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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE

In the Matter of:	)	
	)	
Dean J. Tricarico,	)	**Proceeding No. D2009-40**
	)	
Respondent.	)	
	)	

INITIAL DECISION ON DEFAULT

This proceeding was initiated by the issuance of a Disciplinary Complaint Pursuant to 35 U.S.C. § 32 and 37 C.F.R. § 11.25 ("Complaint" or "Compl.") dated May 4, 2010, by Harry I. Moatz, Director of the Office of Enrollment and Discipline ("Complainant"), United States Patent and Trademark Office ("PTO"), against Dean J. Tricarico ("Respondent"). The Complaint was referred to the undersigned by a Final Order Pursuant to 37 C.F.R. § 11.25(b) ("Final Order"), issued on December 10, 2010.[1] In the Final Order, PTO ordered Respondent's suspension on an interim basis from the practice of patent, trademark, and other non-patent law before the PTO "for having been convicted of two counts of felony prescription fraud" in the State of Virginia.

The Complaint alleges that Respondent is a licensed agent (Registration No. 53,703), recognized to practice and represent others before the PTO, and is subject to the PTO Disciplinary Rules. Compl. ¶ 1. Complainant further alleges that Respondent violated Section 10.23(a), (b)(3), and (b)(4) of the regulations applicable to "Practice Before the Patent and Trademark Office" promulgated at 37 C.F.R. Parts 10 and 11 ("Rules") by: (1) engaging in disreputable or gross misconduct, (2) engaging in conduct involving moral turpitude, and (3) engaging in conduct involving dishonesty. Compl. ¶ 10. The basis for Complainant's allegations is that on January 20, 2009, the Circuit Court of Winchester, Virginia, found Respondent guilty of two counts of felony prescription fraud in violation of Section 18.2-258.1 of the Virginia Code,[2] in *Commonwealth of Virginia v. Dean James Tricarico* (Case Nos. CR08001108-00 and

[1] "Upon entering a final order imposing interim suspension, the [PTO] Director shall refer the complaint to a hearing officer to conduct a formal disciplinary proceeding." 37 C.F.R. § 11.25(b)(5).

[2] The Complaint cites Section 18.2-238.1 of the Virginia Code, which does not exist. Compl. ¶¶ 5, 8. However, Exhibit A attached to the Complaint, titled "Sentencing Order," correctly states that Respondent was convicted under the Virginia Code Section *18.2-258.1* ("Obtaining drugs, procuring administration of controlled substances, etc., by fraud, deceit or forgery"). Compl. Ex. A at 1; Va. Code Ann. § 18.2-258.1 (West 2011).

CR08001107-00) ("Convictions"). Compl. ¶¶ 5, 8; Compl. Ex. A ("Sentencing Order"). As a result of the Convictions, Complainant states, on March 17, 2009, Respondent was sentenced to: (1) two years and six months in prison (suspended sentence), (2) two years of supervised probation, (3) a six-month driver's license suspension, and (4) payment of court costs. Compl. ¶ 6. Complainant asserts the crime Respondent was convicted of is a felony and a serious crime. Compl. ¶ 9. The Convictions put Respondent in violation of Rule 10.23(a), (b)(3), and (b)(4) of the Rules, Complainant argues. Compl. ¶ 10. Therefore, Complainant seeks an order suspending or excluding Respondent from practice before the PTO. Compl. at 4.

Since Respondent filed no answer to the Complaint, on January 25, 2011, Complainant filed a Motion for Default Judgment and Imposition of Discipline ("Motion" or "Mot."). The Motion seeks an initial decision entering a default judgment against Respondent and suspending him from practice before the PTO in patent, trademark, and other non-patent law for a period of no less than one year commencing, *nunc pro tunc*, December 10, 2010. Mot. at 11.

