

SUPREME COURT STATE OF NEW YORK	APPROVED	COMMERCIAL DIVISION SUPPORT OFFICE	<input checked="" type="checkbox"/> MOT <input type="checkbox"/> X-MOT	CLERK'S INITIALS
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At a Term, Part ~~3~~ of the Supreme Court of  
the State of New York, held in and for the  
County of New York, 60 Centre Street,  
Room 248, New York, New York, 10007 on  
the 12<sup>th</sup> day of September, 2006.

022599

Present: Hon. Herman Cahn, Justice

MOTION SEQUENCE # 004

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,  
by ELIOT SPITZER, Attorney General of the State  
of New York,

Index No. 401325/06

Petitioners,

v.

DIRECT REVENUE, LLC, and JOSHUA ABRAM,  
ALAN MURRAY, DANIEL KAUFMAN and  
RODNEY HOOK, Individually,

**ORDER TO  
SHOW CAUSE  
TO SEEK AMICUS  
CURIAE STATUS**

Respondents.

INDEX NUMBER	401325	YEAR	2006
IS MOTIONS			4
TOTAL			4
CREDIT CARD			4

-----X  
Upon the annexed affidavit of Scott S. Christie, sworn to on the 11<sup>th</sup> day of  
September, 2006, and the proposed *amicus curiae* brief submitted by David Post, Eric  
Goldman and Scott Christie (collectively, "Petitioning *Amici*") in support of their  
Application to Seek *Amicus Curiae* Status in this matter,

CMS CAPTION	DATE	TIME
	11 SEP 11	1:58 PM

Let the Petitioners and Respondents show cause before this Court at Part 3  
thereof, to be held at the Courthouse, located at 60 Centre Street, New York, New York  
10007, on the 29 day of Sept., 2006, at 9<sup>30</sup> .m., or as soon thereafter as  
counsel can be heard, why an Order should not be entered allowing Petitioning *Amici* to  
be accorded *amicus curiae* status in this matter and to file the attached proposed *amicus*  
*curiae* brief pursuant to 22 NYCRR 100(B)(6)(b); and sufficient cause having been  
demonstrated, it is hereby

ORDERED, that oral argument shall be required on the return date of this application; and it is further

ORDERED, that service of a copy of this Order to Show Cause, together with the papers upon which it is granted, on counsel for Petitioners and Respondents on or before Sept. 14, 2006, be deemed good and sufficient service thereof. ✓

ENTER,

Herman Cahn  
Herman Cahn, J.S.C.

**ORAL ARGUMENT  
DIRECTED**

He  
J.S.C.

Present: Hon. Herman Cahn, Justice

-----X  
THE PEOPLE OF THE STATE OF NEW YORK,  
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Respondents.  
-----X

Index No. 401325/06

**AFFIDAVIT OF  
SCOTT CHRISTIE**

SCOTT S. CHRISTIE, of full age, hereby certifies as follows:

1. I am an attorney-at-law of the State of New York and a partner of the law firm McCarter & English, LLP. I am fully familiar with all facts stated herein.
2. I make this affidavit in support of the Application of David Post, Eric Goldman and Scott Christie (collectively, "Petitioning *Amici*") to Seek *Amicus Curiae* Status.
3. David Post is the I. Herman Stern Professor of Law at the Temple University Law School. He has been writing about, and teaching, the developing law of the Internet for over a decade, and is the author of numerous scholarly articles, and co-author of "Cyberlaw: Problems of Policy and Jurisprudence in the Information Age," a leading casebook on these issues.
4. Eric Goldman is an Assistant Professor of Law and Director of the High Tech Law Institute at Santa Clara University School of Law. He has also taught Internet Law for a dozen years and written and spoken extensively on the subject.

5. I serve as co-chair of McCarter & English's Information Technology practice group. I am a former Assistant U.S. Attorney in the U.S. Attorney's Office for the District of New Jersey where I headed the Computer Hacking and Intellectual Property Section and prosecuted numerous cases of Internet fraud, telecommunications fraud, dissemination of computer viruses, computer extortion, theft of electronic data, malicious computer hacking as well as a wide variety of criminal copyright, trademark and trade secret theft cases.

