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| NORTH CAROLINA |) | IN THE GENERAL COURT OF JUSTICE |
| |) | SUPERIOR COURT DIVISION |
| FORSYTH COUNTY |) | 09 CVS 4007 |
| BB&T BOLI PLAN TRUST, |) | |
| |) | |
| Plaintiff |) | |
| |) | REPLY BRIEF IN FURTHER SUPPORT |
| v. |) | OF DEFENDANT MASSACHUSETTS |
| |) | MUTUAL LIFE INSURANCE |
| MASSACHUSETTS MUTUAL LIFE INS. CO. |) | COMPANY’S MOTION DISMISS THE |
| and CLARK CONSULTING, INC., |) | FIRST AMENDED COMPLAINT |
| |) | |
| Defendants. |) | |
| |) | |

BB&T BOLI Plan Trust’s (“BB&T”) arguments in opposition to Massachusetts Mutual Life Insurance Company’s (“MassMutual”) motion to dismiss are fundamentally flawed and do not, in any way, save BB&T’s First Amended Complaint (“FAC”) from dismissal.

A. BB&T’S CONTRACT CLAIM SHOULD BE DISMISSED.

While there are several relevant contractual documents, *only* the Stable Value Agreement (“SVA”) between MassMutual and Bank of America (“BOA”) contains any operative Reallocation Event provisions. Because BB&T was neither a party nor a third party beneficiary of the SVA, it has no right to enforce the SVA’s Reallocation Event provisions. BB&T’s response never addresses these points.

Instead, recognizing that it has no right to enforce the SVA, BB&T now shifts its focus to rely *solely* on its August 2006 Letter Agreement with MassMutual as the *sole* grounds for its contract claim. [Response at 18 (“BB&T Trust’s breach of contract claim is based on that breach of the Letter Agreement.”)]. BB&T claims the Letter Agreement required MassMutual to enforce BOA’s “obligations” under the SVA which purportedly included an obligation to liquidate the Falcon Fund account if a Reallocation Event occurred. Further, BB&T claims

MassMutual had an “implicit” duty under the Letter Agreement to comply with an alleged obligation of its own under the SVA to provide notice of Reallocation Events.

But the Letter Agreement’s reference to obligations does not include the SVA’s Reallocation Event provisions which provide BOA with *rights*, not *obligations*, if a Reallocation Event occurs. Further, the Letter Agreement did not impose implied obligations on MassMutual which did not, in any event, have a duty under the SVA to provide notice of Reallocation Events.

1. BOA Had No Contractual “Obligations” Concerning Reallocation Events.

BB&T’s contractual claim fails because the Letter Agreement’s “reasonable efforts” provision is limited to “obligations” owed by BOA:

MassMutual agrees that it shall use reasonable efforts to cause Bank of America (the “Stable Value Provider”) to perform its obligations under the Stable Value Agreement by and between MassMutual and Bank of America, dated August 16, 2006 (the “Stable Value Agreement”).

[Exh. E¹ at 4].

BB&T argues that (1) BOA was obligated to liquidate the Falcon account if a Reallocation Event occurred and (2) MassMutual owed BB&T a duty to use reasonable efforts to enforce BOA’s alleged “obligations.” But the SVA’s Reallocation Event provisions were BOA’s own contractual *protections*, not *obligations*. BB&T’s contract claim thus fails to recognize the fundamental difference between contractual “rights” and contractual “obligations.”

An “obligation” is “[t]hat which a person is bound to do or forbear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc.” *In re Montgomery Ward Holding Corp.*, 268 F.3d 205, 209 (3d Cir. 2001) (citing Black’s Law Dictionary 968 (Fifth ed.

¹ All references to “exhibits” are to the exhibits attached to MassMutual’s Motion.

