

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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APR 16 2001



LUTHER D. THOMAS, Clerk  
Deputy Clerk

SUNTRUST BANK as Trustee of )  
the Stephens Mitchell Trusts f/b/o Eugene )  
Muse Mitchell and Joseph Reynolds Mitchell, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
HOUGHTON MIFFLIN COMPANY, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Civil Action File  
No. 1:01 CV-701-CAP

**DEFENDANT'S SUPPLEMENTAL MEMORANDUM  
IN REPLY TO PLAINTIFF'S EXPERT AFFIDAVITS**

Defendant submits the following memorandum in reply to Plaintiff's expert affidavits filed on April 12, 2001:

**I. Introduction.**

**A. Relevance Standards for Expert Opinions.**

In two recent decisions, the Supreme Court has substantially raised the bar for the relevance and admissibility of expert opinions. See Daubert v. Merrell Dow Pharm., Inc. 509 U.S. 579, 113 S. Ct. 2786 (1993); Kumho Tire Co. Ltd. v. Carmichael, 529 U.S. 137, 119 S. Ct. 1167 (1999). Several admonitions that have existed in the Federal Rules of Evidence and the Federal Rules of Civil Procedure have been elevated to the level of requirements for the "reliability" of such opinions:

1. Fed. R. Evid. 702 provides that an expert must be qualified by “knowledge, skill, experience, training, or education....” An expert in the courtroom must employ “the same level of intellectual rigor that characterizes the practice of an expert in the **relevant** field.” Kumho, 509 U.S. at 152, 119 S. Ct. at 1176 (emphasis supplied).

2. Fed. R. Civ. Procedure 26 (a)(2) requires a complete statement of all opinions to be expressed **and the basis and reasons therefor**. Expert opinion may not consist of “the *ipse dixit* of the expert.” General Electric Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 519 (1997). See Fed. R. Evid. 702 advisory committee’s notes (requiring a “sufficient factual basis” for opinions and stating that “the trial court’s gatekeeping function requires more than simply taking the expert’s word for it.”).

Absent strict compliance with the foregoing mandates, a District Court must exercise its “gatekeeping” role to disregard or disallow opinion testimony.

**B. The Inability (and Failure) of Plaintiff’s Experts to Address Issues.**

In this case, the “threshold question” in analyzing fair use is “whether a parodic character [for *The Wind Done Gone*] **may reasonably be perceived.**” Campbell v. Acuff-Rose Music, 510 U.S. 569, 582, 114 S. Ct. 1164, 1173 (1994) (discussing the first statutory fair use factor). Secondly, “‘once enough has been taken to assure identification,’ ... the reasonableness of taking additional aspects of the original depends on the extent to which ‘the overriding purpose and character’ ... ‘is to parody the original,’ and ‘the likelihood that the parody may serve as a market substitute for the original[.]’” 510 U.S. at 588, 114 S. Ct. at 1176 (discussing the third statutory fair use factor) (a recording of portions of the two songs at issue in Campbell is attached as Exhibit 7).

Accordingly, the literary expertise that is critical to the resolution of the issues before the Court is parody, particularly as expressed in the form of social and political comment couched in African American humor. None of the Plaintiff’s experts is

qualified as to the latter; only one is qualified as to parody. Plaintiff's experts thus do not have knowledge in the "relevant field."

Of equal importance, the opinions expressed by Plaintiff's experts are stated **essentially as conclusions**. Only one specific example is given of a purportedly non-parodic allusion in *The Wind Done Gone*, and that example is demonstrably wrong.

Plaintiff also offers three experts who discuss the "substitute" or "sequel" issue. None state that the work will be regarded by consumers as a sequel; none state that *The Wind Done Gone* will replace the demand for *Gone With the Wind*; none thus proffer opinions that are relevant to the issues before the Court.

Accordingly, Plaintiff's expert affidavits must be disregarded.<sup>1</sup> It is also noteworthy that while the "fairness" of the Beeber Charts has been at issue since the initial argument to this Court, none of Plaintiff's experts has adopted or referred to the Charts. Since the Beeber statement that the Charts are "fair" is an opinion of counsel, not qualified as an expert on parody, and since that opinion is inherently "suspect," Herzog v. Castlerock Entm't, 193 F.3d 1241, 1257 (11<sup>th</sup> Cir. 1999), the Charts must be stricken for want of demonstrated reliability.