6. Petitioning *Amici* have no personal connection to the parties to this action and no financial interest in the outcome of the litigation. They are not being compensated by either party. They have undertaken no independent investigation of Direct Revenue's business practices or of any of the factual allegations set forth in the Petition, and do not intend this brief to endorse or, for that matter, to criticize any of them.

7. Petitioning *Amici* seek *amicus curiae* status to submit to the Court the attached proposed *amicus* brief for the purpose of assisting the Court in its deliberations. The issues raised in this action related to the lawfulness, validity and enforceability of clickwrap agreements are of great importance for the continued development of a coherent and reasonable legal regime for the hundreds of thousands of businesses, and hundreds of millions of individuals, who conduct commercial activities over the Internet. Indeed, the Court's rulings may have substantial, and possibly even profound, implications for commercial law and commerce on the Internet.

8. Petitioning *Amici* are concerned that Petitioners appear to contend that clickwrap agreements, as a general proposition, do not and cannot afford consumers adequate notice of the terms of such agreements, rendering any consent given by

consumers under these agreements unknowing, involuntary and unintelligent. Our proposed *amicus curiae* brief focuses the Court's attention on the near universal use and acceptance of clickwrap agreements as an instrument for furthering the growth and development of electronic commerce. Petitioning *Amici* are not aware that any of the parties to this action have raised such arguments for the Court's consideration.

9. The proposed *amicus curiae* brief or the status of Petitioning *Amici* as *amicus curiae* will not delay this action or otherwise substantially prejudice the rights of any of the parties.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 11, 2006

  
Scott S. Christie

Index No. 401325/06

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**IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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THE PEOPLE OF THE STATE OF NEW YORK,  
by ELIOT SPITZER, Attorney General of the  
State of New York,  
*Petitioners,*

v.

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JOSHUA ABRAM, ALAN MURRAY, DANIEL KAUFMAN and  
RODNEY HOOK, Individually,

*Respondents.*

---

**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY**

---

David Post<sup>1</sup>  
I. Herman Stern Professor of Law  
Temple University, James E. Beasley School of Law  
1719 North Broad St.  
Philadelphia, PA 19122  
Telephone: (215) 204-7861

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<sup>1</sup> Institutional affiliations are for identification purposes only, and imply no endorsement of the views expressed herein by any of the institutions or organizations listed.

Eric Goldman  
Assistant Professor of Law  
Director, High Tech Law Institute  
Santa Clara University School of Law  
500 El Camino Real  
Santa Clara, CA 95053  
Telephone: (408) 551-3000 x6135

Scott S. Christie  
McCarter & English, LLP  
245 Park Avenue  
27<sup>th</sup> Floor  
New York, NY 10167  
Telephone: (212) 609-6800  
*Counsel of Record*

## INTRODUCTION

David Post, Eric Goldman, and Scott Christie respectfully move this Court for leave to file a brief *amicus curiae*.

David Post is the I. Herman Stern Professor of Law at the Temple University Law School. He has been writing about, and teaching, the developing law of the Internet for over a decade, and is the author of numerous scholarly articles, and co-author of "Cyberlaw: Problems of Policy and Jurisprudence in the Information Age," a leading casebook on these issues.

Eric Goldman is an Assistant Professor of Law and Director of the High Tech Law Institute at Santa Clara University School of Law. He has also taught Internet Law for a dozen years and written and spoken extensively on the subject.

Scott Christie is a partner at the law firm McCarter & English, LLP where he co-chairs the firm's Information Technology practice group. He is a former Assistant U.S. Attorney in the U.S. Attorney's Office for the District of New Jersey where he headed the Computer Hacking and Intellectual Property Section and prosecuted cases of Internet fraud, telecommunications fraud, dissemination of computer viruses, computer extortion, theft of electronic data, malicious computer hacking as well as a wide variety of criminal copyright, trademark and trade secret theft cases.

*Amici* have no personal connection to the parties to this action and no financial interest in the outcome of the litigation. They are not being compensated by either party. They have undertaken no independent investigation of Direct Revenue's business practices or of any of the factual



allegations set forth in the Petition, and do not intend this brief to endorse (or, for that matter, to criticize) any of them.

