IN THE SUPREME COURT OF MISSISSIPPI

Trinity Mission Health & Rehabilitation of Clinton;
LPNH Holdings Limited, LLC; **APPELLANTS**

VS. **CASE NO.: 2006-TS-01053**

The Estate of Mary Scott, by and through Elzenia Johnson, Individually and as the Personal Representative of the Estate of Mary Scott, and on behalf of and for the use and benefit of the wrongful death beneficiaries of Mary Scott, **APPELLEE**

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

LIST OF AUTHORITIES

CASE LAW **PAGE**

STATUTORY AUTHORITY

ARGUMENT

I. Elzenia Johnson had authority to bind her Mother in health care matters, including execution of the September 13, 2002 Admission Agreement.

On September 13, 2002, Ms. Johnson acted as her Mother's health care surrogate when she executed an updated Admission Agreement.[1] In *Covenant Health Rehab of Picayune v. Brown*, this Court affirmatively answered the question at issue in this appeal – whether a responsible party, holding no power of attorney or conservatorship, can bind a resident to arbitration. __ So. 2d __, 2007 WL 529675 (Miss. Feb. 22, 2007). There as in here, the Court was faced with deciding whether the lower court erroneously denied the defendants' motion to compel. *Id. See Also*, R. 595-96.

The *Brown* Court began its analysis by looking to Mississippi Code Annotated, § 41-41-211 (rev. 2005) to determine whether Sharon Goss had authority to bind her Mother, Bernice Brown to contract.[2] *Id.* at *2. It was argued ". . . the admissions agreement is procedurally unconscionable because Brown was incompetent and incapable of entering into a contract, and Goss had no authority to bind Brown." *Id.*

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[1]Contracts concerning the provision of health care are an integral part of the health care industry and the practice of medicine. In order to make decisions about the medical care a patient is to receive, a surrogate must be able to enter into binding agreements to bring those decisions to fruition. In *Consolidated Resources Health Care Fund I, Ltd. v. Fenelus*, a Florida appellate court held the resident's son, as the resident's "health care surrogate," could execute the admission agreement, enforcing the arbitration provision contained therein. 853 So. 2d 500 (Fla. 4th DCA 2003).

[2]In Section B. of Appellee's brief, Ms. Johnson argued against reliance upon the Health Care Surrogate Statute, based upon a recent Mississippi Court of Appeals decision, *Covenant Health & Rehabilitation of Picayune, LP v. Lambert*, presently on Motion for Rehearing, as well as several Mississippi Federal District Court cases interpreting Miss. Code Ann. § 41-41-211. This Court's recent holding in *Brown*, however, is decisive of the issue.

The Health Care Surrogate Statute provides, in pertinent part:

> (1) A surrogate may make a health-care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.
>
> (2) An adult or emancipated minor may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient's family who is reasonably available, in descending order of priority, may act as surrogate:
>
> > (a) The spouse, unless legally separated; (b) An adult child; (c) A Parent; or (d) An adult brother or sister.
>
> ****
>
> (7) A health-care decision made by a surrogate for a patient is effective without judicial approval.

Miss. Code Ann. § 41-41-211.

The Court found no adjudication of incapacity had been made, but plaintiffs had admitted Brown "did not have the mental capacity to manage her affairs." *Brown*, __ So. 2d __, 2007 WL 529675, at * 2. As such, this Court determined, "***[h]er adult daughter, Goss, was an appropriate member of the classes from which a surrogate could be drawn and thus, Goss could contractually bind Brown in matters of health care.***" *Id.* (Emphasis supplied).