1979)). For contracts, “the most straightforward understanding of an obligation is something that one is legally required to perform” *Id.*

Conversely, a promise that is illusory is not an “obligation.” *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (“Unlike a binding obligation, an ‘illusory promise’ appears to be a promise, but it does not actually bind or obligate the promisor. . . .”). An illusory promise is one which “by [its] terms make performance entirely optional with the ‘promisor’” Restatement (Second) of Contracts, § 2, cmt. e; 17 Am.Jur.2d, Contracts § 3. This rule has been the law in both Delaware and North Carolina for many decades. *Bowman v. Hill*, 45 N.C. App. 116, 262 S.E.2d 376 (1980); *Raisler Sprinkler Co. v. Automatic Sprinkler Co. of America*, 171 A. 214, 219 (Del. Super. 1934) (citing Williston on Contracts).²

BOA made no “promise” about Reallocation Events. Instead, BOA had the *right* -- but no *obligation* -- to insist on liquidation of the Falcon account if a Reallocation Event occurred. This right protected BOA (not BB&T) against the “price risk” BOA assumed in agreeing to pay the difference between the net investment value and book value upon surrender of the BOLI policy. [Exh. F at 14; FAC ¶ 28; OCC 2004-56 at 16.]. Given the contractual language, and the context for the transaction, there is no basis for BB&T’s argument that BOA was “obligated” to do anything following a Reallocation Event.

And even if BOA’s “right” could somehow be construed as a promise, BOA had an unlimited right to waive Reallocation Events. [Exh. F at 33 (“[T]he Issuer may elect, by

² Therefore, given how BB&T has narrowed its contract claim to rely solely on the Letter Agreement, the Court need not decide the choice of law question for this claim. But, to the extent the Court decides otherwise, MassMutual notes that BB&T’s reliance on Section 58-3-1 is misplaced because North Carolina does not have a close connection with the interests insured by the policy, *see, e.g., Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428-29, 526 S.E.2d 463, 466 (2000), and Section 58-3-1 does not apply to the Letter Agreement, which contains a Delaware choice of law provision.

providing written notice to the Carrier, that the occurrence of any of the events or conditions described in clauses (i) through (vii) (inclusive) immediately above shall not give rise to a Reallocation Event.”)]. Consequently, any purported “promise” by BOA about Reallocation Events was illusory -- and not an “obligation.” *Hill*, 412 F.3d at 543.

Given BOA’s discretion to waive Reallocation Events, the SVA’s Reallocation Event provisions do not impose any “obligation” on BOA. Therefore, the Letter Agreement provides no support for BB&T’s contract claim.

2. *The Letter Agreement Imposed No Implied Reporting Obligations On MassMutual.*

BB&T claims that, under the Letter Agreement, “MassMutual agreed to fulfill its obligations under the SVA and to cause Bank of America to do so as well.” [Response at 18]. But the Letter Agreement did not address MassMutual’s compliance with its obligations (owed to BOA, not BB&T) under the SVA.³

Recognizing the lack of an express provision supporting its position, BB&T softens its rhetoric by claiming MassMutual implicitly agreed to perform its obligations under the SVA. According to BB&T, MassMutual could not enforce BOA’s “obligations” without first providing notice of a Reallocation Event and, therefore, the Letter Agreement contained an *implied* duty to provide notice to BOA.

But under Delaware law, courts should not lightly imply obligations that do not appear in a contract. *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Sys. Co.*, No. C.A. 15388, 1997 WL 525873, at *5 (Del. Ch. Aug. 13, 1997) (unpub.). There is no basis to do so here given

³ BB&T’s characterization of the Letter Agreement as requiring MassMutual to “cause” BOA to comply with its obligations is another literary sleight of hand, as the Letter Agreement imposes only a “reasonable efforts” obligation on MassMutual.

the parties' sophistication, the context of the transaction, and the detailed contractual provisions to which the parties agreed.

However, even if MassMutual agreed in the Letter Agreement to comply with its SVA obligations, the SVA did not impose the obligations BB&T claims. Without citing any SVA provision, BB&T asserts "[o]ne of MassMutual's obligations under the SVA was to monitor for and provide notice of any of the events or conditions that constituted a Reallocation Event." [Response at 19]. But the SVA plainly imposes no obligation on MassMutual to provide notices to *BB&T* -- who is neither a party nor a third party beneficiary. Nor did the SVA impose an obligation on MassMutual to provide BOA with notice of Reallocation Events.