*Amici* submit this brief solely for the purpose of assisting the court in its deliberations. The issues raised in this action are of great importance for the continued development of a coherent and reasonable legal regime for the hundreds of thousands of businesses, and hundreds of millions of individuals, who conduct commercial activities over the Internet. The court's decision may have substantial, and possibly even profound, implications for commercial law and commerce on the Internet, and we hope that this brief can help clarify some of the issues involved and help the court to make a reasoned and just decision in this case.

## ARGUMENT

Much of Petitioner's case, at bottom, appears to be based on the theory that (1) Respondents (along with their distributors and subdistributors) installed software<sup>2</sup> on consumers' computers without giving those consumers "reasonable or conspicuous notice" of, and without obtaining user consent to, that installation; and (2) this conduct constitutes both a "deceptive

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<sup>2</sup> The technical issues in this case, as in many cases involving activity on the Internet, are difficult enough without the added distraction of imprecise usage of terminology. Petitioner refers throughout to Respondents' software as "spyware." See, e.g., *Petition*, at 1 ("Direct Revenue has installed more than 150 million ad-serving programs (also known as 'spyware'"); *id.*, at 5 ("Direct Revenue has installed its invasive spyware onto consumers' computer (*sic*) more than 150 million times") and *passim*; see, also, Petitioner's Memorandum of Law in Opposition to Respondents' Motion to Dismiss (hereinafter, "Opp."), at 2 – 3 ("Direct Revenue distributed its spyware in one of two ways . . . [and] hired third-party distributors to help distribute its spyware") and *passim*.

Such a characterization is inaccurate at best, and misleading at worst. "Spyware," as the term is generally used, refers to software that, unbeknownst to the user (and without the user's consent), collects information about a user's computer activities and relays that information to a third party. See, e.g., Oxford English Dictionary (available online at <http://dictionary.oed.com>) (defining "spyware" as "software that enables information to be gathered covertly about a person's computer activities, passwords, etc., and relayed to interested parties"); see, also, Merriam-Webster Online Dictionary (available online at <http://www.m-w.com/dictionary/spyware>) (spyware is "software that is installed in a computer without the user's knowledge and which transmits information about the user's computer activities over the Internet"); *Wikipedia* (available online at <http://en.wikipedia.org/wiki/Spyware>) ("In the field of computing, the term spyware refers to a broad category of malicious software designed to intercept or take partial control of a computer's operation without the informed consent of that machine's owner or legitimate user. . . . spyware is a type of program that watches what users do with their computer and then sends that information over the internet.").

Respondents' software does not appear to behave in this manner; in particular, Petitioner does not allege that it generated a record of user activity that was communicated to a third party. It appears that Respondent's software is more accurately identified as "ad-ware" – software that enables the display of "pop-up" windows on a user's computer while the user is accessing the World Wide Web.

practice,” within the meaning of N.Y. GBL § 349, as well as an unlawful “trespass” on, and “tampering” with, those computers.<sup>3</sup>

The legal principle asserted is, we believe, a generally-accepted one: installation of software without notice or consent of the owner of the computer on which the installation takes place is unlawful.

In support of its claims, however, Petitioner describes a notice/disclosure/consent arrangement – viz., the use of a “clickwrap” agreement – that is ubiquitous on the Internet. Before any of the complained of installation actions were taken, and before any files were downloaded to a consumer’s computer, that consumer was (a) notified of the existence of a detailed agreement that would be binding in the event the download was completed, (b) given the opportunity to access and read the agreement (via a hyperlink), and (c) given the opportunity to decline to go forward with the transaction.

“Respondents purport to have obtained user consent as follows. The FasterXP.com home page contained a link (in small print) stating: ‘By clicking the ‘Free download’ button above and downloading FasterXP, I accept and agree to abide by the End User License Agreement.’ This license agreement was not directly presented to users, and was only available through a link. The fourth page of the eleven page ‘agreement,’ in turn, contained the vague directive: ‘Please read and understand the ABetterInternet End user license agreement before Installing FasterXP.’ This second link led to yet another, lengthy license agreement which finally disclosed that

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<sup>3</sup> See, e.g., Opp. at 11 (“As alleged in the Petition and supporting affidavits, Respondents engaged in deceptive business practices and false advertising by, inter alia, failing to clearly and conspicuously disclose their bundled spyware programs on their websites and in their advertisements.”); *id.*, at 19 (“Because Respondents failed to provide consumers with clear and conspicuous notice of its spyware programs . . . Respondents are also liable for trespass to chattels and computer tampering”).