Likewise, in the instant matter, Elzenia Johnson (hereinafter "Ms. Johnson") admitted her Mother, Mary Scott (hereinafter "Ms. Scott") into Clinton Health & Rehabilitation Center on January 4, 2001. R. 558-59. Throughout her three-year residency, Ms. Johnson, acting as her Mother's Responsible Party, executed numerous documents on Ms. Scott's behalf, including the September 13, 2002 Admission Agreement at issue before the Court. R. 550-568. By executing this Admission

Agreement, Ms. Johnson gave effect to a health care decision.[3] Implicit in the Legislature's grant of authority to make decisions about a patient's care is a corresponding ability to enter into an agreement which allows the surrogate to enter into a contract concerning such care. *See Allred v. Web*, 641 So. 2d 1218, 1222 (Miss. 1994) (A law which imposes a duty implies necessary power to achieve those duties.). Based upon the clear language of the Statute, as well as the Court's recent ruling in *Brown*, Ms. Johnson acted as her Mother's health care surrogate throughout her residency. A necessary part of the authority to make health care decisions is the power to perform those duties. Accordingly, on September 13, 2002, like many other times, Elzenia Johnson stepped into the role of Ms. Scott's surrogate and contractually bound her, in matters of health care, including the agreement to arbitrate "any an all claims, dispute and/or controversies between them and the Facility or its Owners, officers, directors or employees. . . ." R. 293.

In addition to Section IV of Appellants' principle brief, as well as the health care surrogate argument contained herein, *Broughsville v. OHECC, LLC,* further supports the underlying authority argument. 2005 WL 3483777 (Ohio App. 9 Dist. Dec. 21, 2005)(slip copy). On appeal, the court reviewed whether "Appellant's daughter, Odarisa McCall wheeler, ("Wheeler"), had the authority to bind Appellant to Arbitration, effectively waiving her right to a jury trial." *Id.* at *1. In support of her argument against waiver, Wheeler submitted an affidavit that she was never given ". . .

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[3]Federal statutes convey similar authority to Elzenia Johnson. Pursuant to 42 C.F.R. 483.10(a)(4), "in the case of a resident who has not been adjudged incompetent by the State court, any legal surrogate designated ***in accordance with State law*** may exercise the residents' rights. . . ." (Emphasis supplied). Accordingly, since Ms. Johnson would qualify as Ms. Scott's healthcare surrogate, as set forth by Mississippi law, she had authority to select a long-term care facility for her Mother. This selection necessitated execution of an admission agreement, and an updated agreement, which in this instance, contained a valid and now fully enforceable arbitration provision. Ms. Johnson's authority was in line with both state and federal statutes and not violative of Ms. Scott's rights as a resident.

authority to agree to submit any claim for injury to arbitration and to the right to a jury trial." *Id.* at *2. The court found "[e]ven setting aside the arguably self-serving nature of this statement, the question is not whether Wheeler had *actual* authority to bind Appellant to arbitration, but whether she has apparent authority to do so." *Id.* (Emphasis in original).

The Broughsville court reviewed how authority may arise:

> The authority for one party to bind another can arise in several ways. The Ohio Supreme Court has held that: Even where one assuming to act as agent for a party in the making of a contract has no actual authority to so act, such party will be bound by the contact, if such party has by his words or conduct, reasonably interpreted, caused the other party to the contract to believe that one assuming to act as agent had the necessary authority to make the contract. *Id.*

The Brounghsville court next found apparent authority present to bind Appellant to arbitration:

> The present case is a classic example of apparent authority. Wheeler, by signing the Agreement on behalf of her Mother, acted in such a way that a reasonable person could believe she has the necessary authority to make the contract. Regardless of actual authority, circumstances were such a the time of signing that Wheeler's conduct could be interpreted as authority to enter into an agreement on Appellant's behalf.

Id. Likewise, in the case-at-law, although Ms. Johnson submitted an affidavit to the contrary, her actions throughout her Mother's residency exhibited authority. But for the Admission Agreement, Ms. Johnson would have no cause of action against Clinton Health & Rehabilitation Center. Accordingly, the lower court's ruling is erroneous.

