

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-00121

REBUILD AMERICA, INC.

APPELLANT

VS.

**ROBERT K. MILNER AND WIFE,
PATRICIA K. MILNER AND WACHOVIA
BANK, N.A., SUCCESSOR IN INTEREST TO
FIRST UNION NATIONAL BANK, AS
INDENTURE TRUSTEE**

APPELLEES

**BRIEF OF APPELLEES, ROBERT K. MILNER AND WIFE,
PATRICIA K. MILNER AND WACHOVIA BANK, N.A.,
SUCCESSOR IN INTEREST TO FIRST UNION NATIONAL BANK,
AS INDENTURE TRUSTEE**

**APPEAL FROM THE CHANCERY COURT OF
PEARL RIVER COUNTY, MISSISSIPPI**

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

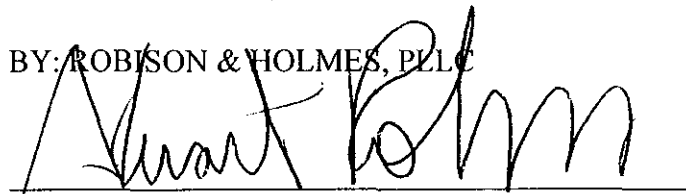
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

1. **Kimberly P. Turner**, Henry, Barbour, DeCell & Bridgforth, Ltd.
Appellant's Attorney
Jackson, Mississippi
2. **W. Stewart Robison**, Robison & Holmes, PLLC
Appellees' Attorney
McComb, Mississippi
3. **Honorable James H. C. Thomas, Jr.**, Chancellor
Hattiesburg, Mississippi
4. **Rebuild America, Inc.**, Appellant
5. **Robert K. Milner**, Appellee
6. **Patricia K. Milner**, Appellee
7. **Wachovia Bank, N.A., Successor in interest to
First Union National Bank, As Indenture Trustee**, Appellee

Respectfully submitted,

ROBERT K. MILNER AND WIFE,
PATRICIA K. MILNER AND WACHOVIA BANK,
N.A., SUCCESSOR IN INTEREST TO FIRST UNION
NATIONAL BANK, AS INDENTURE TRUSTEE

BY: ROBISON & HOLMES, PLLC


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STATEMENT OF THE ISSUES

1. THE CHANCERY COURT DID NOT ERR IN VOIDING THE 2003 TAX SALE FOR 2002 AD VALOREM TAXES DUE PEARL RIVER COUNTY PREDICATED UPON FAILURE BY THE CHANCERY CLERK AND SHERIFF TO FOLLOW THE NOTICING REQUIREMENTS SET FORTH BY MCA §27-43-1, ET SEQ, BOTH AS TO THE OWNERS, ROBERT K. MILNER AND WIFE, PATRICIA K. MILNER AND THE LIEN HOLDER, WACHOVIA BANK, N.A., FORMERLY FIRST UNION NATIONAL BANK, INDENTURE TRUSTEE.
2. THE CHANCERY COURT DID NOT ERR IN OVERRULING THE MOTION TO DISMISS OF DEFENDANT, REBUILD AMERICA, INC., THEREBY ALLOWING ROBERT K. MILNER AND WIFE, PATRICIA K. MILNER TO PURSUE THEIR CLAIMS THAT THE 2003 TAX SALE FOR 2002 PEARL RIVER COUNTY AD VALOREM TAXES AND SUBSEQUENT DEEDS RESULTING THEREFROM WERE VOID PREDICATED UPON THE CHANCERY CLERK'S FAILURE TO COMPLY WITH THE STATUTORY REQUIREMENTS PERTAINING TO NOTICE OF TAX SALES AND MATURATION THEREOF.
3. THE LOWER COURT DID NOT ERR IN SETTING ASIDE THE QUITCLAIM DEED FROM ROBERT K. MILNER AND PATRICIA K. MILNER TO REBUILD AMERICA, INC., ON THE BASIS THAT SUCH DEED WAS GIVEN WITHOUT ANY CONSIDERATION, AND "SUBJECT TO THAT CERTAIN SALE FOR 2002 AD VALOREM TAXES, WHICH SALE, HAVING BEEN FOUND BY THE TRIAL COURT TO BE VOID, RESULTS IN A FAILURE TO CONVEY TITLE TO THE PROPERTY DESCRIBED THEREIN TO REBUILD AMERICA, INC.