'ABetterInternet' (a subsidiary of Direct Revenue) would install advertising software on the user's computer."<sup>4</sup>

There are no authoritative statistics concerning the number of such "clickwrap" agreements in current use on the Internet. We are certain, however, based upon over a decade of work on these questions, that they number in the hundreds of thousands, if not millions, and that they comprise much of the legal infrastructure for Internet commerce worldwide. None of the *amici*, in his own personal experience, can recall downloading software over the Internet, or subscribing to an Internet information service, without first being presented with a clickwrap agreement of some kind. Simply put, clickwrap notice-and-consent arrangements are *the* way that websites and Internet publishers communicate legal terms to their users.

As a result, they have been the subject of a large body of caselaw<sup>5</sup> and scholarly commentary.<sup>6</sup> In most circumstances,<sup>7</sup> they have been deemed to

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<sup>4</sup> Petition, at 8. See, also, *id.*, at 5 ("As a general rule, at no time during this process were consumers given reasonable or conspicuous notice that Direct Revenue would download its 'spyware' . . . At best, notice of the spyware was hidden deep within a linked 'agreement' . . ."); *id.*, at 10 (disclosure in "a lengthy, linked license agreement"); Opp., at 12 ("The dialog boxes that appeared . . . also failed to give clear and conspicuous notice of the installation of Respondents' spyware. Although the dialog box provided a hyperlink to Respondents' 'Consumer Policy Agreement,' the terms of the 'Agreement' were not shown directly to the consumer, the consumer was not required to view the 'Agreement' before proceeding to installation, and neither the dialog box nor the hyperlink gave the consumer any indication whatsoever that the 'Agreement' contained important information about spyware or other software programs that would be installed onto the user's computer.").

<sup>5</sup> An extensive list of the cases involving a question of the enforceability of clickwrap agreements can be found online at <http://www.ericgoldman.org/Resources/onlinecontracts.htm>.

<sup>6</sup> See, e.g., Mark A. Lemley, "Intellectual Property and Shrinkwrap Licenses," 68 S. Cal. L. Rev. 1239 (1995); David A. Einhorn, "Shrink-Wrap Licenses: The Debate Continues," 38 IDEA: J. L. & Tech. 383 (1998); Daniel B. Ravicher, "Facilitating Collaborative

constitute a legitimate means of obtaining valid, enforceable consent to a binding contract. Hundreds of thousands of individuals and businesses have relied upon those rulings and on that body of law; the generally-accepted enforceability of clickwrap agreements is now part of the background legal regime that has helped to generate a vibrant and immensely valuable “information economy” on the Internet.

Our concern in this case is that Petitioner appears to cast its net of illegality broadly enough to encompass relatively common, standard agreements, *viz.*, those in which material terms of the transaction are

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Software Development: The Enforceability of Mass-Market Public Software Licenses,” 5 Va. J.L. & Tech. 11 (2000); Dawn Davidson, “Click and Commit: What Terms Are Users Bound to When They Enter Web Sites?” 26 Wm. Mitchell L. Rev. 1171 (2000); Donnie L. Kidd Jr. & William H. Daughtrey Jr., “Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions,” 26 Rutgers Computer & Tech. L.J. 215 (2000); Anthony M. Balloon, “From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions,” 50 Emory L. J. 905 (2001); Ryan J. Casamiquela, “Electronic Commerce: Contractual Assent and Enforceability in Cyberspace,” 17 Berkeley Tech. L.J. 475 (2001); Maureen A. O’Rourke, “Common Law and Statutory Restrictions On Access: Contract, Trespass, and the Computer Fraud and Abuse Act,” 2002 U. Ill. J.L. Tech. & Pol’y 295 (2002); Matthew D. Stein, “Rethinking UCITA: Lessons From the Open Source Movement,” 58 Me. L. Rev. 157 (2003); Deborah Tussey, “UCITA, Copyright, and Capture,” 21 Cardozo Arts & Ent. L.J. 319 (2003); William J. Condon, Jr., “Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?,” 16 Regent U.L. Rev. 433 (2004).