I. **Rules Relevant to Default**

Rule 11.35 provides in pertinent part that:

> (a) A complaint may be served on a respondent in any of the following methods:
>
> * * *
>
> > (2) By mailing a copy of the complaint by "Express Mail," first-class mail, or any delivery service that provides ability to confirm delivery or attempted delivery to:
> >
> > (i) A respondent who is a registered practitioner at the address provided to OED [the Office of Enrollment and Discipline] pursuant to § 11.11 . . . .
>
> * * *
>
> (b) If a copy of the complaint cannot be delivered to the respondent through any one of the procedures in paragraph (a) of this section, the OED Director shall serve the respondent by causing an appropriate notice to be published in the Official Gazette for two consecutive weeks, in which case, the time for filing an answer shall be thirty days from the second publication of the notice. Failure to timely file an answer will constitute an admission of the allegations in the complaint in accordance with paragraph (d) of § 11.36, and the hearing officer may enter an initial decision on default.

37 C.F.R. § 11.35(a)(2), (b).

Rule 11.36 provides in pertinent part:

> (a) Time for answer. An answer to a complaint shall be filed within the time set in

> the complaint but in no event shall that time be less than thirty days from the date the complaint is filed.
>
> * * *
>
> (e) Default judgment. Failure to timely file an answer will constitute an admission of the allegations in the complaint and may result in entry of default judgment.

37 C.F.R. § 11.36(a), (e).

II. Findings and Conclusions Regarding Default

The Motion and the Certificate of Service accompanying the Complaint attest that on May 4, 2010, the Director of the Office of Enrollment and Discipline ("OED") attempted to serve the Complaint on Respondent by mailing it via certified first class mail, return receipt requested, to: (1) Dean J. Tricarico, 6933 Carnation Drive, Carlsbad, CA 92009 (the most recent address provided by Respondent to the OED Director); and (2) Dean J. Tricarico, 609 Tudor Drive, Winchester, VA 22603 (where the OED Director reasonably believed that Respondent last received mail). Mot. ¶ 2; Certificate of Service accompanying the Complaint. Complainant alleges that both mailings were returned undelivered (the Carlsbad, CA mailing was labeled "Undeliverable as Addressed," and the Winchester, VA mailing was labeled "MOVED LEFT NO ADDRESS – UNABLE TO FORWARD"). Mot. ¶ 3. Complainant then served the Complaint on Respondent by publishing a notice entitled "Service by Publication" in the PTO's *Official Gazette* for two consecutive weeks beginning June 22, 2010 and June 29, 2010. Mot. ¶ 4. This notice announced the disciplinary proceeding initiated against Respondent and provided instructions on how Respondent could obtain a copy of the Complaint.[3] *Id.*

The Complaint stated, in pertinent part:

> No response to this Complaint is required to be made by Respondent at the present time. Within thirty (30) days from the date of an Order by the USPTO Director referring this Complaint to a hearing officer, however, Respondent is to file a written answer with the hearing officer to whom the USPTO Director refers this matter and is to serve a copy of his answer on the OED Director. [ ] A decision by default may be entered against Respondent if a written answer to this Complaint is not timely filed. [ ]

Compl. at 1 (citations omitted). The addresses of the Director and this Tribunal appear on page 5 of the Complaint.

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[3] The full notices of OED's "Service by Publication" for the weeks of June 22, 2010, and June 29, 2010 are available at:
http://www.uspto.gov/web/offices/com/sol/og/2010/week25/TOC.htm#ref12 and
http://www.uspto.gov/web/offices/com/sol/og/2010/week26/TOC.htm#ref9, respectively.

Rule 11.35(b) provides that service by publication can be initiated "[i]f a copy of the complaint cannot be delivered to the respondent through any one of the procedures in paragraph (a)," which includes first class mail or mail with delivery confirmation capability. 37 C.F.R. § 11.35(a)(2), (b). Complainant attempted to serve the Complaint on Respondent by first class certified mail, return receipt requested, pursuant to Rule 11.35(a)(2), which did not result in delivery. Mot. ¶ 3. Thereafter, service by publication was appropriately commenced and executed, as evidenced by the excerpts from the *Official Gazette* within Complainant's Motion, as well as review of the archived "Service by Publication" notices from the *Official Gazette*, for the weeks beginning June 22, 2010 and June 29, 2010. Mot. ¶ 4; *see* supra, n.3. On the basis of the foregoing and 37 C.F.R. § 11.35, it is concluded that service of the Complaint is complete.