### **C. Plaintiff's Consequent Failure to Carry Its Burden.**

The law of this circuit is clear: "a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant **clearly** carries the burden of persuasion." Canal Auth. Of the State of Florida v. Callaway, 489 F.2d

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<sup>1</sup> If this matter were being considered by a jury, defendant would file a motion in limine to strike each of the affidavits. Not one of the affidavits is entitled to any weight.

567, 573 (5<sup>th</sup> Cir. 1974)(emphasis added). “The burden of persuasion on all of the four requirements for a preliminary injunction is at all times on the plaintiff.” Id.

“[W]here sharp issues of fact are presented it is apparent that the case is not a fit one for preliminary relief, and the resolution of the disputed issues must await trial.” Gianni Cereda Fabrics, Inc. v. Bazaar Textiles, Inc., 335 F. Supp. 278, 281 (D.C.N.Y. 1971), quoting Heyman v. Ar. Winarick, Inc., 166 F. Supp. 880, 883 (S.D.N.Y. 1958). A plaintiff is not entitled to preliminary relief where a determination of likely success “would require evaluation of the credibility of experts, which cannot be done without a full hearing on the matter.” SQP, Inc. v. Sirrom Sales, Inc., 130 F. Supp.2d 364, 368 (N.D.N.Y. 2001). Plaintiff clearly has failed to meet, much less to overcome, the thrust of Defendant’s many expert declarations; *a fortiori*, the failure of Plaintiff’s experts to present **any issues at all** compels denial of its motion.

## **II. Plaintiff’s Experts.**

### **A. Plaintiff’s Literary Experts.**

The Plaintiff has presented four affiants who discuss *The Wind Done Gone* from a literary perspective.

#### **1. Alan Lelchuk.**

Mr. Lelchuk does not reveal in his affidavit or in his attached Curriculum Vitae that he has any expertise as to parody, much less as to a political or social parody couched in the form of African American humor and ridicule. He states his

opinions, moreover, substantially in the form of conclusions,<sup>2</sup> and in his judgment, *The Wind Done Gone* is “a subliterary parasitical work.” The impressive array of affiants lined up against Mr. Lechuk include, among many others, the following:

“Miss Randall’s prose is by turns evocative, wry, plangent. Her wit is sharp but free of malice. Her gift for lyrical economy is rare.... Considering the First Amendment rights properly accorded *Gone With the Wind*, in spite of the pain, humiliation and outrage its a-historical representation has caused African Americans, it seems particularly odd for the Mitchell estate to deny this clever but gentle effort to assuage the damage....”

**Toni Morrison, winner of the Nobel Prize for Literature, Pulitzer Prize, National Book Critic’s Circle Award, and National Book Foundation Medal for Distinguished Contribution to American Letters.**

“someone from houghton mifflin sent me an early copy of the book [*The Wind Done Gone*] knowing of my involvement with the gwtw sequel, and I read it with pleasure and laughed out loud at its clever inversions and insiders jokes on the themes of gwtw. the only suitable response that black america can have to the immense popularity of gwtw is to turn to parody, to mockery, to humor and to the power of laughter.... alice randall’s book is a parody and a grand send-off of gwtw. she is uncommonly talented and a great welcome to american letters.”

**Pat Conroy, “an american novelist of the Southern variety” and author of such national best sellers as *The Prince of Tides*, *The Great Santini* and *Beach Music*.**

“*The Wind Done Gone* is a classic parody, in a long line of literary creations that extend back to the ancient Greeks.... It constitutes both an original work of art and a moving act of political commentary, deconstructing as it does a text that many scholars believe to be racist. At last the slaves at Tara have found their voices, and I say ‘Amen.’”

**Henry Louis Gates, Jr., Chair of the Department of Afro-American Studies, Harvard University.**

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<sup>2</sup> He concludes, for example, that *The Wind Done Gone* “is not satire or parody” because “[t]here is no consistency ... of style, tone or attitude to substantiate either form of critical mockery.” The Declarations of John E. Sitter and the Declaration of Barbara McCaskill, by contrast, consume forty pages that are substantially replete with specific examples of parody, political and social commentary and African American humor.

