UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

IN RE	**Jointly Administered under Case Number 08-45257**
PETTERS COMPANY, INC.,	Court File No. 08-45257
Debtors.	Court File Nos:
(includes:	
Petters Group Worldwide, LLC;	08-45258 (GFK)
PC Funding, LLC;	08-45326 (GFK)
Thousand Lakes, LLC;	08-45327 (GFK)
SPF Funding, LLC;	08-45328 (GFK)
PL Ltd, Inc.;	08-45329 (GFK)
Edge One LLC;	08-45330 (GFK)
MGC Finance, LLC;	08-45331 (GFK)
PAC Funding, LLC;	08-45371 (GFK)
Palm Beach Finance Holdings, Inc.)	08-45392 (GFK)
	Chapter 11 Cases
	Judge Gregory F. Kishel

DOMAIN ASSETS, LLC'S MEMORANDUM IN SUPPORT OF MOTION REQUESTING RELIEF FROM STAY

PRELIMINARY STATEMENT

Domain Assets, LLC, d/b/a CONSOR Intellectual Asset Management ("CONSOR") submits this memorandum in support of its motion requesting relief from the automatic stay imposed by 11 U.S.C. § 362, which became effective when debtors Petters Group Worldwide, LLC ("Petters Group") and Petters Company, Inc. ("Petters Company"), hereinafter collectively, the "Debtors", filed for bankruptcy protection on October 11, 2008. CONSOR seeks relief from the stay for the limited and sole purpose of prosecuting an appeal from an adverse summary judgment ruling in the matter of *Domain Assets, LLC, d/b/a CONSOR Intellectual Asset*

Management, Plaintiff, v. Petters Group Worldwide LLC, (individually and as successor in interest to RedtagBiz, Inc., d/b/a Redtag, Inc.) and Petters Company, Inc., Defendants, United States District Court for the District of Minnesota, File No. 06-4379 (PAM/JSM). The appeal is currently pending before the United States Court of Appeals for the Eighth Circuit and has been briefed by both CONSOR and the International Licensing Industry Merchandising Association, Inc., as Amicus Curiae. *See Domain Assets, LLC, d/b/a CONSOR Intellectual Asset Management, Appellant, v. Petters Group Worldwide LLC, (individually and as successor in interest to RedtagBiz, Inc., d/b/a Redtag, Inc.) and Petters Company, Inc., Appellees*, File Nos. 08-2649 and 08-2724.

In its 2006 Complaint, as amended, CONSOR alleged that Tom Petters unlawfully manipulated the various entities he owned or controlled, including RedtagBiz, Inc., Petters Company, Petters Group and its subsidiaries, in what was essentially a corporate shell game intended to avoid Redtag's contractual liability to pay CONSOR a percentage-based fee for making the introductions that enabled Petters to license the Polaroid® brand name for use on consumer electronic products. Acting in his capacity as Redtag's Chairman, Tom Petters entered into a contract with CONSOR that provided him with an introduction to Polaroid's licensing executives. Unknown to CONSOR or to Redtag's minority shareholders, however, Tom Petters secretly diverted Redtag's corporate opportunity to the shell Petters Company (falsely represented to Polaroid as a Redtag "affiliate"), and exploited the Petters Company-Polaroid license through Petters Group and its subsidiaries. Without its management or minority shareholders ever knowing that it could have licensed the Polaroid® brand, Redtag soon thereafter ceased doing business, Tom Petters acquired all of the minority shares for little or nothing and he merged the empty Redtag shell into Petters Group. Since 2003 Petters Group and

its subsidiaries have sold more than $2 Billion of Polaroid® brand product, for which CONSOR is contractually owed in excess of $160,000,000.

On cross-motions for summary judgment the District Court found that CONSOR had produced evidence sufficient for a jury to find in its favor in the merits, i.e., that for purposes of the transaction in question, RedtagBiz, Inc., Petters Group and Petters Company were all operated as the alter egos of Tom Petters and of each other; but nevertheless ruled that Minn. Stat. §§ 82.17, subd. 18(d), and 82.18, subd. 1, precluded CONSOR from suing to collect its contractual fee in a Minnesota court because it was required to be, but was not a licensed Minnesota Real Estate Broker. The issue to be decided on appeal is whether Minn. Stat. Ch. 82, titled "Real Estate Brokers and Salespersons," can be interpreted to bar CONSOR, a California-based intellectual property consulting firm, from bringing suit in a Minnesota court to collect its contractual fee for a service performed in Nevada and related solely to the subject matter of intellectual property. The issue is purely one of statutory interpretation.