II. Arbitration is mandated, pursuant to the Court's holding in *Vicksburg Partners, L.P. v. Stephens* and *Covenant Health Rehab of Picayune v. Brown.*

Following a finding Ms. Johnson did in fact possess authority to execute the Admission

Agreement, the remaining inquiry requires an analysis of conscionability.[4] "[T]he doctrine of 'unconscionability has been defined as an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *Stephens*, 911 So. 2d at 516-17.

> *Procedural* unconscionability is applicable to the overall formation of the contract in which the subject clause (such as the arbitration clause) is contained, whereas *substantive* unconscionability is applicable only to the subject clause (such as the arbitration clause) itself. Thus, while procedural unconscionability must be discussed as to the formation of the overall contract, it must also be discussed as to the arbitration contract itself, since the arbitration clause is contained within the overall contract. On the other hand, when discussing and applying substantive unconsionability, we are looking only to a particular clause within the contract, such as an arbitration clause. We are not looking at the overall contract.

Id. (Emphasis in original).

"In *Vicksburg Partners*, this [C]ourt considered an assertion of procedural unconscionability where the daughter, serving as the responsible party, admitted her father to a nursing home." *Brown*, __ So. 2d __, 2007 WL 529675, at *3 (citing *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 510, 516-20 (Miss. 2005)). Two considerations must be taken into account when determining whether a contract is procedurally unconsionable: "(1) lack of voluntariness and (2) lack of

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[4]In Section II(B) of Appellee's brief, Ms. Johnson argues several provisions of the Admission Agreement are illegal; thus, voiding the contract. Sections II(B)(1), (2), (8) and (9) go to the merits of the case, and not probative in determining whether the arbitration provision is conscionable. As such, and in accord with *Holman Dealerships, Inc. v. Davis*, the Court should overrule the lower court's denial of arbitration, sending the matter to arbitration for a determination of the underlying dispute. 934 So. 2d. 356, 358-59 (Miss. Ct. App. 2006); *see also Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) ("court's inquiry on a motion to compel arbitration is limited").

The remaining numbered subsections of II(B) have previously been stricken in *Stephens* and *Brown*, thus rendering argument on same moot.

Further, Appellee's argument regarding unenforceability due to lack of an arbitrable fourm is also moot because of the savings clause contained within the contract.

knowledge." *Id.* (citing *Stephens*, 911 So. 2d at 517-18 (citing *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998)).

In *Brown*, the Court found contracts of adhesion not automatically void, but "the party seeking to avoid the contract generally must show that it is unconscionable." *Brown*, __ So. 2d __, 2007 WL 529675, at * 3. "There is nothing per se unconscionable about arbitration agreements." *Id.* (citing *Stephens*, 911 So. 2d at 518). As with the arguments before the Court, the "description of the facts, including the location and format of the arbitration in the agreement in *Vicksburg Partners* is identical to the provision in this case, thus controlling in the case at bar. Therefore, we find that in accordance with *Stephens*, there is no procedural unconscionability in this admissions agreement." *Id.*

Substantive unconscionability, on the other hand, ". . . is present when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance of a breach." *Id.* at 521. In *Stephens*, the Mississippi Supreme Court found "arbitration agreements merely submit the question of liability to another forum – generally speaking, they do not waive liability." *Id.* at 522.

The *Stephens* Court reviewed an admission agreement *identical* to the one at issue and found the limited liability and punitive damages provisions created a "windfall for one party by curtailing another."

> Specifically, such language can be found starting with the last sentence of that clause which states that "[c]onsistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Paragraph E.7." Paragraph E.7 of the contract provides:

> Should any claim, dispute or controversy arise between the Parties or be asserted against any of the Facility's owner's (sic), officers, directors or employees, the settlement thereof shall be for actual damages not to exceed the lesser of a) $50,000 or b) the number of days the Resident was in the Facility multiplied times the daily rate applicable to said Resident. This limitation of liability shall be binding on the Resident, Responsible Party and the Resident's heirs, estate and assigns.