"Life resides compressed in *The Wind Done Gone* and it reads like poetry."

Yusef Komunyakaa, poet, author of **Pulitzer Prize** winning *Neon Vernacular*, **Professor of Creative Writing at Princeton University**.

"Spare, haunting, beautiful. Randall takes on an epic, throwing stones at America's mirage of racial purity. But her real achievement is a debut novel of shimmering lyricism."

**Lisa Jones**, author of *Bulletproof Diva: Tales of Race, Sex, and Hair*, writer for the *Village Voice*.

The *Wind Done Gone* is one of the most beautifully written—and researched—novels I've read in a long time. Fiction has never been more credible."

Claude Brown, author of *Manchild in the Promised Land*, a **classic work in African American literature**.

*The Wind Done Gone* ... is an unpretentious little gem of a novel....

**John Egerton**, author of *Speak Now Against the Day: A Generation Before the Civil Rights Movement in the South*, winner of the **Robert F. Kennedy Award**, 1994, author of *The Americanization of Dixie*.

Declarations of Toni Morrison, Pat Conroy and Anton Mueller. Mr. Lelchuk's affidavit, therefore, is neither factually nor legally entitled to weight. He is not qualified as to parody in any form, or as to African American humor; he does not and cannot say whether *The Wind Done Gone* "may be reasonably perceived" as parody; he speaks in conclusions; his views are roundly rejected.

## 2. Louis Rubin.

Mr. Rubin does not reveal in his affidavit or in his attached Curriculum Vitae that he has any expertise with respect to parody, particularly as expressed in the form of a social and political comment couched in African American humor and ridicule. This critical omission in Mr. Rubin's background leads to his clear misreading of the only *specific* example given in his affidavit, *i.e.*, he finds fault with Ms. Randall's

reference to Ellen's (Lady's) deathbed utterance of "Philippe," when, in fact, it is a classic example of the use of parody:

a. In *Gone With the Wind*, "Ellen" is the paradigm of an aristocratic "white" lady and the source of Scarlett's aristocratic whiteness.

b. In *The Wind Done Gone*, the letters between "Lady" and "Felepe" reveal that Lady's great-grandmother was black, and she becomes the source of Other's blackness.

c. The Ellen/Lady parallel is thus critical to the parody in *The Wind Done Gone* of the obsession in *Gone With the Wind* with racial purity.

Supplemental Declarations of Alice Randall and Barbara McCaskill.

Mr. Rubin next states that: [a.] "[t]he obvious intention, and certainly the effect, of '*Wind Done Gone*' is not to burlesque or ridicule Margaret Mitchell's work of fiction. [b.] Rather, it is to make use of the characterization, plot and milieu of the earlier work to **create another work of fiction** centered on a supposed half-sister of Margaret Mitchell's principal character." With respect to the point [a.], Mr. Rubin reflects that he does not have a greater appreciation for African American humor than he does for parody;<sup>3</sup> with respect to point [b.], he essentially rebuts Mr. Lelchuk and comes very close to saying that *The Wind Done Gone* is a **creative** parodic work.<sup>4</sup>

Finally, Mr. Rubin states that "racial stereotypes" have "long since been exploded" in other histories and novels. Again, given his lack of expertise in the area, Mr. Rubin fails to appreciate that "racial stereotypes" are still very much a subject of political and social comment:

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<sup>3</sup> See the discussion of the McCaskill Declaration, and its numerous examples of African American humor, in connection with the Conarroe Affidavit, *infra*.

<sup>4</sup> His judgment that Ms. Randall should not have used a parody of *Gone With the Wind* to do so is simply beside the point.