STATEMENT OF THE CASE

On November 2, 2006, Robert K. Milner and wife, Patricia K. Milner and Wachovia Bank, N.A., successor in interest to First Union National Bank, Indenture Trustee filed their Complaint against Rebuild America, Inc., seeking to set aside the following conveyances:

1. Conveyance by David Earl Johnson, Clerk of the Chancery Court of Pearl River County, Mississippi to Magnolia Investors, LLC, such conveyance being commonly known as a Tax Deed, arising out of the 2003 tax sale for ad valorem taxes assessed for the year 2002 on the following described property described in said conveyance:

H. E. ALLEN'S ADD. LOT PT. OF 48 & 49 DB 757 PG 588, SEC 31-2-15
PPIN 6847 PARCEL 2159310010301100

(Ex. 8)

2. Quitclaim Deed and Assignment from Wachovia Bank, N.A. Magnolia Investors, LLC WBNA to Rebuild America, Inc. describing the following property situated in Pearl River County, Mississippi, to-wit:

H. E. ALLEN'S ADD. LOT
PT OF 48 & 49
DBP 757/588
PPIN 6847
PARCEL #2159310010301100
SEC. 31 TWP 2, RANGE 15

(Ex. 9)

3. Quitclaim Deed from Robert Milner and Patricia Milner to Rebuild America, Inc. describing the following property:

H. E. ALLEN'S ADD. LOT
PT OF 48 & 49
DBP 757/588
PPIN 6847
PARCEL #2159310010301100
SEC. 31 TWP 2, RANGE 15

(Ex. 10)

Rebuild America, Inc. claims its title to the subject property was obtained by virtue of those Deeds abovementioned, and that such title is free and clear of the lien evidenced by the Deed of Trust held by Wachovia Bank, N.A., successor in interest to First Union National Bank, Indenture Trustee, by virtue of its status as assignee of the Deed of Trust executed by Robert K. Milner and Patricia K. Milner, husband and wife to Jim Walter Homes, Inc., December 19, 2000, recorded in Book 904 at Page 67 in the land records of Pearl River County, Mississippi. (Ex. 2, Tr 16-17)

First Union National Bank, predecessor to Wachovia Bank, N.A., Indenture Trustee, with corporate trust offices at 4211 W. Boy Scout Blvd, Tampa, Florida 33607 is the last assignee of record under the terms and conditions of that certain assignment of Deeds of Trust executed December 11, 2001, recorded in the office of the Pearl River County Chancery Clerk December 17, 2001, in Book 965 at Page 86, and re-recorded January 4, 2005, in Book 1193 at Page 266. (Ex. 3, Tr 16-17)

Rebuild America, Inc. filed a Motion to Dismiss, Answer with Affirmative Defenses to Plaintiffs' Complaint and Counterclaim April 10, 2007, (Appellees' R Ex 16), which primarily asserts the following two defenses to the Plaintiffs' Complaint:

1. The tax sale and subsequent procedures followed by the Chancery Clerk prior to maturation of the tax sale were conducted properly, and more specifically, both the land owners and the lienholder were provided the notice required by statute and thus the deeds above mentioned should not be set aside as void.

2. The Milner Defendants, having allegedly divested themselves of title by virtue of signing the Quitclaim Deed above referred to, lost any standing which they may otherwise have had to contest the 2003 tax sale and its subsequent maturation.