Finally, the Final Order issued and served on December 10, 2010, directed Respondent to file and serve an answer to the Complaint within thirty days. Final Order at 3; Mot. ¶¶ 10-11. Complainant states that it mailed a copy of the Final Order via first-class certified mail, return receipt requested, to the same Carlsbad, CA and Winchester, VA addresses. Mot. ¶ 10. The mailings were returned with explanations of "Undeliverable as Addressed" and "MOVED LEFT NO ADDRESS – UNABLE TO FORWARD." *Id.* Rule 11.42(f) provides that for papers other than the complaint, "[s]ervice by mail is completed when the paper mailed in the United States is placed into the custody of the U.S. Postal Service." 37 C.F.R. § 11.42(f). Therefore, service of the Final Order was completed when Complainant mailed it on December 10, 2010.

Complainant states that as of the date of the Motion, Respondent has not answered the Complaint, "or otherwise communicated with the Office about this disciplinary proceeding." Mot. ¶ 12. To date, Respondent has not filed any documents with this Tribunal. In addition, Respondent has not responded to Complainant's Motion for Default Judgment. The Certificate of Service attached to the Motion indicates that it was sent by certified mail, return receipt requested, to Respondent on January 25, 2011, at the mailing addresses to which the Complaint was mailed without success. *See* Certificate of Service accompanying the Motion. The Rules instruct that motions may be served by first-class mail, "Express Mail," or other delivery service, and that service by mail is complete upon mailing. 37 C.F.R. § 11.42(b)(2), (f). Rule 11.43 provides that "[t]he hearing officer will determine . . . the time period for filing . . . a response" to a motion. 37 C.F.R. § 11.43.

Because Respondent has not answered the Complaint or otherwise appeared in the proceeding, and service has been completed in accordance with the Rules, it is not necessary to allow Respondent a lengthy period of time to respond to the Motion. The Rules do not specify a minimum response period, nor do they require, for default to be entered, that a motion for default be filed. 37 C.F.R. § 11.36(e). Nevertheless, since the Motion was served on January 25, 2011, a substantial period of time has been provided for Respondent to respond and he has not done so. Therefore, for his failure to file a timely answer to the Complaint, Respondent is hereby found in default, and is deemed to have admitted all of the allegations in the Complaint.

III. Rules Regarding Violations Charged in the Complaint

Rule 10.23 (Misconduct), provides, in pertinent part, as follows:

(a) A practitioner shall not engage in disreputable or gross misconduct.

(b) A practitioner shall not:

* * *

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

* * *

(c) Conduct which constitutes a violation of paragraphs (a) and (b) of this section includes, but is not limited to:

(1) Conviction of a criminal offense involving moral turpitude, dishonesty, or breach of trust.

37 C.F.R. § 10.23(a), (b)(3), (b)(4), (c)(1).

IV. Discussion of Issues Regarding Liability

The Complaint alleges that Respondent violated Rule 10.23(a) by engaging in disreputable or gross misconduct; Rule 10.23(b)(3) by engaging in illegal conduct involving moral turpitude; and Rule 10.23(b)(4) by engaging in conduct involving dishonesty ("Violations"). Compl. ¶ 10. Complainant bases all of the Violations on Respondent's Convictions for felony prescription fraud.

Complainant alleges that on July 15, 2008, a pharmacist provided police with two prescription slips that Respondent had used or intended to use to obtain medication. Compl. ¶¶ 2-3. One of the prescription slips was originally written for "Ultrauf," and the other for "Flexoral," however, those words were crossed out and "Percocet" was written in their place in what appeared to be different handwriting than the one in which the original prescription slips were written. *Id.* Upon questioning the physicians who wrote the two prescriptions, the police learned that the prescriptions that were crossed out were the ones they had prescribed, and they had not prescribed Percocet. *Id.* ¶ 4. Respondent was "found guilty" of two counts of felony prescription fraud in violation of Virginia Code Section 18.2-258.1 on January 20, 2009. *Id.* ¶ 5; Compl. Ex. A at 1.