... the continuing appeal of works that revisit the history of slavery like Alex Haley's *Roots*, *Amistad*, Toni Morrison's *Beloved* (winner of the Pulitzer Prize), Charles Johnson's *Middle Passage*, Lucille Clifton's *Good Woman*, Octavia Butler's *Kindred*, Ishmael Reed's *Flight to Canada*, and Sherley Anne Williams' *Dessa Rose* substantiate the fact that racial relationships in the antebellum and postbellum South are still very much a topic of social and political concern. Further evidence of this continuing concern is the popularity of depictions of slavery by visual artists such as Jacob Lawrence, Atlanta's own Radcliffe Bailey and Kara Walker, Glenn Ligon, Pat Ward Williams, Faith Ringgold, Bettye Saar, and Carrie Mae Weems. Cincinnati's Museum of the Underground Railroad will open in 2002, and academic institutions such as Yale University's Gilder Lehrman Center for the Study of Slavery, Resistance, and Abolition exist for the sole purpose of studying this era and related moments. Thus, Dr. Rubin's opinion that "racial stereotypes" have "long since been exploded" by other works (Rubin Aff. ¶¶10,11) fails to recognize that racial stereotypes and slavery are still the subjects significant political, social, and cultural interest. Although we are more than a century removed from the 1850s and 1860s, the issues that the period raises—racism, stereotyping, oppression of women and blacks, what was lost and what was gained through slavery—still linger, especially in the imaginations of black readers. "The problem of America is the problem of the color line," wrote philosopher and educator W.E.B. DuBois at the turn of the 20<sup>th</sup> century. At the turn of the 21<sup>st</sup>, the public discussion raised by books such as *The Wind Done Gone* is critical to the continued search for healing and truth in our country.

Supplemental Declaration of Barbara McCaskill, ¶ 6.

Mr. Rubin, accordingly, is not qualified to opine on the specific issues before the Court; he does not and cannot say whether *The Wind Done Gone* "may be reasonably perceived" as parody; his only example as to non-parodic purpose is in error; he otherwise speaks in conclusions; and his conclusions are demonstrably incorrect.

3. Joel Conarroe.

Mr. Conarroe does not reveal in his affidavit or in his attached Curriculum Vitae that he has any expertise with respect to parody in any form or to African American humor, and he states his opinions substantially in the form of conclusions. His observation that serious writers of fiction have written about the lives of slaves

without referencing *Gone With the Wind* is irrelevant; his characterization of *The Wind Done Gone* as “stylistically chaotic” is subject to the above noted rebuttal from Nobel and Pulitzer Prize winners; and his conclusion that “neither [wit nor humor] is in evidence here” demonstrates his lack of appreciation for African American humor – as Ms. McCaskill, a true expert in the field, attests:

- a. that R. is in love with a former slave and is the abandonee, not the abandonor, is classic such humor;
- b. that slaves switch Mammy’s grave with that of Lady is classic such humor;
- c. that Tata, after the war, is run by Garlic is classic such humor;
- d. that, throughout *The Wind Done Gone*, blacks are clever and whites are dull-witted is classic such humor;
- e. that blacks joke among each other (*e.g.*, Weems sarcastically describes how “upset” he was to learn that a black Union captain had seized a Confederate warship) is classic such humor;
- f. that the slaves are round characters and the slaveholders are stereotypes is classic such humor;
- g. that Other and Lady are part black and that Planter’s love for the land had “something African in it” is classic such humor;
- h. that Dreamy Gentleman, the model of Southern manhood, is a homosexual and sleeps with a slave is classic such humor.

Declaration of Barbara McCaskill. Henry Louis Gates, Jr. “laughed until [he] wept when [he] read *The Wind Done Gone*.” Declaration of Henry Louis Gates, Jr., ¶ 6.

Mr. Conarroe’s “conclusions,” therefore, do not advance Plaintiff’s cause any more than did those of Mr. Lelchuk and Mr. Rubin. To the extent that he attempts to address the issues, he is without the expertise to do so and is plainly wrong.

#### 4. Gabriel Motola.

Mr. Motola has at least taught parody, the only one of Plaintiff's experts who states he has done so, and he (**partially**) quotes a definition of parody that fits *The Wind Done Gone*. He says, for example, that parody is "satirical mimicry" and that "[t]here has to be a subtle balance between **close** resemblance to the 'original,' and a deliberate distortion of its principal characteristics" which is **exactly what *The Wind Done Gone* accomplishes**. Second Supplemental Declaration of John Sitter. He agrees with Mr. Gates that "[p]arody does not exist without an extensive evocation of the original." Declaration of Henry Louis Gates, Jr., ¶ 7.