The appeal will determine how CONSOR may proceed in this Court. If the Eighth Circuit rules that Minn. Stat. Ch. 82 does not apply, then CONSOR's Amended Complaint will be reinstated, and all of the District Court's rulings over the past two years of litigation will be the law of the case and/or may be used to collaterally estop the Debtors in an adversary or other proceeding to establish the amount of CONSOR's claim. If, on the other hand, the Eighth Circuit rules that Minn. Stat. Ch. 82 does apply, then an adversary or other proceeding will be commenced in this Court, and CONSOR will start over just as it would have been entitled to do in another jurisdiction had the Debtors not filed their Petitions -- the District Court's interpretation of Ch. 82 says only that CONSOR may not proceed in a Minnesota Court; it does

not bar CONSOR from proceeding in the courts of any other state, including a bankruptcy court having jurisdiction of claims that could have been filed in California, Nevada or elsewhere.

PROCEDURAL BACKGROUND

I. THE UNDERLYING ACTION.

CONSOR filed the underlying action on November 1, 2006, seeking to recover damages from Petters Group for (i) breach of and interference with a contract between CONSOR and non-party RedtagBiz, Inc., d/b/a Redtag, Inc. ("Redtag"); (ii) interference with CONSOR's prospective advantage; and (iii) for damages under a variety of equitable theories. On April 4, 2007, CONSOR filed its Amended Complaint naming Petters Company as an additional defendant. (District Court Docket Number ("D.C. Doc. No.") 19).[1]

The Amended Complaint alleged that, for a fee, California-based CONSOR agreed to introduce Redtag Chairman and majority owner Thomas J. Petters ("Tom Petters"), to non-party Polaroid Corporation so he could discuss Redtag's desire to license the Polaroid® trademark for use on consumer electronics. CONSOR negotiated its fee with Redtag's California office, and was to be paid a fixed sum for each licensed product category plus 0.5% of all revenues derived from the sale of Polaroid® brand products in the event Redtag and Polaroid entered into a license agreement. In January 2002 CONSOR introduced Tom Petters and Redtag to Polaroid Corporation at a trade show in Nevada. No services were provided in Minnesota.

Within weeks after the introduction, Tom Petters told CONSOR that Redtag was not interested in pursuing a Polaroid® brand license agreement. He then used his near total control

[1] CONSOR has not submitted to this Court any documents filed in the District Court or Eighth Circuit, and, with the exception of the transcript of the summary judgment hearing, all of CONSOR's citations to the record refer to documents filed and available for viewing on either the District Court or Eighth Circuit docket. CONSOR would be pleased to submit the cited record to this Court if the Court so wishes.

over and domination of Redtag's business affairs to keep the existence of the Polaroid® licensing opportunity and his discussions with Polaroid Corporation secret from Redtag's Board of Directors, management and minority shareholders, and to steer Redtag's opportunity to become a licensee of the Polaroid® brand to his wholly owned companies, Petters Group and Petters Company. Since 2003, companies wholly owned by Tom Petters, including Petters Group and its subsidiaries, have generated approximately $2 Billion in revenue from the sale of Polaroid® brand products. CONSOR has never been paid its agreed fee, Redtag went out of business in 2003 and Tom Petters acquired all of Redtag's minority stock for little or nothing.

In 2006 CONSOR discovered by accident that Tom Petters-controlled entities had licensed the Polaroid® brand, and it brought this action to recover on the Redtag Agreement. Petters Group filed its Counterclaim on March 14, 2007, and Amended Counterclaim on June 28, 2007, alleging that CONSOR was the "dual agent" of Redtag and non-party Polaroid Corporation with respect to the Redtag Agreement, and therefore cannot recover.