In pertinent part, Section 18.2-258.1 of the Virginia Code provides that:

> A. It shall be unlawful for any person to obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance or marijuana: (i) by fraud, deceit, misrepresentation, embezzlement, or subterfuge; or (ii) by the forgery or alteration of a prescription or of any written order; or (iii) by the concealment of a material fact; or (iv) by the use of a false name . . . .
>
> B. It shall be unlawful for any person to furnish false or fraudulent information in or omit any information from, or willfully make a false statement in, any prescription . . . .
>
> * * *
>
> E. It shall be unlawful for any person to make or utter any false or forged prescription or false or forged written order.

Va. Code Ann. § 18.2-258.1 (West 2011).

Rule 10.23(c)(1) provides that "[c]onviction of a criminal offense involving moral turpitude, dishonesty, or breach of trust" constitutes a violation of Rules 10.23(a) and (b), which bar practitioners from, among other things, engaging in disreputable or gross misconduct, illegal conduct involving moral turpitude, and conduct involving dishonesty, fraud, deceit or misrepresentation. Without a doubt, Respondent's 2009 Convictions for felony prescription fraud constitute convictions involving moral turpitude and dishonesty, and therefore, constitute violations of Rules 10.23(a) and (b). Fraud was at the heart of Respondent's crimes. *See Small v. Weiffenbach*, 10 U.S.P.Q.2d 1898, 1989 WL 281895 (PTO 1989) (PTO Commissioner ordered practitioner suspended for five years for backdating certificates of mailing, *inter alia*, in violation of the Rules at Part 10); *Hurd v. State*, 428 So.2d 191, 193 (Ala. Crim. App. 1983) ("[W]e hold that attempting to obtain [a prescription drug] by use of a forged prescription is a crime involving moral turpitude."); *State Bd. of Physician Quality Assurance v. Oltman*, Case No. DHMH-BPQA-73-200200001, at 9 (ALJ, Jan. 31, 2003) (Proposed Decision[4]) (in a physician assistant certificate revocation proceeding, the ALJ found that the physician's misdemeanor conviction for prescription fraud was dishonest: "The Respondent's crime, although a misdemeanor, was willfully dishonest, and characterized by fraud and deceit. Thus, it was a crime of moral turpitude.") (adopted in *Carl F. Oltman, Sr., PA-C*, Case No. 2001-0562 (Final Decision and Order) (citations omitted), aff'd *Oltman v. Md. State Bd. of Physicians*, 162 Md. App. 457 (Md. Spec. App. 2005); *Butler County Bar Ass'n v. Schaeffer*, 172 Ohio St. 165 (Ohio 1961) (affirming attorney's suspension for an indefinite period for attorney's conviction of obtaining narcotic drugs by forging prescriptions and uttering false prescription for narcotic drugs).

Because Respondent is in default and therefore deemed to have admitted all of the allegations in the Complaint, the following findings and conclusions are rendered based upon the allegations in the Complaint and the discussion above.

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[4] Available at: www.mbp.state.md.us/bpqapp/Orders/C0140708.113.PDF

V. Findings and Conclusions

1. At all times relevant to this proceeding, Respondent was an agent registered (Registration No. 53,703) to practice before the PTO in patent cases. Compl. ¶ 1. Respondent is subject to the PTO Code of Professional Responsibility set forth in 37 C.F.R. Part 10. *Id.*

2. This Tribunal has jurisdiction of this proceeding pursuant to 35 U.S.C. §§ 2(b)(2)(D) and 32, and 37 C.F.R. §§ 11.25(b)(5) and 11.39. Compl. at 2.

3. On July 13, 2008 and July 15, 2008, Respondent submitted prescriptions to a pharmacist for the prescription drug "Percocet." Compl. ¶¶ 2-3. The July 13th prescription featured the word "Flexoral" scratched out and "Percocet" written in its place, and the July 15th prescription featured the word "Ultrauf" marked out and "Percocet" written in its place. *Id.*

4. A police investigation revealed that the physicians who wrote Respondent's two prescriptions wrote said prescriptions for "Flexoral" and "Ultrauf," and neither prescription was written by the physicians for "Percocet." Compl. ¶ 4.