Critically, the SVA contains explicit notice provisions (which BB&T ignores) requiring MassMutual to provide a variety of information to BOA. [Exh. F at 17]. None require MassMutual to perform calculations or render an opinion on possible Reallocation Events.

In fact, the notice provisions confirm that MassMutual did not have an obligation to report Reallocation Events. Instead, MassMutual was required to report the raw data (such as periodic net asset value figures) from which BOA could independently determine whether a Reallocation Event had occurred. [Exh. F. at 17-18 §§ 8(A)(iii) and (iv)]. Given the attention to detail in the notice provisions, the notion that there is an "implied" obligation to provide notice of a Reallocation Event is untenable.

In short, the Letter Agreement provides no basis for the Court to create new obligations not found in the SVA, a contract to which BB&T is not a party. Consequently, the Court should not hesitate in dismissing BB&T's contract claim.

B. CHOICE OF LAW

1. Tort Claims.

Although BB&T agrees that North Carolina applies the *lex loci delecti* standard for tort claims, BB&T claims the location of the act giving rise to the injury, allegedly North Carolina, applies. [Response at 7- 8]. BB&T mischaracterizes MassMutual’s argument and misstates North Carolina law.

Contrary to BB&T’s assertion, MassMutual does not argue that Delaware law should apply merely because Plaintiff’s “wallet” is located in Delaware. Instead, Delaware was the center of the transaction: Plaintiff is a Delaware trust, with a Delaware trustee, that agreed to Delaware choice of law provisions in both the Letter Agreement and the BOLI policy (delivered in Delaware).

Second, under North Carolina law, the location of the *injury*, not the location of the act causing the harm, determines choice of law. *Santana v. Levi Strauss & Co.* (which BB&T cites) states unambiguously that North Carolina law applies the law of the place of the injury to tort claims. 674 F.2d 269, 272 (4th Cir. 1982). *N.C. Mutual Life v. McKinley* (which BB&T does not distinguish) stated, “[C]ourts considering tort claims have traditionally applied the law of the state where the injuries were sustained.” 386 F. Supp. 2d 648, 658 (M.D.N.C. 2005); *see also Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 854 (1988); *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 554, 555 (M.D.N.C. 1999).

Under North Carolina law, the place of the injury, not the location of the misrepresentations or reliance as BB&T argues, determines which state’s substantive law applies to claims for fraud. *Jordan v. Shaw Indus.*, 131 F.3d 134, 1997 WL 734029, at *3 (4th Cir. Nov. 26, 1997) (unpub.); *Rhone-Poulenc*, 73 F. Supp. 2d at 555 n.2. BB&T’s claim that *Jones v. Skelley*, ___ N.C. App. ___, 673 S.E.2d 385 (2009), alters this rule is misplaced: *Jones* involved

the “transitory tort” of alienation of affections “based on transactions that can take place anywhere” and relied on choice of law cases addressing that tort.

Two out-of-state cases BB&T cites for the proposition that the “location of the trust beneficiary is determinative” in determining choice of law are distinguishable. In *Koch v. Koch Indus., Inc.*, plaintiffs were trusts asserting claims on behalf of their beneficiaries, and the issue addressed by the Court was whether the location of the trustee (not the trust) or the beneficiary controlled the choice of law analysis. 2 F. Supp. 2d 1416, 1418, 1423 (D. Kan. 1998). Similarly, in *Appel v. Kidder, Peabody & Co.*, the lawsuit was brought by the trust beneficiaries and trustees, and the trust was not a plaintiff. 628 F. Supp. 153, 155 (S.D.N.Y. 1986). Here, the trust (not the beneficiary) is the plaintiff.

Moreover, BB&T’s argument that the beneficiary suffered damages conflicts with BB&T’s numerous allegations that the Trust suffered damages. [FAC ¶¶ 1, 6, 12, 65, 79, 90, 102, 103, 107, 108, 112, 113, 120, 121, 127, 134, 135, 141, 142]. Simply put, BB&T cannot distance itself from its pleading just to advance a choice of law argument.