On April 14, 2008, the parties filed their cross-motions for partial summary judgment. Although the defense was never raised in their original Answer, Answer to Amended Complaint or Amended Answer and Counterclaims, in their May 9, 2008 Memorandum in Opposition to CONSOR's Motion for Summary Judgment, Petters Group and Petters Company alleged as a defense to the action, for the first time ever, that "[o]ne who acts as a [real estate] broker without a license may not bring a civil action to collect a fee or commission" in a Minnesota court. (D.C. Doc. No. 143 (citing Minn. Stat. § 82.18, subd. 1)). Moreover, although not included or referenced in any pleadings, at oral argument counsel for Petters Group and Petters Company argued that the "broker statute" was their primary defense. (Transcript of May 29, 2008 Hearing on Motions for Summary Judgment, at 6 ("[L]et's get into the legal arguments and start with, we

think, the most obvious reason these claims fail. And that is that it is outside of the requirements of the Minnesota Brokers Statute 82.18.")).

In its opposition to the Petters Group/Petters Company summary judgment motion, CONSOR objected on the ground that the defense of illegality, generally, and the defense of failure to comply with Minn. Stat. Ch. 82's Real Estate Broker licensing requirements, specifically, have been waived because they were not affirmatively pled. (D.C. Doc. No. 140, at 17-18). CONSOR also argued that the Real Estate Broker Statute was not intended to, and did not apply to an out-of-state intellectual property transaction.

On cross-motions for summary judgment, the District Court, the Honorable Paul A. Magnuson, issued its June 23, 2007, Order (D.C. Doc. No. 154) and Judgment (D.C. Doc. No. 155). The District Court found with respect to CONSOR's claims that Petters Group and Petters Company could be held liable on the Redtag Agreement in contract or in tort because "[t]here is enough evidence in the record from which a jury could conclude that Redtag and the Petters entities were in essence and in practice the same company." (D.C. Doc. No. 154). With respect to Petters Group's counterclaims, however, the District Court found that "there is no evidence in the record from which a jury could conclude that CONSOR was the agent either of Polaroid or of Redtag with respect to the Polaroid/Redtag licensing deal . . . . [T]he Court cannot find that CONSOR owed either Polaroid or Redtag a fiduciary duty . . . . [T]he record does not support Defendants' claims for breach of fiduciary duty, and those claims must be dismissed." (*Id.*).

Despite having found facts sufficient for a jury to find in CONSOR's favor, the District Court dismissed the Amended Complaint with prejudice, based on its conclusion, unrelated to the merits, that CONSOR is barred by Minn. Stat. §§ 82.17, subd. 18(d), and 82.18, subd. 1, from recovering damages in a Minnesota Court because it did not have a Minnesota Real Estate

Broker's license. (*Id.*). The "Real Estate Broker" licensing defense, however, had never been pled as an affirmative defense, the summary judgment brief in which it was raised for the first time was filed more than a year after the deadline for amending the pleadings had expired, and there was no motion to modify the Pretrial Scheduling Order for good cause.

On July 2, 2008, CONSOR asked the District Court for leave to file a motion for reconsideration, because summary judgment had been granted "[b]ased on a technical legal defense that was never plead and which violates the U.S. and Minnesota Constitutions as applied[.]" (D.C. Doc. No. 156). CONSOR's request specifically pointed out, among other things, that the "'broker licensing' defense was raised for the first time on summary judgment, and not in the Answer." (*Id.*(citing Fed. R. Civ. P. 8(a) (requiring affirmative defenses to be pled), and *Albers v. Fitschen*, 274 Minn. 375, 143 N.W.2d 841 (1966) (the Minnesota licensing statute is an affirmative defense that is waived if not pled)). The District Court denied CONSOR's request to file a motion for reconsideration. (D.C. Doc. No. 158).

II. CONSOR'S APPEAL.

CONSOR filed its Notice of Appeal with the District Court of Minnesota on July 23, 2008, appealing the District Court's June 23, 2008, Order granting the Debtor's motion for partial summary judgment and dismissing CONSOR's Amended Complaint with prejudice. (D.C. Doc. No. 159). Petters Group filed its Notice of Cross-Appeal on August 4, 2008, appealing the District Court's Order dismissing its Amended Counterclaim with prejudice. (D.C. Doc. No. 165). The Eighth Circuit Court of Appeals assigned these cross-appeals the respective case numbers 08-2649 (CONSOR's appeal) and 08-2724 (Petters Group's cross-appeal). (Eighth Circuit Docket Document dated August 5, 2008 ("8th Cir. Doc. dated 8/5/08")). On September 24, 2008, CONSOR filed its appellate brief and appendix with the Eighth Circuit. (8th Cir.