Accordingly, in an effort to render an opinion favorable to Plaintiff, Mr. Motola is forced to **contradict his own definition**: he argues, *e.g.*, that parody should allude to another work only "briefly,"<sup>5</sup> an argument that neither his own reference nor the Supreme Court's decision in Campbell permits. It is even more concerning, therefore, that Mr. Motola states his opinion ("the line between parody and plagiarism has been breached") as a conclusion. His leap, then, to a postulation that readers will see *The Wind Done Gone* as a sequel far transcends his expertise.<sup>6</sup>

When carefully read, therefore, Mr. Motola supports the theory of defendant's position, and does not state any facts to support plaintiff's. Indeed, the portion of the

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<sup>5</sup> *The Wind Done Gone*, of course, actually accomplishes Mr. Motola's stricter and extra-legal test. Declaration of Anton Mueller, ¶ 7; also, see the Declarations of John Sitter and Barbara McCaskill noting how "sparingly" Ms. Randall alluded to *Gone With the Wind*.

<sup>6</sup> In light of Mr. Conroy's experience as to what the Mitchell trust would have required of a sequel, reflecting its position as to the necessary content of a sequel that would perpetuate the original in consumers' minds, Mr. Motola's postulation might be characterized even less charitably.

parody definition that he excises from his quotation – “as a branch of satire, [parody’s] purpose may be corrective as well as derisive” – is telling: “[*The Wind Done Gone*] not only ridicules GWTW, but seeks to *correct* through parody GWTW’s demeaning and stereotypical portrayals of blacks and its idealized representation of slaveholding society.” Second Supplemental Declaration of John Sitter, ¶ 2.

**B. Plaintiff’s Sequel Experts.**

Plaintiff’s remaining three experts principally discuss the issue of sequels. Interestingly, **not one of the three** opines that *The Wind Done Gone* will be regarded by the public as a sequel. By contrast, defendant has submitted the declaration of Frank Price, a producer of major motion pictures and television programming with particular experience in producing and marketing sequels, that “*The Wind Done Gone* will not be perceived by the public as a sequel to *Gone With the Wind*” and “**will not serve any of the market functions that a sequel to *Gone With the Wind* would serve.**” Declaration of Frank Price, ¶¶ 7, 11. See also, Declaration of Jane Chelius, ¶ 4 (“readers will easily perceive that *The Wind Done Gone* is a parody of *Gone With the Wind*, not a sequel.”).

1. Hope Dellon.

Ms. Dellon only discusses the value of sequel rights.<sup>7</sup> Since she cannot say that *The Wind Done Gone* will be regarded as a sequel, she obviously cannot say that the value of *Gone With the Wind* rights have been impaired. The only conclusion to be drawn from her affidavit is that, in deciding on a first publication of only 25,000

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<sup>7</sup> Presumably, those rights have not been diminished by the parody of *Gone With the Wind* that St. Martin’s Press has published.

copies, it is clear that Houghton-Mifflin did not regard *The Wind Done Gone* as a sequel. Supplemental Declaration of Alice Randall.

2. Alex Holtz.

Mr. Holtz does not opine that *The Wind Done Gone* will be deemed a sequel and he cannot opine, therefore, that if it has “weak sales,” it would impact *Gone With the Wind*. As for his remarks about schedule slippages, he can only offer that “these events ... are not considered as an **indelible** black mark,” and he does not discuss at all the damaging impact of an injunction for copyright infringement, **much less the damage to the defendant and the public from a prior restraint of a work whose “time is now.”** It thus stands unrebutted that if publication of *The Wind Done Gone* is delayed, “the publisher’s extensive marketing investments would be wasted, the public’s receptiveness to *The Wind Done Gone*’s political message may change, and the chances that *The Wind Done Gone* would achieve its maximum potential would be curtailed and possibly eliminated.” Declaration of Frank Price, ¶ 24.

3. Kevin J. Anderson.

Mr. Anderson carefully avoids opining that *The Wind Done Gone* will be regarded as a sequel. Rather, he argues that *The Wind Done Gone* will “taint” *Gone With the Wind*, which is what a parodist legally may do,<sup>8</sup> and then he makes a passionate plea that allowing *The Wind Done Gone* will open the floodgates with respect to other works.