Last, even if the choice of law depended on the location of the wrongful act, Delaware law applies. Although BB&T argues that “the misrepresentations at issue were made to, and relied on by, representatives of BB&T Trust located in North Carolina” [Response at 9], BB&T never pleads that its representatives were located in North Carolina, and instead pleads the representatives *of its grantor* were in North Carolina. According to the FAC, any alleged misrepresentations by MassMutual were made through its employee in Connecticut. [FAC ¶¶ 41, 43, 59, 80, 82, 83, 84, 100, 116]. Moreover, any reliance by BB&T on those representations would occur in Delaware, as BB&T is a Delaware trust, BB&T’s trustee, Wilmington Trust, executed the Policy, PPM, and Letter Agreement in Delaware, and the Policy

was delivered in Delaware. *See, e.g., Simms Inv. Co. v. E.F. Hutton & Co.*, 688 F. Supp. 193, 199 (M.D.N.C. 1988) (stating that the action taken in reliance of the alleged misrepresentations was execution of the agreement).

2. UDTPA Claim.

BB&T also argues that North Carolina law should apply to its UDTPA claim because the “substantive interaction” occurred in North Carolina and cites one case, *Simms Inv. Co.*, 688 F. Supp. 193, to support its conclusion. [Response at 10]. But *Simms* is distinguishable because there, the parties’ entire relationship was centered in North Carolina. *Id.* at 199. Here, in contrast, the alleged misrepresentations were made in Connecticut to a Delaware resident, the contracts were executed and delivered in Delaware, the documents contained Delaware choice of law provisions, and any alleged harm was felt in Delaware. Delaware thus has the most significant relationship to this lawsuit.

C. EACH OF BB&T’S TORT CLAIMS SHOULD BE DISMISSED.

1. Delaware Law.

BB&T does not distinguish the cases MassMutual cited that preclude transformation of contract claims into tort claims under Delaware law, nor does BB&T argue (since it cannot) that its contract claim is not virtually identical to its tort claims. Instead, relying on an unpublished Delaware Superior Court decision, *Data Mgmt. Int’l, Inc. v. Saraga*, 2007 WL 2142848 (Del. Super. Ct. July 25, 2007), BB&T claims that, under some circumstances, the same conduct can constitute both a breach of contract and a tort. [Response at 13].

After noting “a plaintiff bringing a claim based entirely upon a breach of the terms of a contract generally must sue in contract, and not in tort,” the *Saraga* court determined, in that particular case, the duty breached arose by operation of law, not as a matter of contract. *Id.* at *3-4. Here, however, the duties allegedly breached by MassMutual were the duties to “properly

and timely monitor and report . . . the performance of BB&T TRUST’s investment” and to timely advise BB&T of “its rights and protections given the performance of the investment” [FAC ¶¶ 95, 99, 110-111] -- the same duties forming the basis for BB&T’s breach of contract claim [*id.* ¶¶ 125-126].

The other case BB&T cites is likewise inapposite because it did not address whether claims for breach of fiduciary duty could exist independently of claims for breach of contract, but rather whether the defendants could be fiduciaries at all. *Forsythe v. ESC Fund Mgmt. Co.*, CA No. 1091-VCL, 2007 WL 2982247, at *10 (Del. Ch. Oct. 9, 2007). Thus, *Forsythe* does not address the type of commingling of tort and contract claims that BB&T tries here.

2. North Carolina Law.

Notably, even if North Carolina law applies, the Court should reach the same conclusion: BB&T’s tort claims are inappropriate attempts to transform a contract dispute into torts that should be dismissed. *See, e.g., Newton v. Standard Fire Ins. Co.*, 229 S.E.2d 297, 302 (N.C. 1976) (affirming dismissal of tort counts on motion to dismiss because the “case involves no tort” and “[w]e are slow to impose upon an insurer liabilities beyond those called for in the insurance contract”); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345-47 (4th Cir. 1998); *Strum v. Exxon Co., USA*, 15 F.3d 327, 329 (4th Cir. 1994). The case BB&T cites, *Zubaidi v. Earl L. Pickett Enters., Inc.*, 164 N.C. App. 107, 115-16, 595 S.E.2d 190, 195 (2004), does not advance BB&T’s argument because *Zubaidi* addressed whether punitive damages were recoverable for breaches of contract, not whether claims for fraud arising from alleged breaches of contractual duties could be pursued.