Docs. dated 9/25/08). On that same day, agents from the F.B.I., I.R.S., and U.S. Postal Service conducted a raid and executed search warrants at the Debtors' headquarters, Tom Petters's Lake Minnetonka mansion and other places, and subsequently arrested Petters for allegedly using the Debtor entities to perpetrate a 14-year, multi-billion dollar Ponzi scheme.

On September 29, 2008, the Debtors' attorneys, Fredrikson & Byron, P.A., filed a motion with the Eighth Circuit seeking to withdraw, citing irreparable damage to the attorney-client relationship. (8th Cir. Doc. dated 9/29/08). The Eighth Circuit granted the Motion on October 1, 2008. (8th Cir. Doc. dated 10/1/08). On October 15, 2008, new counsel for the Debtors (representing the Court-appointed Receiver, Douglas Kelley), Lindquist & Vennum, P.L.L.P., filed notices of appearance with the Eighth Circuit and a Notice of Bankruptcy Filing and Mandatory Stay of Proceedings. (8th Cir. Docs. dated 10/15/08). On October 16, 2008, the Eighth Circuit ordered the parties to show cause why the appeals should not be stayed pursuant to 11 U.S.C. §362. (8th Cir. Doc. dated 10/16/08). CONSOR has filed a pleading with the Eighth Circuit stating that the appeal is properly stayed pursuant to 11 U.S.C. §362, but that the Bankruptcy Court will be asked to grant relief from the stay. (8th Cir. Doc. dated 10/30/08). On October 31, 2008, the Court issued an Order staying the appeal pursuant to 11 U.S.C. §362. (8th Cir. Doc. dated 10/31/08). On October 23, 2008, the Eighth Circuit accepted the filing of an Amicus Curiae Brief supporting CONSOR's position by the International Licensing Merchandising Association, Inc. (8th Cir. Docs. dated 10/23/08).

ARGUMENT AND AUTHORITY

I. STANDARD OF REVIEW.

"On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . such as by terminating, annulling, modifying, or conditioning such stay

. . . for cause . . . ." 11 U.S.C. § 362(d)(1) (1995). As used in that section, "the term 'cause' is a broad and flexible concept which permits a bankruptcy court, as a court of equity, to respond to inherently fact-sensitive situations." *In re Indian River Estates, Inc.*, 293 B.R. 429, 433 (Bankr. N.D. Ohio 2003). "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." *In re Avila*, 311 B.R. 81, 83 (Bankr. N.D. Cal. 2004) (citing *In re MacDonald*, 755 F.2d 715, 717 (9th Cir.1985)).

Courts have identified several factors relevant to the determination of whether a stay should be lifted to allow the continuance of pending litigation in a non-bankruptcy forum. The Second Circuit Court of Appeals outlined twelve factors:

(1) whether relief would result in a partial or complete resolution of the issues;

(2) lack of any connection with or interference with the bankruptcy case;

(3) whether the other proceeding involves the debtor as a fiduciary;

(4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;

(5) whether the debtor's insurer has assumed full responsibility for defending it;

(6) whether the action primarily involves third parties;

(7) whether litigation in another forum would prejudice the interests of other creditors;

(8) whether the judgment claim arising from the other action is subject to equitable subordination;

(9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;

(10) the interests of judicial economy and the expeditious and economical resolution of litigation;

(11) whether the parties are ready for trial in the other proceeding; and

(12) impact of the stay on the parties and the balance of harms.

In re Sonnax Indus. Inc., 907 F.2d 1280, 1286 (2d Cir. 1990). "Not all of these factors will be relevant in every case." *In re Mazzeo*, 167 F.3d 139, 143 (2d Cir. 1999). Moreover, a court need not give equal weight to each factor. *In re Burger Boys, Inc.*, 183 B.R. 682, 688 (S.D.N.Y. 1994); *see also In re Mid-Atlantic Handling Sys., LLC*, 304 B.R. 111, 130 (Bankr. D.N.J. 2003) ("A court need not rely on any plurality of factors in deciding whether to lift the automatic stay"). As set forth below, the relevant *Sonnax* factors weigh heavily in favor of lifting the automatic stay and allowing the underlying appeal to proceed before the Eighth Circuit Court of Appeals.