The trial court overruled the Defendant's Motion to Dismiss at a preliminary hearing June

7, 2007, however, no Order was entered confirming such action, and the Defendant's Motion was renewed on the trial date, November 29, 2007, both in chambers and on the trial record. After hearing arguments of counsel, the Court overruled the Defendant's Motion to Dismiss, and the case proceeded to trial. (Tr 6-9)

On December 14, 2007, Chancellor James H. C. Thomas, Jr. issued his Judgment setting aside the 2003 tax sale and subsequent Deeds hereinabove described and authorized Rebuild America, Inc. to file its claim for refund of the ad valorem taxes it paid.¹

Aggrieved by the decision of the trial court, Rebuild America, Inc. noticed its appeal January 11, 2008, filed its Appellant's Brief July 31, 2008, asserting that the lower court erred as a matter of law by failing to apply appropriate legal standards to the facts of this case, thereby reaching an erroneous conclusion in favor of Robert K. Milner and wife, Patricia K. Milner and Wachovia Bank, N.A., successor in interest to First Union National Bank, Indenture Trustee.

STATEMENT OF THE FACTS

By Warranty Deed executed December 15, 2000, recorded December 18, 2000, in Book 757 at Page 588 in the land records of Pearl River County, Mississippi, Robert K. Milner and wife, Patricia K. Milner succeeded to ownership of the following described real property situated in Pearl River County, Mississippi, to-wit:

Begin at the Northeast corner of Lot 48 of H. E. Allen's Addition to the City of Poplarville, as per plat thereof on file in the Office of the Chancery Clerk of Pearl River County, Mississippi; thence run South 17½ feet; thence run West 200 feet for the point of beginning of the land conveyed hereby; thence run West 200 feet; thence run South 100 feet; thence run East 200 feet; thence run North 100 feet to the place of beginning, being a part of the SW¼ of NE¼ of Section 31, Township 2 South,

1

Although not part of the trial record, all ad valorem taxes due upon the subject property, including those taxes which had been paid by Rebuild America, Inc., have been paid to the Chancery Clerk as ordered by the trial court.

Range 15 West, Pearl River County, Mississippi.
(Ex. 1, Tr 14)

On December 19, 2000, Robert K. Milner and wife, Patricia K. Milner, executed a Deed of Trust to Jim Walter Homes, Inc., securing the purchase price for construction of a residential dwelling for the Milners by Jim Walter on the real property above described. The Deed of Trust was recorded in Book 904 at Page 67 in the land records of Pearl River County, Mississippi on January 8, 2001. (Ex. 2, Tr 15)

The Deed of Trust from the Milners to Jim Walter was subsequently assigned to First Union National Bank, as Indenture Trustee, (predecessor in interest to Wachovia Bank, N.A.) with corporate trust offices at 4211 W. Boy Scout Boulevard, Tampa, Florida 33607. The Assignment was first recorded December 17, 2001, in Book 965 at Page 86, and subsequently re-recorded January 4, 2005, in Book 1193 at Page 266 in the land records maintained by the Chancery Clerk of Pearl River County, Mississippi. (Ex. 3) The Assignment last mentioned is the most recent Assignment of the subject Deed of Trust recorded in the land records maintained by the Chancery Clerk of Pearl River County, Mississippi. (Tr 16)

The Milners' property sold for ad valorem taxes due Pearl River County for calendar year 2002 in August, 2003 following notice published in the Poplarville Democrat to Milner, Robert K., et ux. (Ex. 6, Tr 20)

Subsequently, on June 16, 2005, a notice of maturation of the 2003 tax sale for 2002 ad valorem taxes due Pearl River County, Mississippi, was published in the Poplarville Democrat for Milner, Robert K., et ux. (Ex. 7, Tr 20-21) The tax sale records maintained by the Chancery Clerk of Pearl River County reflect that a notice of forfeiture was mailed, certified mail, return receipt requested to Robert K. Milner, et ux and signed for by Robert Milner June 16, 2005. (Ex. 4, Tr 17)

A notice of forfeiture in the same form (Ex. 4, Tr 18-19) was mailed by certified mail to First Union National Bank at 230 So. Tyron St., Charlotte, NC 28288-1179 and signed for on June 19, 2005.