D. THE ECONOMIC LOSS DOCTRINE BARS BB&T'S NEGLIGENCE CLAIMS.

BB&T argues its negligence claims should survive because (1) negligent misrepresentation claims are “exempt from the economic loss doctrine” and (2) the doctrine does not “prevent the recovery of economic losses resulting from professional negligence.” [Response at 15]. Both arguments are incorrect.

First, the economic loss doctrine applies to negligent misrepresentation claims under Delaware law. *See, e.g., Int'l Fidelity Ins. Co. v. Mattes Elec., Inc.*, No. Civ.A. 99-C-10-065WCC, 2002 WL 1400217, at *1-2 (Del. Super. Ct. June 27, 2002) (unpub.). The exception to the rule is a claim for negligent misrepresentation under Section 552 of the Restatement (Second) of Torts, which is a separate claim from common law misrepresentation. *Christiana Marine Service Corp. v. Texaco Fuel & Marine Mktg.*, 2002 WL 1335360, at *6 (Del. Super. Ct. June 13, 2002).

As explained in *Danforth v. Acorn Structures, Inc.*, Civ. A. No. 90C-JN-30, 1991 WL 269956, at *3-4 (Del. Super. Ct. Nov. 22, 1991) (unpub.), among the requirements of Section 552 are (1) that the defendant is in the business of supplying information; and (2) that the information was supplied for the plaintiff's use in its business dealings with third parties. Neither requirement is met here.

For example, while BB&T argues that “MassMutual was in the business of supplying information . . . to BB&T Trust for its use in business transactions” [Response at 15 n.8], the transaction here involved the sale of an insurance policy, not the sale of information. Stated otherwise, MassMutual sold a product (the BOLI Policy), not information, to BB&T; any information provided was merely incidental and not the basis of the transaction. *See, e.g., Danforth*, 1991 WL 269956, at *3-4 (fact that defendant supplied instructions along with home

building products did not trigger Section 552 because the information provided was incidental to the sale of the building products).

Moreover, BB&T fails to allege that any information MassMutual provided to BB&T was for the use of third parties. *Id.* at *2 (“In other words, the information must be used in a transaction not involving the defendant.”). Therefore, any “information [MassMutual] supplied to [BB&T] is more aptly described as information incidentally supplied to [BB&T] for the ultimate service” of providing the BOLI policy. *Christiana Marine Service Corp.*, 2002 WL 1335360, at *7.

BB&T’s second argument arises from a footnote in *Danforth* stating that the decision did not address whether professional malpractice claims were barred by the economic loss doctrine. *Danforth*, 608 A.2d at 1201 n.5. Yet BB&T cites no cases where this “exception” was applied, and instead relies on a federal case applying New York law that dismissed a negligent misrepresentation claim. *Hatzel & Buehler, Inc. v. Orange & Rockland Utilities, Inc.*, Civ. A. No. 88-391-SLR, 1992 WL 391154, at *15 n.21 (D. Del. Dec. 14, 1992). Similarly, *Millsboro Fire Co. v. Constr. Mgmt. Svcs., Inc.*, C.A. No. 05C-06-137 MMJ, 2006 WL 1867705, at *3 (Del. Super. Ct. June 7, 2006) (unpub.), discussed the Section 552 exception, not the alleged “professional malpractice” exception, and dismissed negligent misrepresentation claims.

E. MASSMUTUAL IS NOT A FIDUCIARY.

BB&T does not dispute that under Delaware law, the relationship between an insurer and an insured is not generally fiduciary in character. [See MassMutual Brief at 17-18]. Instead, BB&T focuses on distinguishing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113 (Del. 2006).