II. JUDICIAL ECONOMY DEMANDS THAT THE COURT GRANT CONSOR RELIEF FROM THE STAY IN ORDER TO PURSUE ITS APPEAL.

This Court should grant CONSOR's motion for relief from the stay to pursue its appeal in the Eighth Circuit because it is the most efficient and economical manner in which to resolve an issue of statutory interpretation that will, to a large extent, determine how CONSOR may proceed in the bankruptcy. It is more efficient and economical for the Eight Circuit to decide the issue currently before it, rather than this Court, because either party may have a right of appeal from this Court's decision that, ultimately, would be back before the Eighth Circuit. It is also proper to let the Eighth Circuit decide the issue now before it, because the Bankruptcy Court should avoid having to serve as an appellate court with respect to the District Court's ruling. *See, e.g., In re Metz*, 165 B.R. 769, 771 (Bankr. E.D.N.Y. 1994).

In *Mertz*, the moving party, a bank, sought relief from stay in order to appeal the state trial court's denial of its deficiency claim against the debtor. The debtor argued that relief from the stay should be denied because the bankruptcy court could easily resolve the issue on an objection to proof of claim. *Id*. The bankruptcy court disagreed, noting the potential for duplication of effort, and the possibility of inconsistent rulings if the movant subsequently appealed the bankruptcy court's decision. *Id*. The bankruptcy court accordingly ruled that, "[i]t would be very prudent to modify the automatic stay to promote judicial economy and prevent possibly inconsistent rulings." *Id*. (citing *In re Sonnax*, 907 F.2d at 1286); *see also In re Davis*, 91 B.R. 470, 471 (Bankr. N.D. Ill. 1988) ("Cause for lifting the stay exists, here, principally because of the risks, if the stay is not lifted, of inconsistent results in two forums, of a conflict in the interpretation of state law between this court and the state court, and of duplication of lawyer and judicial effort.").

Many courts have similarly exercised their discretion in favor of lifting the automatic stay based, at least in part, upon considerations of judicial economy. *See C & A, S.E. v. Puerto Rico Solid Waste Mgmt. Auth.*, 369 B.R. 87 (D.C.P.R. 2007); *In re G.S. Distrib., Inc.*, 331 B.R. 552 (Bankr. S.D.N.Y. 2005); *In re MCSi, Inc.*, 371 B.R. 270 (S.D. Ohio 2004); *In re Mid-Atlantic Handling Sys. LLC*, 304 B.R. 111 (Bankr. D.N.J. 2003); *In re Med. Care Mgmt. Co.*, 361 B.R. 863 (Bankr. M.D. Tenn. 2003); *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154 (Bankr. D. Conn. 2002).

In *In re Mid-Atlantic*, for example, the movant requested relief from an automatic stay issued in favor of the debtor. The underlying civil matter had been "plagued by discovery disputes and procedural 'jockeying' between the parties" and the "discovery exchanged between the parties [was] voluminous." *In re Mid-Atlantic*, 304 B.R. at 118. Accordingly, the court held

that "based upon the circumstances of this case, the notion of judicial economy compels this Court to conclude that the stay should be lifted so as to permit the litigation to proceed in state court." *Id*. at 131. As a result of the "substantial time, effort and resources already expended by the parties," the bankruptcy court concluded its interference in the matter would be detrimental to the efforts already undertaken, and lifted the automatic stay. *Id*.

CONSOR's underlying action against the Debtors has been pending for nearly two years. CONSOR has expended hundreds of thousands of dollars in attorneys' fees pursuing the underlying action, discovery was completed months ago and the parties were preparing to proceed to trial, with a trial-ready date of September 1, 2008. As explained above, the District Court ruled, wholly apart from the merits of the case, that Minn. Stat. Ch. 82 barred CONSOR from pursuing its action in Minnesota courts. It is from that purely legal issue of statutory interpretation that CONSOR appealed to the Eighth Circuit. The Court should allow CONSOR to pursue its appeal because the *Sonnax* factors all favor granting such relief.