Mississippi Code Annotated §27-43-3 prescribes notice requirements relative to maturation of tax sales to property owners. In pertinent part, the statute reads as follows:

The clerk shall issue the notice to the sheriff of the county of the reputed owner's residence, if he be a resident of the State of Mississippi, and the sheriff shall be required to serve personal notice as summons issued from the Court are served, and make his return to the Chancery Clerk issuing same. The clerk shall also mail a copy of same to the reputed owner at his usual street address, if same can be ascertained after diligent search and inquiry, or to his post office address if only that can be ascertained, and he shall note such action on the tax sale record. The clerk shall also be required to publish the name and address of the reputed owner of the property and the legal description of such property in a public newspaper of the county in which the land is located, or if no newspaper is published as such, then in a newspaper having a general circulation in such county. Such publication shall be made at least forty-five (45) days prior to the expiration of the redemption period...

The failure of the land owner to actually receive the notice herein required shall not render the title void, **provided the clerk and sheriff have complied with the duties herein prescribed for them.**

Should the clerk inadvertently fail to send notice as prescribed in this Section, then such sale shall be void and the clerk shall not be liable to the purchaser or owner upon refund of all purchase money paid.

MCA §27-43-3 (Emphasis added)

The record in this case reveals that a notice of forfeiture was mailed to "Milner, Robert K, et ux" at 1302 S. Gandy, Poplarville, MS 39470 0000. (Ex. 4)

The record further reflects that a notice of forfeiture in the same form was mailed to First Union National Bank at 230 So. Tyron Street, Charlotte, NC 28288-1179. (Ex. 4, Tr 26, 65)

No evidence exists that the Sheriff of Pearl River County, Mississippi served the notice of forfeiture on Robert K. Milner or Patricia K. Milner as prescribed by the statute aforesaid. (Ex. 11, Tr 20, 61)

There is no evidence in the tax sale records maintained by the Chancery Clerk of Pearl River

County that the affidavit prescribed by MCA §27-43-3 was prepared by the Chancery Clerk attesting to efforts made to locate an address for Robert K. or Patricia K. Milner for service of the notices required by statute upon them. (Ex. 11, Tr 62)

The trial record also reveals that the Quitclaim Deed from the Milners to Rebuild America, Inc. dated November 3, 2006, (Ex. 10) was signed by the Milners without any consideration whatsoever flowing to them. (Tr 41) Also, the expressed language of the Deed from the Milners to Rebuild America, Inc. conveys title by Quitclaim Deed “subject to that certain sale for 2002 ad valorem county taxes.”(Ex. 10)

SUMMARY OF THE ARGUMENT

In the recent case of *Betty Reed vs. Charles Ray Florimonte*, No. 2007-CA-01540-SCT, the Supreme Court reiterated its mandated standard of appellant review by saying that “[t]his Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” Citing *Rush v. Wallace Rentals, LLC*, 837 So.2d 191, 194 (Miss. 2003) and *Bell v. Parker*, 563 So.2d 594, 596-597 (Miss. 1990)

The Mississippi Court of Appeals has stated:

Statutes dealing with land forfeitures for delinquent taxes should be strictly construed in favor of the land owners. *Brown v. Riley*, 580 So.2d 1234, 1237 (Miss. 1991). Any deviation from the statutorily mandated procedure renders the sale void. *Hart v. Catoe*, 390 So.2d 1001, 1003 (Miss. 1980) *Roach v. Goebel*, 856 So.2d 711, 716 (Miss. Ct. App. 2003).

The Chancery Court correctly applied appropriate legal standards in setting aside the 2003 ad valorem tax sale of the property owned by Robert K. and Patricia K. Milner because of failure by the Pearl River Chancery Clerk and the Sheriff of Pearl River County, Mississippi to provide Mr. and Mrs. Milner and Wachovia Bank, N.A., Successor in interest to First Union National Bank, Indenture Trustee the notice of maturation of the tax sale and the right to redeem the subject property

sold for taxes. The Judgment of the Chancery Court of Pearl River County, Mississippi is not in error, because Mississippi statutes pertaining to tax sales and maturation thereof are to be strictly and liberally construed in favor of the landowner, as those statutes impose a standard of diligence on the Chancery Clerk and the Sheriff and not on the landowner. Even a technical error in providing notice is considered ample by the Courts to render a sale for ad valorem taxes void.