Although *Wal-Mart* did not involve an investment component, this distinction is meaningless. As MassMutual previously noted, the relevant documents demonstrate the parties

viewed the transaction as a purchase of life insurance, not an investment management contract. [MassMutual Brief at 18]. Moreover, the agreements did not give MassMutual discretion over BB&T's investment in Falcon. Instead, it is undisputed that BB&T made the initial decision to enter into a stable value endorsement and to allocate some of its funds to Falcon. [FAC at ¶¶ 41, 43]. Thus, *Forsythe* is distinguishable because MassMutual was not an investment advisor to BB&T, *Forsythe*, 2007 WL 2982247, at *10, and the “special trust and confidence” alleged by BB&T is defeated by the very contract itself.

F. BB&T HAS NO VIABLE UDTPA CLAIM.

Apparently conceding its UDTPA claim would not survive under Delaware law, BB&T argues it has sufficiently pleaded its UDTPA claim under North Carolina law because (1) it pleaded claims for fraud and negligent misrepresentation, (2) “an act that constitutes both a breach of contract and an intentional misrepresentation” can support a UDTPA claim, and (3) business entities like BB&T may assert UDTPA claims. [Response at 22-23].

As to its first argument, because BB&T's underlying tort claims are not legally viable, BB&T's UDTPA claim premised on those allegations fails. *See, e.g., The Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 42, 626 S.E.2d 315, 323 (2006) (noting that one of the elements of a UDTPA claim is committing an unfair or deceptive act or practice).

With respect to BB&T's second basis, BB&T fails to distinguish the cases MassMutual cites, and also fails to specify what conduct constitutes “substantial aggravating circumstances” such that its breach of contract claim can serve as the basis for a UDTPA claim. [See MassMutual Brief at 24]. Instead, the one case BB&T cites, *N.C. Mut. Life Ins. Co. v. McKinley Fin. Svcs., Inc.*, No. 1:03-CV-00911, 2005 WL 3527050, at *10-11 (M.D. N.C. Dec. 22, 2005), emphasized the rule that substantial aggravating circumstances must exist to transform a contract

claim into an UDTPA claim. *See id.* (finding most of the alleged deceptive practices were actually breach of contract claims).

Third, BB&T argues it has standing to bring a UDTPA claim because North Carolina courts have held that businesses have standing to pursue UDTPA claims. [Response at 22-23]. Yet those cases confirm that, for an out-of-state plaintiff (such as BB&T) to have standing to raise an UDTPA claim, that plaintiff must have suffered damages in North Carolina. *See, e.g., Ada Liss Group (2003) v. Sara Lee Corp.*, No. 1:06-C-V610, 2009 WL 3241821, at *11-13 (M.D. N.C. Sept. 30, 2009); *Dixie Yarns, Inc. v. Plantation Knits, Inc.*, No. 3:93-cv-301-P, 1994 WL 910955, at *2-3 (W.D. N.C. July 12, 1994); *Lawrence v. UMLIC-Five Corp.*, No. 06 CVS 20643, 2007 NCBC 20, 2007 WL 2570256, at *7 (N.C. Super. June 18, 2007) (Diaz, J.). Because BB&T, a Delaware trust, suffered damages in Delaware, its UDTPA claim cannot survive.

G. CONCLUSION

The deficiencies in BB&T's First Amended Complaint are not mere pleading technicalities; instead, each of the issues raised in MassMutual's motion to dismiss are substantive problems that preclude BB&T's recovery against MassMutual. For these reasons, MassMutual respectfully requests that this Court dismiss BB&T's claims with prejudice.

This the 19th day of October, 2009.

ROBINSON & LAWING, LLP

By: /s/ Michael L. Robinson

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CERTIFICATE OF COMPLIANCE WITH RULE 15.8

I, Michael L. Robinson, certify that the foregoing **REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY'S MOTION TO DISMISS** complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

ROBINSON & LAWING, LLP

By: /s/ Michael L. Robinson
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CERTIFICATE OF SERVICE

The undersigned, as counsel for Defendant Massachusetts Mutual Life Insurance Company, hereby certifies that, on this date, he served a copy of the foregoing document upon all other parties to this action, pursuant to stipulation, by emailing same to the following individuals:

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This the 19th day of October, 2009.

/s/ Michael L. Robinson
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