5. On January 20, 2009, the Circuit Court of Winchester, Virginia, found Respondent guilty of two counts of felony prescription fraud in violation of Section 18.2-258.1 of the Virginia Code, in *Commonwealth of Va. v. Dean James Tricarico* (Case Nos. CR08001108-00 and CR08001107-00). Compl. ¶ 5; Compl. Ex. A at 1.

6. On March 17, 2009, Respondent was sentenced to: (1) two years and six months in prison with two years and six months of the sentence suspended; (2) two years of supervised probation; (3) a six month driver's license suspension; and (4) payment of court costs. Compl. ¶ 6; Compl. Ex. A at 1.

7. Respondent's conviction for two counts of felony prescription fraud, in violation of Section 18.2-258.1 of the Virginia Code, is a felony and a serious crime. Compl. ¶ 9; Va. Code Ann. § 18.2-258.1 (West 2011).

8. Respondent's conviction for two counts of felony prescription fraud, pursuant to Section 18.2-258.1 of the Virginia Code, is evidence that Respondent engaged in disreputable or gross misconduct, in violation of 37 C.F.R. § 10.23(a). Compl. ¶ 10; Compl. Ex. A at 1; 37 C.F.R. § 10.23(a), (c)(1).

9. Respondent's conviction for two counts of felony prescription fraud, pursuant to Section 18.2-258.1 of the Virginia Code, is evidence that Respondent engaged in

illegal conduct involving moral turpitude, in violation of 37 C.F.R. § 10.23(b)(3). Compl. ¶ 10; Compl. Ex. A at 1; 37 C.F.R. § 10.23(b)(3), (c)(1).

10. Respondent's conviction for two counts of felony prescription fraud, pursuant to Section 18.2-258.1 of the Virginia Code, is evidence that Respondent engaged in conduct involving dishonesty, fraud and deceit in violation of 37 C.F.R. § 10.23(b)(4). Compl. ¶ 10; Compl. Ex. A at 1; 37 C.F.R. § 10.23(b)(4), (c)(1).

11. Respondent has unsuccessfully concluded all legal appeals of these convictions. See website of Virginia's Judicial System at www.courts.state.va.us.

VI. Penalty

As to the penalty for Respondent's engagement in professional misconduct, the Complaint sought an order of suspension or exclusion. However, the Motion requests issuance of an initial decision suspending Respondent from practice before the PTO "for a period of no less than one year, with the period of suspension commencing, *nunc pro tunc*, on December 10, 2010," the date the Final Order was issued. Mot. at 9-12.

Rule 11.54(b) provides that in determining any penalty, the following factors are to be considered:

> (1) Whether the practitioner has violated a duty owed to a client, to the public, to the legal system, or to the profession;
>
> (2) Whether the practitioner acted intentionally, knowingly, or negligently;
>
> (3) The amount of the actual or potential injury caused by the practitioner's misconduct; and
>
> (4) The existence of any aggravating or mitigating factors.

37 C.F.R. § 11.54(b).

In its Motion, Complainant discusses each factor in turn. First, Complainant argues that Respondent violated duties owed to the public and to the profession because his Convictions "cause[ ] the public to question his competency and ability to advocate for his clients." Mot. at 8-9. Moreover, Complainant asserts that Respondent's actions breached duties owed to the profession and "brings the reputation of the profession into disrepute." *Id.* Second, Complainant argues that Respondent acted intentionally when he knowingly altered a prescription slip by changing the prescribed medication to one that had not been prescribed for him. *Id.* at 9. Third, Complainant concedes that Respondent has not caused any particularized harm through his

conduct, but that the general public was harmed through Respondent's commission of a crime. *Id.* Fourth, Complainant acknowledges that Respondent has no prior disciplinary history before the PTO. However, Complainant argues that consideration of mitigating factors is not warranted because the present disciplinary proceeding is predicated upon Respondent's criminal misconduct. *Id.* Respondent's conduct is "the antithesis of honest, ethical, and moral behavior" and "adversely reflects on Respondent's fitness to practice before the Office." *Id.* at 10.