<sup>7</sup> Compare Eslworldwide.com, Inc. v. Interland, Inc., 2006 WL 1716881 (S.D.N.Y. June 21, 2006); Moore v. Microsoft Corp., 741 N.Y.S.2d 91 (N.Y. App. Div. 2002); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (N.Y. App. Div. 1998); Net2Phone, Inc. v. Superior Court, 109 Cal.App.4th 583 (Cal. App. 2003); Cairo, Inc. v. Crossmedia Serv., Inc., 2005 WL 756610 (N.D.Cal. Apr. 1, 2005); Barnett v. Network Solutions, Inc., 38 S.W.3d 200 (Tex. Ct. App. 2001); Caspi v. Microsoft Network L.L.C., 323 N.J.Super. 118 (App. Div. 1999); Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (D.C. 2002); Adobe Sys., Inc. v. Stargate Software, Inc., 216 F.Supp.2d 1051 (N.D.Cal. 2002); I.Lan Sys., Inc. v. Netscout Service Level Corp., 183 F.Supp.2d 328 (D.Mass. 2002); Hotmail Corp. v. Van\$ Money Pie, 1998 WL 388389 (N.D.Cal. Apr. 16, 1998) with Specht v. Netscape Communications Corp. 306 F.3d 17 (2d Cir. 2002); Klocek v. Gateway, Inc., 104 F.Supp.2d 1332 (D.Kan. 2000).

disclosed only in a linked document presented to the consumer only by request.<sup>8</sup> A declaration by this court that the use of agreements of this kind amounts to “induce[ment] by deception and fraud,”<sup>9</sup> and a “deceptive business practice” – irrespective of the enforceability of the agreements as a matter of contract law<sup>10</sup> – would create substantial uncertainty about the legal underpinnings of literally millions of transactions taking place each day, and could have immediate, and potentially serious, implications for Internet law and commerce. If there is to be such a substantial modification of existing law regarding the basic contractual foundations of Internet commerce, we respectfully submit that the instant special proceeding under Executive Law §63(12), with its sparse factual record and accelerated schedules, is hardly the best vehicle for accomplishing it.

Respectfully submitted,



SCOTT S. CHRISTIE, ESQ.

McCarter & English, LLP

245 Park Avenue

27<sup>th</sup> Floor

New York, NY 10167

Counsel for *Amici* David Post,  
Eric Goldman and Scott Christie

Dated: September 11, 2006

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<sup>8</sup> We do not mean to suggest that clickwrap agreements are (or should be) deemed valid and enforceable in all circumstances; these agreements take many different forms, and each agreement must be examined individually to determine whether or not it meets the requisite contractual standards.

<sup>9</sup> Opp., at 9.

<sup>10</sup> Opp, at 14 – 18 (arguing that the existence of an enforceable contract is not a defense to claims for deceptive practices and false advertising).

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RODNEY HOOK, Individually,

Respondents.

-----X  
STATE OF NEW YORK                    )  
  ) SS:  
COUNTY OF NEW YORK                )

Michael Palitz, of full age, being duly sworn according to law, upon his  
oath deposes and says:

1. I am not a party to this action and I reside at c/o McCarter &  
English, LLP, 245 Park Avenue, New York, NY 10167.

2. That, on the 14th day of September, 2006, at 12:00 pm. at 599  
Lexington Avenue, New York, NY 10022, I served the within Order to Show Cause to  
Seek Amicus Curiae Status and Affidavit of Scott Christie on Goodwin Proctor, LLP, a  
law firm, by delivering a true copy thereof to Christine Vaker, a black female with brown  
hair, approximately twenty-five years old, a height of 5'5" and weight of 130 pounds,  
personally.