ARGUMENT

The trial court correctly held that the Pearl River County Chancery Clerk failed to follow the essential mandates of Mississippi Code Annotated §27-43-3. The trial court specifically noted the following in its Judgment:

Exhibit 11 at trial is a Records Search Certificate from the Chancery Clerk of Pearl River County, Mississippi which certifies the records in their office (1) do not show a sheriff's return of notice to anyone of the tax sale maturation; (2) do not show an affidavit by the Chancery Clerk; (3) reveal one notice of the tax sale was mailed to Robert K. Milner et ux, with a return receipt from him but no mailing or receipt to Patricia K. Milner; and (4) a Notice to Lienor was mailed to First Union National Bank with return receipt and the Tax Sale Book notation is not certified, dated or signed by the Chancery Clerk. (Judgment Setting Aside Tax Sale and Deed) (Appellees' R Ex 32).

The trial court found that MCA §27-43-7 requires a notice to be mailed to a lienor at the post office address of the lienor, if such address is set forth in the instrument creating the lien. In the case *sub judice*, trial exhibit 3 clearly shows the address of the lienor in Tampa, Florida rather than Charlotte, North Carolina. The Courts of this state have consistently held that failure to provide a lien holder proper notice of maturation of a tax sale renders the sale void as to that lien holder. Citing the case of *Lamar Life Ins. Co. v. Billups*, 175 Miss. 771, 783, 169 So.2d 32, 35-36, the Supreme Court stated that "[i]t is long settled that a tax sale in which a lienor fails to receive notice is void as to that lienor". "[W]e must read the notice statutes together with the statutes governing validity". *Gober v. The Chase Manhattan Bank*, 918 So.2d 840, 843 (Miss. 2005).

The Chancery Clerk also failed to provide the lien holder with the form of notice of forfeiture prescribed by MCA §27-43-5, having utilized the same notice provided to Robert K. Milner, et ux. Had the legislature deemed the latter notice sufficient, it is submitted that a specific section depicting the form of notice would not appear in MCA §27-43-5.

The trial court's finding that there was not proper or adequate consideration to support the Quitclaim Deed from the Milners to Rebuild America, Inc. is supported by the evidence. Contrary to the claims of Rebuild America, Inc. within its appellant's brief, (Appellant's Br. 12), the only testimony in the record was that no money or other consideration whatsoever was paid or otherwise given for execution of the Deed. (Tr. 41) In fact, the threat of eviction was the only reason provided by the Milners for signing and returning the Deed to Rebuild America. (Tr 40-41)

The deed from the Milners to Rebuild conveys title expressly "subject to that certain sale for 2002 ad valorem county Taxes". (Tr. Ex. 10) In the case of *Texaco, Inc., v. Junior Pigott, et al.*, 235 F. Supp. 458 (S.D. Miss. 1964), the Court considered the language "subject to" in a conveyance, and concluded:

the words "subject to" mean "subservient to" or "limited by" . . . "Subject to" as used in the referring to an earlier conveyance or lease means that title passed in the subsequent instrument was "subject to" the earlier lease. These words are words of qualification showing the grantor's intent not to grant an absolute title.

Texaco, 235 F.Supp. 458, 462.

In the case of *Stockstill v. Gammill*, 943 So.2d 35 (Miss. 2006), the Mississippi Supreme Court stated:

A purchaser of land is charged with notice not only of every statement of fact made in the various conveyances constituting his chain of title, but he is also bound to take notice of and to fully explore and investigate all facts to which his attention may be directed by recitals in said conveyance contained. A duty is also imposed on him to examine all deeds and conveyances previously executed and placed of record by his grantor - either immediately or remote - if such deeds or conveyances in any way

affect his title. And if in any such deed or conveyance there is contained any recital sufficient to put a reasonably prudent man on inquiry as to the sufficiency of the title, then he is charged with notice of all of those facts which could and would be disclosed by a diligent and careful investigation.

Stockstill v. Gammill, 943 So.2d 35, 43 (Miss. 2006) (quoting *Dead River Fishing and Hunting Club v. Stovall, et al.*, 147 Miss. 385, 113 So. 336, 338); See *Florida Gas Exploration Company, et al., v. J. C. Searcy, et al.* 385 So.2d 1293 (Miss. 1980).