> However, we must also read Section F. and paragraph E.7 in conjunction with paragraph E.8, which states that "[t]he parties hereto agree to waive punitive damages against each other and agree not to seek punitive damages under any circumstances." In reading this language, we find the Vicksburg Partners has effectively limited Stephens to recovery of actual damages not to exceed $50,000 while Vicksburg Partners is not so limited, and that they have precluded damages which could only be recovered against Vicksburg Partners.

Id.

In *Brown*, following the *Stephens* dictate, the Court found it proper for "sections C8, waiving liability for criminal acts of individuals and C5, requiring forfeiture by the resident of all claims except those for willful acts" also unconscionable. *Brown*, 2007 WL 529675, at * 4 (citing *Stephens*, 517 So. 2d at 523). The *Brown* Court also held the "grievance resolution process" as set forth in section E5 and E6 to be unconscionable and unenforceable. *Id.* The Court struck language in Section E12, which required "the resident to pay all costs for enforcement of the agreement if the resident avoids or challenges either the grievance resolution process or an award therefrom." *Id.* The Court next found section E16 to be unenforceable in that it prohibited a resident from seeking legal redress more than one year following the happening of the alleged event. *See Id.* (The "Court will not enforce a contractually created time limitation on suits.").

The *Brown* Court next reviewed section E13 of the admission agreement - "All Parties hereto are hereby waiving all rights to a jury trial."

> Section E13 waives the right of all parties to a jury trial. The provision waives the right of a jury trial for both the nursing home and the resident. Thus it is not one-sided. *The provision has the same effect as signing an arbitration agreement.* It is well established that this Court respects the ability of parties to agree to the means of a dispute resolution prior to a dispute and enforces the plain meaning of a contract as it represents the intent of the parties.

Id. at *5 (citing *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 922 (Miss. 2002); *I.P. Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96, 108 (Miss. 1998)). (Emphasis supplied).

Following a review of all clauses in the admission agreement relative to arbitration – *i.e.*, limiting statute of limitations, barring punitive damages, limiting recovery amount, etc., the *Brown* Court reviewed the arbitration provision itself to determine whether it was substantively conscionable:

> With regard to Section F, the arbitration provision, the very heart of the dispute, *Vicksburg Partners* is the controlling case. As in this case, the dispositive issue was whether the arbitration provision rendered the subject admissions agreement unenforceable. The admissions agreement contained numerous other provisions, some of which were found unconscionable. Two such provisions were used to justify striking similar provisions in this case. Moreover, the arbitration provision was identical to the one in this case. The provision even included the last sentence of the provision in this case, referencing section E7, which was found unconscionable and stricken as in this case. This Court concluded that the arbitration provision was not unconscionable.

Id. (citing *Stephens*, 911 So. 2d at 510-11, 517, 523-24 and 526).

In the instant matter, as well as in *Stephens* and *Brown*, the arbitration provision, in bold print, is identical:

> The Resident and Responsible Party agree that any and all claims, disputes and/or controversies between them, and the Facility or its Owners, officers, directors, or employees shall be resolved by binding arbitration administered by the American Arbitration Association and its rules and procedures. The Arbitration shall be heard and decided by one qualified Arbitrator selected by mutual agreement of the Parties. Failing such agreement, each Party shall select one qualified Arbitrator and the two selected shall select a third. The Parties agree that the decision of the Arbitrator(s) shall be final. The Parties further agree that the Arbitrators shall have all authority necessary to render a final, binding decision of all claims and/or controversies and shall have all requisite powers and obligations. If the agreed method of selecting an Arbitrator(s) fails for any reason or the Arbitrator(s) appointed fails for any reason or the Arbitrator(s) fails or is unable to act or the successor(s) has not been duly appointed, the appropriate circuit court, on application of a party, shall appoint one Arbitrator to arbitrate the issue. An Arbitrator so appointed shall have all the powers of the one named in this Agreement. All Parties hereto agree to arbitration for their individual respective anticipated benefit of reduced costs or pursuing a timely resolution of a claim, dispute or controversy, should one arise. The Parties agree to share equally the costs of such arbitration regardless of the outcome. Consistent with the terms and conditions of this Agreement, the Parties agree that the Arbitrator(s) may not award punitive damages and actual damages awarded, if any, shall be awarded pursuant to Section E.7.