First, the appeal would resolve a critical aspect of the underlying action, namely whether CONSOR can pursue its claim in a Minnesota court. If the Eighth Circuit answers in the affirmative, then CONSOR may proceed in the Bankruptcy Court with the benefit of all of the District Court's rulings over the past two years which either will be the law of the case, or will collaterally estop the Debtors. For example, the District Court has already determined that "[t]here is enough evidence in the record from which a jury could conclude that Redtag and the Petters entities were in essence and in practice the same company." Or, in other words, if the appeal comes down in CONSOR's favor, this Court need not determine in the first instance whether the Debtors can be held liable to CONSOR in contract or in tort because Tom Petters

manipulated his various alter ego entities avoid a contractual liability and to enrich himself. That decision has already been made.

Second, the appeal will in no way interfere with the bankruptcy case. If anything, it will assist the Court and the bankruptcy trustee in determining the extent and priority of CONSOR's claims against the Debtors.

Third, the Eighth Circuit, as the appellate tribunal, is the proper court to decide the validity of the District Court's ruling. The issue on appeal is solely one of state law, and involves the interpretation of a state statute that, apart from determining CONSOR's right to proceed in a Minnesota court, has nothing to do with bankruptcy law or procedure. Moreover, because the issue, whether Minnesota's Real Estate Broker licensing statute can be given extra-territorial application, or can be applied to transactions having nothing to do with Minnesota real property, has such wide sweeping ramifications for those working in the intellectual property licensing industry (as fully explained in the Amicus Brief accepted for filing by the Eighth Circuit), it should be decided by the appellate court so as to provide certainty to all of those indirectly affected.

Fourth, the "interests of judicial economy and the expeditious and economical resolution of litigation" favor granting relief from the stay. *In re Sonnax*, 907 F.2d at 1286. As stated above, the underlying action has been pending for nearly two years and CONSOR and Amicus Curiae have already briefed the appeal. It is more efficient and economical for the Debtors to respond to the appeal that has already been teed up than to require CONSOR and the Debtors to start over in the Bankruptcy Court.

Fifth, allowing the statutory interpretation issue to be decided in the Eighth Circuit would not in any way prejudice the interests of other creditors. Whether CONSOR is allowed to benefit

from its two plus years of litigation before the District Court, or to start all over in the Bankruptcy Court has no effect on how any other creditor may proceed.

Finally, the impact of the stay harms CONSOR far more than the Debtors. As the District Court has already found, CONSOR has produced facts from which a jury could find in its favor on the merits. The only question is whether CONSOR will receive the full benefit of that ruling and others in the Bankruptcy Court, or whether CONSOR will be forced to start over in the Bankruptcy Court and prove its claims all over again. CONSOR cannot proceed with any certainty or efficiency in the Bankruptcy Court until that question has been decided. The Debtors, on the other hand, will not in any way be harmed if the stay is lifted. Just the opposite, it is in their interest, and in the interest of the orderly administration of justice, to learn at the earliest opportunity whether the District Court's rulings in CONSOR's favor will be the law of the case or will collaterally estop them in any adversary or other proceeding in the Bankruptcy Court. The Eighth Circuit is in a position to make that decision with relative speed and finality.

CONCLUSION

For all of the foregoing reasons, the Court should grant CONSOR's Motion for Relief from the Stay and permit CONSOR and the Debtors to proceed with the appeal that is currently pending before the United States Court of Appeals for the Eighth Circuit in the matter of *Domain Assets, LLC, d/b/a CONSOR Intellectual Asset Management, Appellant, v. Petters Group Worldwide LLC, (individually and as successor in interest to RedtagBiz, Inc., d/b/a Redtag, Inc.) and Petters Company, Inc., Appellees*, File Nos. 08-2649 and 08-2724.

HENSON & EFRON, P.A.

Dated: November 12, 2008.

By s/ Wesley T. Graham
David Bradley Olsen, #197944
Stuart T. Williams, #11750X
Wesley T. Graham, #034574X
220 South Sixth Street, Suite 1800
Minneapolis, Minnesota 55402
Telephone: 612-339-2500
Attorneys for Domain Assets, LLC, d/b/a
CONSOR Intellectual Asset Management

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