Applying the facts of this case to the applicable law, it is clear that the title of Rebuild America, Inc., having been conveyed expressly subject to the sale for 2002 county ad valorem taxes, it logically follows that the Milners did not lose their right to contest the validity of the 2003 tax sale upon signing the subject quitclaim deed.

The trial court also further correctly found that the notice to the land owner of expiration of the redemption period required by MCA§27-43-3 must be made to each owner independently. See *Brown v. Riley*, 580 So.2d 1234 (Miss. 1991). In the case at bar, it is uncontroverted that the only notice provided to the land owner was addressed via certified mail to Milner, Robert K., et ux. Mrs. Milner received no separate notice whatsoever of the impending maturity of the tax sale. (Ex. 11, Tr 40)

The learned trial judge applied the correct legal standards to the facts before him. Those standards reflect Mississippi's public policy favoring and protecting the owner of land from loss by its sale for taxes. The same safeguards apply to lien holders of record, and those statutory mandates were likewise not complied with by the Chancery Clerk in this case.

CONCLUSION

The trial court did not abuse its discretion or err in its rulings under review in this case. Applying appropriate rules of law, the court properly concluded that the Pearl River County Chancery Clerk and the Pearl River County Sheriff failed to comply in numerous respects regarding notification of the Milners or First Union National Bank, Indenture Trustee, predecessor to Wachovia Bank, N.A., of the impending maturation of the subject tax sale as required by statute.

Public policy in Mississippi demands that public officials charged with following the legislative mandates set forth by statute do so with due diligence. In the case *sub judice*, the errors committed by those officials are more than technical or clerical. They are substantive in nature and clearly warrant affirmance of the Chancellor's decision in this case. It is respectfully submitted that no abuse of the Chancellor's discretion in his ruling can be demonstrated by Rebuild America, Inc. in the case at bar, and the trial court's ruling should be affirmed in all respects.

Respectfully submitted,

ROBERT K. MILNER AND WIFE, PATRICIA
K. MILNER AND WACHOVIA BANK, N.A.,
SUCCESSOR IN INTEREST TO FIRST
UNION NATIONAL BANK

BY: ROBISON & HOLMES, PLLC

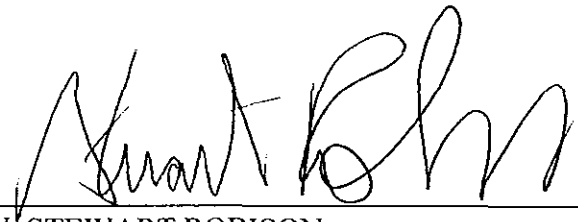

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C E R T I F I C A T E

I, W. STEWART ROBISON, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to Kimberly P. Turner, Esquire, Henry, Barbour, DeCell & Bridgforth, Ltd., at her regular mailing address of Post Office Box 4681, Jackson, Mississippi 39296.

THIS, the 28thday of August, 2008.



W. STEWART ROBISON

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-00121

REBUILD AMERICA, INC.

APPELLANT

VS.

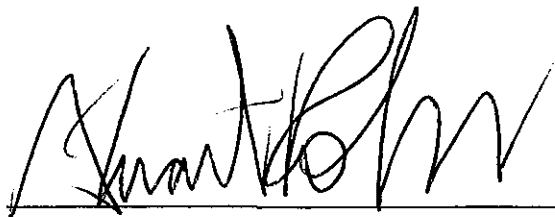
**ROBERT K. MILNER AND WIFE,
PATRICIA K. MILNER AND WACHOVIA
BANK, N.A., SUCCESSOR IN INTEREST TO
FIRST UNION NATIONAL BANK, AS
INDENTURE TRUSTEE**

APPELLEES

AMENDED CERTIFICATE

I, W. STEWART ROBISON, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees to Honorable James H. C. Thomas, Jr., Chancellor, at his regular mailing address of Post Office Box 807, Hattiesburg, Mississippi 39403-0807, and Kimberly P. Turner, Esquire, Henry, Barbour, DeCell & Bridgforth, Ltd., at her regular mailing address of Post Office Box 4681, Jackson, Mississippi 39296.

THIS, the 28th day of August, 2008.



W. STEWART ROBISON