Complainant argues that a suspension of no less than one year is appropriate in light of the disciplinary sanctions imposed upon attorneys in other jurisdictions under similar circumstances.[5] Specifically, Complainant cites *People v. Robertie*, 2006 WL 702004, 1 (Colo. O.P.D.J. 2006) (attorney suspended for one year and a day for attempting to obtain a prescription from a pharmacist with a forged prescription slip containing false information); *Hasbrouck*, 140 N.J. 162, 167 (N.J. 1995) (rejecting the Disciplinary Review Board's recommendation to suspend attorney's one year suspension while attorney received outpatient treatment and remained drug-free; forging prescriptions "warrants strict disciplinary measures because it calls into question [practitioner's] honesty and integrity"). Complainant compares Respondent's lack of participation and response to the allegations in this proceeding to the circumstances in *Kerry O'Donnell*, 747 N.W.2d 504 (N.D. 2008) (attorney's two year suspension for conviction of attempting to obtain controlled substance by misrepresentation, fraud, and forgery stayed because attorney was undergoing treatment and seeking assistance for personal problems, made timely good faith effort to rectify misconduct, showed remorse, etc.). Mot. at 10-11.

Respondent's default in this proceeding has prevented a full record from being developed as to the circumstances surrounding Respondent's professional misconduct and his current circumstances. As such, imposition of an indeterminate suspension, until such time as reinstatement is deemed appropriate is deemed warranted. Respondent may show cause in the future as to why he failed to respond and may provide some explanation for the misconduct set forth and found herein. Until he does so his name should be removed from the rolls.

There is nothing in Complainant's Motion supporting its request that the period of suspension begin, *nunc pro tunc*, on December 10, 2010. The undersigned believes it unnecessary in this proceeding to rule retroactively regarding the interim suspension imposed by the Final Order.

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[5] Rule 11.25(e)(2), however, provides: "Any practitioner convicted of a serious crime and disciplined in whole or in part in regard to that conviction, may petition for reinstatement under conditions set forth in § 11.60 *no sooner than five years* after being discharged following completion of service of his or her sentence, or after completion of service under probation or parole, whichever is later." 37 C.F.R. § 11.25(e)(2) (italics added).

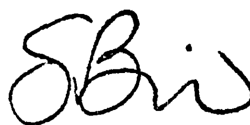
ORDER

After careful and deliberate consideration of the above facts and conclusions, as well as the factors identified in 37 C.F.R. § 11.54(b),

IT IS HEREBY ORDERED that Respondent, **DEAN J. TRICARICO**, be **SUSPENDED for an indeterminate period** as a licensed agent from the practice of patent, trademark, and other non-patent law before the Patent and Trademark Office.

Respondent's attention is directed to 37 C.F.R. § 11.58 regarding the responsibilities of disciplined practitioners, and 37 C.F.R. § 11.60 concerning petition for reinstatement.

The facts and circumstances of this proceeding shall be fully published in the Patent and Trademark Office's official publication.



Susan L. Biro
Chief Administrative Law Judge[6]
U.S. Environmental Protection Agency

Dated: April 20, 2011
Washington, D.C.

Pursuant to 37 C.F.R. § 11.55, any appeal by the Respondent from this Initial Decision must be filed with the U.S. Patent and Trademark Office at the address provided in 37 C.F.R. § 1.1(a)(3)(ii) within 30 days after the date of this Initial Decision. Such appeal must include exceptions to the Administrative Law Judge's Decision and supporting reasons for those exceptions. Failure to file such an appeal in accordance with 37 C.F.R. § 11.55 will be deemed both an acceptance by Respondent of the Initial Decision and that party's waiver of rights to further administrative and judicial review.

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[6] The Administrative Law Judges of the Environmental Protection Agency are authorized to hear cases pending before the United States Department of Commerce, Patent and Trademark Office, pursuant to an Interagency Agreement effective for a period beginning March 22, 1999.

In The U.S. Patent and Trademark Office Matter of *Dean J. Tricarico.*
Proceeding No. D2009-40

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Initial Decision on Default,** dated April 20, 2011, issued by Susan L. Biro, Chief Administrative Law Judge, was sent this 20th day of April 2011, in the following manner to the addressees listed below.

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Legal Staff Assistant

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Dated: April 20, 2011
Washington, D.C.