3. I knew said person to be authorized to accept service on behalf of  
the Respondent.

  
\_\_\_\_\_  
Michael Palitz

Sworn to and subscribed before  
me this 14th day of September, 2006

  
\_\_\_\_\_  
Notary Public

**BRYAN WIDDO**  
Notary Public, State of New York  
No. 01W6133478  
Qualified in Nassau County  
Commission Expires 9/19/2009

ME1\5848119.1

SUPREME COURT OF THE STATE OF NEW YORK  
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STATE OF NEW YORK                    )  
  ) SS:  
COUNTY OF NEW YORK                )

Michael Palitz, of full age, being duly sworn according to law, upon his  
oath deposes and says:

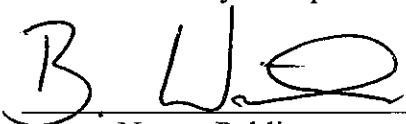
1. I am not a party to this action and I reside at c/o McCarter &  
English, LLP, 245 Park Avenue, New York, NY 10167.

2. That, on the 14th day of September, 2006, at 12:30 pm. at 545  
Madison Avenue, New York, NY 10022, I served the within Order to Show Cause to  
Seek Amicus Curiae Status and Affidavit of Scott Christie on Emery Celli Brinckerhoff  
& Abady, LLP, a law firm, by delivering a true copy thereat to Glendaly Munoz, a  
Hispanic female with brown hair, approximately twenty-five years old, a height of 5'2"  
and weight of 110 pounds, personally.

3. I knew said person to be authorized to accept service on behalf of  
the Respondent.

  
\_\_\_\_\_  
Michael Palitz

Sworn to and subscribed before  
me this 14th day of September, 2006

  
\_\_\_\_\_  
Notary Public

**BRYAN WIDRO**  
Notary Public, State of New York  
No. 01W16133478  
Qualified in Nassau County  
Commission Expires 9/19/2009

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SUPREME COURT OF THE STATE OF NEW YORK  
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STATE OF NEW YORK                    )  
  ) SS:  
COUNTY OF NEW YORK                )

Michael Palitz, of full age, being duly sworn according to law, upon his  
oath deposes and says:


1. I am not a party to this action and I reside at c/o McCarter &  
English, LLP, 245 Park Avenue, New York, NY 10167.

2. That, on the 14th day of September, 2006, at 12:50 pm. at 1740  
Broadway, New York, NY 10019, I served the within Order to Show Cause to Seek  
Amicus Curiae Status and Affidavit of Scott Christie on Davis & Gilbert, LLP, a law  
firm, by delivering a true copy thereat to Richard Gomez, a Hispanic male with brown  
hair, approximately thirty-five years old, a height of 5'10" and weight of 190 pounds,  
personally.

3. I knew said person to be authorized to accept service on behalf of  
the Respondent.

  
\_\_\_\_\_  
Michael Palitz

Sworn to and subscribed before  
me this 14th day of September, 2006

  
\_\_\_\_\_  
Notary Public

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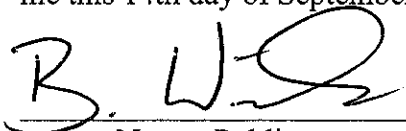
1. I am not a party to this action and I reside at c/o McCarter &  
English, LLP, 245 Park Avenue, New York, NY 10167.

2. That, on the 14th day of September, 2006, at 1:45 pm. at 120  
Broadway, New York, NY 10271, 24<sup>th</sup> Floor, I served the within Order to Show Cause to  
Seek Amicus Curiae Status and Affidavit of Scott Christie on the Assistant Attorney  
General of the State of New York, Justin Brookman, by delivering a true copy thereof to  
Totlyn M. Lewis, a Black woman with brown hair, approximately forty years old, a  
height of 5'4" and weight of 120 pounds, personally.

3. I knew said person to be authorized to accept service on behalf of  
the Petitioner.

  
\_\_\_\_\_  
Michael Palitz

Sworn to and subscribed before  
me this 14th day of September, 2006

  
\_\_\_\_\_  
Notary Public

**BRYAN WIDRO**  
Notary Public, State of New York  
No. 01W06133478  
Qualified in Nassau County  
Commission Expires 9/19/2009

ME1\5848286.1