]laintiff['s] claims are prescribed on the face of the petition," and so "plaintiff has the burden of proving the claims

are not prescribed." *Sims v. Am. Ins. Co.*, 101 So. 3d 1, 4 (La. 2012). Caldwell has not met that burden. Both the LUTPA and tortious interference claims are time barred.

E. Caldwell Has Failed to State a Tortious Interference Claim.

Other than a generalized citation regarding notice pleading and a discussion of one of *RJR*'s cases, Caldwell does not cite a single case to support the argument that it has sufficiently pled tortious interference. And Caldwell ignores the numerous cases cited by RJR establishing that the standard for stating a tortious interference claim is a very rigorous one. *See* Br. at 15-17.

As pointed out in RJR's opening brief, to successfully plead tortious interference, "it is not enough to allege that a defendant's actions affected plaintiff's business interests; the plaintiff must allege that the defendant actually prevented the plaintiff from dealing with a third party." *Bogues v. Louisiana Energy Consultants, Inc.*, 71 So. 3d 1128, 1135 (La. 2d Cir. 2011) (emphasis added). And that third party must be identifiable.[9] *Brand Coupon Network, LLC v. Catalina Mktg. Corp.*, No. 11-CV-556, 2014 WL 6674034, at *10 (M.D. La. Nov. 24, 2014). But far from alleging that RJR "actually prevented" it from engaging in business with specific, identifiable retailers, Caldwell has merely alleged that the absence of a special buydown relationship with RJR has made it more likely that some unidentified customer(s) might choose to do business with a distributor other than Caldwell. Nowhere is there any allegation of any communication, proper or otherwise, between RJR and a Caldwell customer.

As RJR has shown, Br. at 16, and Caldwell cannot deny, Opp. at 13, a tortious interference claim cannot be pled without, at a bare minimum, communications between RJR

[9] Caldwell's attempt to divine a distinction between "identifiable" and "identified" third parties is manifestly erroneous. The mandate that the third parties be identifiable requires, plainly, that the plaintiff identify the specific third parties at issue, not merely, as plaintiff argues, that the plaintiff need only allege that it *could* identify the third parties if theoretically required to do so.

and Caldwell's retail customers. But all Caldwell can muster is the feeble assertion that the absence of a buydown relationship between Caldwell and RJR "is, itself, a communication to retailers." Opp. at 13. This redefinition of "communication" defies both the plain meaning of the word and case law. *See, e.g.*, *Dorsey v. N. Life Ins. Co.*, No. 04-CV-342, 2005 WL 2036738, at *16 (E.D. La. Aug. 15, 2005) (claim for tortious interference with business failed where there were "no allegations that any in-house agent [of defendant] *actually contacted* any of plaintiffs' clients" (emphasis added)).[10] Finally, and perhaps most damning, while Caldwell contests, *as to its LUTPA claim*, application of the rule that Reynolds, "regardless of . . . motive, has an absolute right to refuse to deal with" Caldwell, *Int'l Bhd. of Elec. Workers*, 2007 WL 781354, at *7 (emphasis added), it does not do so with regard to the tortious interference claim. Caldwell having failed to explain why this fundamental principle of Louisiana law should not apply, the claim should be dismissed.

II. CONCLUSION

For these reasons, and those stated in RJR's opening brief, the Amended Complaint should be dismissed with prejudice.[11]

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[10] Even if Caldwell had alleged that RJR had affirmatively communicated to retailers that it had no buydown or other business relationship with Caldwell, such an allegation—missing here—still would not come close to alleging the "improper" influence that Caldwell admits, Opp. at 12, must exist to successfully plead tortious interference.

[11] While Caldwell "suggests" in passing that leave to file a Second Amended Complaint might be "appropriate," Opp. at 14, it has not moved to amend nor indicated what new information it could add to a third complaint that would make it fare better than the present one. A trial court may "deny[] leave to amend where the proposed amendment would be futile because it could not survive a motion to dismiss." *Rio Grande Royalty Co. v. Energy Transfer Partners, L.P.*, 620 F.3d 465, 468 (5th Cir. 2010). Further, the operation of the limitations period here underscores the propriety of dismissal with prejudice. *See, e.g.*, *Ali v. Higgs*, 892 F.2d 438, 440 (5th Cir. 1990) (converting dismissal without prejudice to dismissal with prejudice where court of appeals held "that plaintiff's action [was] barred by [statute of] limitations").

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Respectfully submitted,

/s/ Scott L. Zimmer
Scott L. Zimmer, No. 26151
KEAN MILLER, LLP
333 Texas Street, Suite 450
Shreveport, Louisiana 71101
Telephone: 318.562.2655
Facsimile: 318.562.2751
scott.zimmer@keanmiller.com

Mark A. Marionneaux, No. 21743
James R. Chastain, Jr., No. 19518
KEAN MILLER LLP
P.O. Box 3513 (70821)
11 City Plaza
400 Convention Street, Suite 700
Baton Rouge, Louisiana 70802
Telephone: 225.387.0999
Facsimile: 225.388.9133
mark.marionneaux@keanmiller.com
sonny.chastain@keanmiller.com

Thomas Demitrack
(admitted *pro hac vice*)
Tracy K. Stratford
(admitted *pro hac vice*)
Emmett E. Robinson
(admitted *pro hac vice*)
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: 216.586.3939
Facsimile: 216.579.0212
tdemitrack@jonesday.com
tkstratford@jonesday.com
erobinson@jonesday.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2017, R.J. Reynolds Tobacco Company's Reply in Support of Defendant's Motion to Dismiss was filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Scott L. Zimmer
Scott L. Zimmer

Attorney for Defendant