See Stephens, *Brown*, and R. 299.

In *Brown*, the Court reiterating Mississippi jurisprudence favoring arbitration, stated, "[s]eeing that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,' one factor negating an assertion of unconscionability was that the provision was typical of those endorsed by the Federal Arbitration Act." *Brown*, 2007 WL 529675, at * 5 (quoting *Stephens*, 911 So. 2d at 513, 521). Further, a conscionable arbitration provision has been found to bear some relationship to the risks and needs of the business." *Id.* at 517.

In this matter, as in *Stephens* and *Brown*, the arbitration provision contained within the September 13, 2002 Admission Agreement bears a reasonable relationship to the risks and needs of Clinton Health & Rehabilitation Center. The business of custodial care, includes daily medical treatment and care, all pursuant to doctor's prescriptions and orders, professional care plans drawn up and specifically for the resident by a team of trained care givers and a highly regulated and inspected environment. There is an undisputed relationship to the risks and needs of the nursing home industry and the need to keep their costs down in order to continue operating. To resolve disputes through arbitration rather than litigation is one step that is being taken. Avoiding the expense of litigation through the use of arbitration still preserves the rights of an individual to recover damages where appropriate. The arbitration provision is not oppressive or unconscionable, but rather, provided Elzenia Johnson, a Mary Scott's Responsible Party, and Mary Scott a "fair process through which to pursue their claims." *Brown*, 2007 WL 529675, at *5. In finding the arbitration provision to be substantively conscionable, the *Brown* Court found, as this Court should, that "*Vicksburg Partners* deemed the exact language that composed the entirety of Section F to be substantively conscionable." *Id.*

Thus, the Court should strike, consistent with its findings in *Stephens* and *Brown*, the unenforceable provisions of the September 13, 2002 Admission Agreement, and enforce the remainder of the contract.[5] *See Russell*, 826 So. 2d at 724-25 ("[I]f a court strikes a portion of an agreement as being void, the remainder of the contract is binding.") "Contracts are solemn

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[5]Counsel by agreement, as well as lower courts are now voluntarily striking from admission agreements those terms declared unenforceable by the Court in *Stephens*. This Admission Agreement was entered into before the *Stephens* decision, however, Appellants are not seeking to enforce the stricken provisions.

obligations, and the court must give them effect as written." *Brown*, 2007 WL 529675, at *6 (citing *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 487 (Miss. 2005).

III. Both Mary Scott's Estate, as well as Elzenia Johnson, are bound to arbitrate.

Although argued otherwise in Section I (C) of Appellee's brief, by executing the September 13, 2002 Admission Agreement, Ms. Johnson bound herself, as well as Mary Scott's Estate, to binding arbitration.[6] Directly above Ms. Johnson's signature is the following acknowledgment:

> **THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ AND UNDERSTOOD THIS AGREEMENT, INCLUDING THE ARBITRATION PROVISION AND HAS RECEIVED A COPY OF THIS AGREEMENT, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO AND ACCEPTS ALL OF ITS TERMS.**

R. 299. (Emphasis in original). "The United States Supreme Court has held '[i]t is a presumption of law that the parties to a contract bind not only themselves but their personal representatives." *Brown*, 2007 WL 529675, at *4. "This Court has held that arbitration agreements, specifically are not invalidated by the death of a signatory and may be binding on successors and heirs if provided in the agreement." *Id.* (citing *Cleveland v. Mann*, 942 So. 2d 108, 118 (Miss. 2006)). Section D4 of the Admission Agreement provides, in part, "Notwithstanding any other provision set forth herein, . . . this Agreement shall survive the termination for any reason of this Agreement and shall survive and shall not be revoked by the death of any Party hereto including the Resident. Said provisions shall be binding on the estate of the Resident in the event the Resident is