The response is two-fold. First, only works with an overall purpose to parody or comment will be authorized as fair use. Second, as Mr. Rubin recognizes, few

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<sup>8</sup> See Campbell, 510 U.S. at 591-92, 114 S. Ct. at 1178.

works, after sixty-five years, have the iconic status of a “historical myth” that belongs to *Gone With the Wind*, and it is among a small number of works in American literature in containing so much that is obviously fair game for criticism:

“How stupid negroes were! They never thought of anything unless they were told. And the Yankees wanted to free them.” – pg. 409.

“Time and again, Ellen had said: ‘Be firm but be gentle with inferiors, especially darkies.’ But if she was gentle the darkies would sit in the kitchen all day, talking endlessly about the good old days when a house nigger wasn’t supposed to do a field hand’s work.” -- pg. 432.

“Negroes were provoking sometimes and stupid and lazy, but there was loyalty in them that money couldn’t buy, a feeling of oneness with their white folks which made them risk their lives to keep food on the table.” -- pg. 472.

“The negroes she passed turned insolent grins at her and laughed among themselves as she hurried by, slipping and sliding in the mud, stopping, panting to replace her slippers. How dared they laugh, the black apes! How dared they grin at her, Scarlett O’Hara of Tara! She’d like to have them all whipped until the blood ran down their backs. What devils the Yankees were to set them free, free to jeer at white people!” – pg. 589.

“‘Free darkies are certainly worthless,’ Scarlett agreed.... ‘Mr. Johnson says he never knows when he comes to work in the morning whether he’ll have a full crew or not. You just can’t depend on the darkies any more. They work a day or two and then lay off till they’ve spent their wages, and the whole crew is like as not to quit overnight. The more I see of emancipation the more criminal I think it is. It’s just ruined the darkies. Thousand of them aren’t working at all and the ones we can get to work at the mill are so lazy and shiftless they aren’t worth having.’” -- pg. 639.

“Aided by the unscrupulous adventurers who operated the Freedmen’s Bureau and urged on by a fervor of Northern hatred almost religious in its fanaticism, the former field hands found themselves suddenly elevated to the seats of the mighty. There they conducted themselves as creatures of small intelligence might naturally be expected to do. Like monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild -- either from perverse pleasure in destruction or simply because of their ignorance.” -- pg. 654.

“Sam galloped over to the buggy, his eyes rolling with joy and his white teeth flashing, and clutched her outstretched hand with two black hands as big as

hams. His watermelon-pink tongue lapped out, his whole body wiggled and his joyful contortions were as ludicrous as the gambolings of a mastiff.” -- pg. 779.

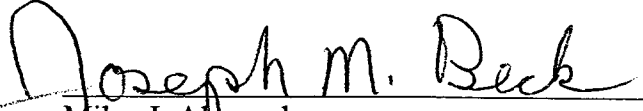
“These negroes sat in the legislature where they spent most of their time eating goobers and easing their unaccustomed feet into and out of new shoes.” -- pg. 904.

Accordingly, the only real damage to *Gone With the Wind* may be if, as a consequence of *The Wind Done Gone*, it is sensitively reread.

### III. Conclusion.

Plaintiff’s experts are not qualified by “knowledge, skill, experience, training or education” to comment on the **relevant** issues before the Court, and they do not comment on: (a) whether *The Wind Done Gone* “may be reasonably perceived” as a parody; (b) whether there are allusions in *The Wind Done Gone* that extend beyond the “overriding purpose ... to parody”; and (c) whether *The Wind Done Gone* can serve as “a market substitute” for *Gone With the Wind*. Moreover, they do not support their opinions with a “**complete statement**” of the “basis and reasons therefor” – they rely largely on “the *ipse dixit* of the expert.” Accordingly, they do not present **any issues** to support Plaintiff’s heavy burden as to a preliminary injunction; much less do they overcome the **multitude of compelling issues** presented in the declarations of Defendant’s experts. This case is not remotely a “fit” exception to the almost universal condemnation of prior restraints.

Respectfully submitted,



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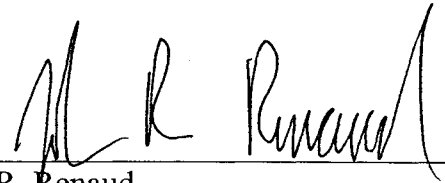
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Defendant's Supplemental Memorandum in Reply to Plaintiff's Expert Affidavits** has been hand-delivered to counsel of record as follows:

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This 16th day of April, 2001.



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