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[6]In Section II(A), Appellee argues the lower court's opinion should be upheld for reasons of judicial economy. This, however, would serve to negate a binding contract Ms. Scott benefitted from while at Clinton Health & Rehabilitation Center. While this argument is not probative of the Court's inquiry as to arbitration, in *Long v. McKinney*, it was held there can be but *one wrongful death action*. 897 So. 2d 160 (Miss. 2004). As such, Appellee is free to amend, eliminating the wrongful death claims, against the Mariner Defendants (in Hinds County Circuit Court) *or* against Appellants (in arbitration).

deceased." R. 297. Accordingly, the lower court erred in denying arbitration and Appellee's argument as to third-party beneficiary status lacks merit.

IV. Mississippi's public policy is best served by overruling the denial of arbitration.

Should the lower court's ruling stand, precedence would be established that without creation of a power of attorney (or other judicially created authority, such as a conservatorship) a family member would be unable to admit a loved one into a nursing home.[7] The Minimum Standards of the Mississippi Department of Health for the operation of a nursing home requires "[p]rior to or at the time of admission, the administrator and the resident or the resident's responsible party shall execute in writing a financial agreement." Nursing Homes, Minimum Standards § 404.3. It would be against public policy as unduly burdensome on future patients of nursing homes – not to mention a strain on the court system of setting up thousands of conservatorships or paying for the drafting of a power of attorney – to require residents to jump through legal hoops prior to admission into a nursing home. Such a requirement would place an undue financial burden on an elderly person enter into a nursing home, as well as taking up scarce resources of the judicial system.

CONCLUSION

The claims asserted by Elzenia Johnson, including the wrongful death claims, are derivative, relate directly to the services rendered to Mary Scott and all fall within the purview of the Admission Agreement's valid and fully enforceable arbitration agreement. Accordingly, Elzenia

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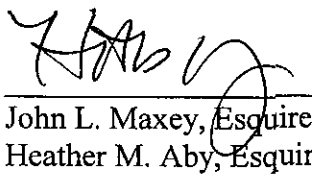
[7]In *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661 (Ala. 2004); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004); and *McGuffey Health and Rehabilitation Center v. Gibson*, 864 So. 2d 1061 (Ala. 2003), the Alabama Supreme Court affirmatively ruled, after reviewing nursing home agreements which were not signed by the resident, but were, instead, executed by the resident's responsible party. In each case, the Alabama Court found the contract to be valid and enforced the arbitration provision contained therein.

Johnson is bound the contractual decision she made on her Mother's behalf – a decision to arbitrate. In *MS Credit Center, Inc. v. Horton*, this Court held, "***[u]nder Mississippi law . . . parties to a contract have an inherent duty to read the terms of a contract prior to signing; that is, a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it.***" 926 So. 2d 167 (Miss. 2006) (citing *Titan Indem. Co. v. City of Brandon, Miss.*, 27 F.Supp.2d 693, 697 (Miss. 1997) (Emphasis supplied). Elzenia Johnson "may not [now] escape the agreement by simply stating [she] did not read the agreement or understand its terms." *Id.* (Bracketed information supplied).

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth hereinafter, a true and correct copy of ***Reply Brief of Appellants*** was caused to be served to the following by first class mail:

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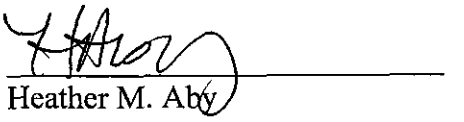
THIS, the 12th day of March, 2007.



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