IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2008-CA-00826

K.R. DAUGHTREY and PAUL UPTON — APPELLANTS

VERSUS

WILLIAM W. ALLRED — APPELLEE

APPEAL FROM THE CHANCERY COURT OF
JONES COUNTY, MISSISSIPPI

BRIEF OF APPELLANTS

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:

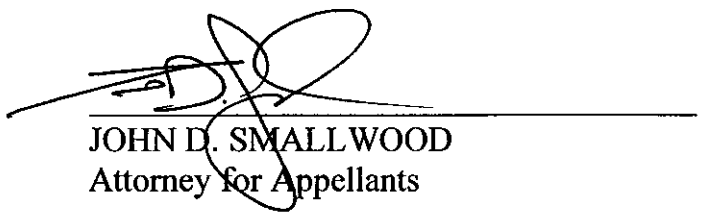
1. Kenneth R. Daughtrey and Paul Upton, Appellants

2. John D. Smallwood, Esq. of TUCKER BUCHANAN, PA (Laurel, MS) and Larry O. Norris, Esq. of LARRY O. NORRIS, PA (Hattiesburg, MS), Attorneys for Appellants

3. William Wallace Allred, Esq. (Collins, MS), Appellee

4. James L. Quinn, Esq. (Hattiesburg, MS), Attorney for Appellee

5. Honorable Frank McKenzie, Chancery Court Judge of Jones County, Mississippi



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STATEMENT OF THE CASE

This is a civil action stemming from a Complaint for Breach of Contract, Constructive Trust, Damages and Other Relief [RE-6] filed by William Wallace Allred ("Mr. Allred") on February 27, 2003 in the Chancery Court of Jones County, Mississippi in the Second Judicial District. Mr. Allred actually filed two separate yet substantially identical Complaints against Paul Upton ("Mr. Upton") [R. 18] and Kenneth R. Daughtrey ("Mr. Daughtrey") [R. 84] in Chancery Court Cause Nos. 2003-131 and 2003-232, respectively. On April 8, 2008, Mr. Upton and Mr. Daughtrey filed their separate and substantially identical Answer and Counter-Claim [R. 35 and 100, respectively]. For purposes of this appeal, only the first filed Complaint [RE-6] and Answer/Counter-Claim [RE-7] are attached as Record Excerpts.

By Order for Consolidation [R. 142] dated June 6, 2005, the trial court consolidated the separate actions for purposes of discovery and trial. Thereafter, on August 16, 2006, the trial court entered an Order of Bifurcation [R. 172] from which the trial court separated the trial for purposes of liability and then damages.

The trial court heard testimony and evidence on the Complaint and Counter-Claims on September 19 and 20, 2006. At the conclusion of the trial, the trial court held his ruling in abeyance for the attorneys to provide authority for the legal arguments and for Mr. Allred to obtain and file a Judgment from the Probate Court in St. Tammany Parish, Louisiana from which he claimed his assignment of the contract at issue [Tr. 285-

292]. On March 13, 2007, after receiving the authorities provided by counsel and the Certified Judgment from the St. Tammany Parish court [RE-10], the trial court entered its Judgment [RE-11]. Ruling on the issue of liability, the trial court found that the contract assigned to Mr. Allred was enforceable by Mr. Allred against Mr. Upton and Mr. Daughtrey. The trial court also found that Mr. Allred's claims for defamation and intentional interference as well as Mr. Upton and Mr. Daughtrey's Counter-Claims should all be dismissed. The trial court also ordered that Mr. Upton and Mr. Daughtrey should make and file an accounting based upon the trial court's ruling against them for a determination of damages.

Aggrieved, Mr. Upton and Mr. Daughtrey filed their initial Notice of Appeal [R. 206] on April 11, 2007. By Order of this Court dated June 6, 2007, Justice Diaz dismissed this initial appeal as being premature. (*see* 2007-TS-00596).

On August 6, 2007, Mr. Upton and Mr. Daughtrey filed their Accountings [R. 227]. On April 4, 2008, Mr. Upton and Mr. Daughtrey filed their Motion to Dismiss [RE-12]. On June 10, 2008 the trial court conducted a hearing on the Accounting and the Motion to Dismiss at which time Mr. Upton and Mr. Daughtrey provided the trial court with Memorandum of Authority in Support of Motion to Dismiss [RE-13]. On April 15, 2008, the trial court entered its Judgment on damages and on the Motion to Dismiss [RE-14]. The trial court awarded Mr. Allred a judgment in the sum of $26,807.00 against each Mr. Upton and Mr. Allred plus assessed each one-half of the costs of the action.

On April 15, 2008, Mr. Upton and Mr. Daughtrey filed their Motion for New Trial

[RE-15]. On May 6, 2008, the trial court entered an Order denying the Motion for New Trial [RE-16]. Aggrieved, on May 7, 2008, Mr. Upton and Mr. Daughtrey timely filed their Notice of Appeal [RE-17]. On May 16, 2008, Mr. Upton and Mr. Daughtrey each filed their Appeal Bond to Supreme Court of Mississippi with Supersedeas [RE-18]. Mr. Allred did not file a cross-appeal.

Due to the initial appeal filing and preparation of record, identity of the claims and counter-claims, the consolidation of the two cases for discovery and trial purposes and only one transcript, on May 19, 2008 the trial court entered a Supplemental Order of Consolidation for Purposes of Appeal [RE-19]. As such, the Jones County Chancery Clerk's Index and General Docket contain pleadings filed in both underlying and consolidated action.

STATEMENT OF THE FACTS

The foundation of the Complaint and Counter-Claims filed in this matter is the sale and purchase of gas and oil interests in what is referred to as the "Amoco Mineral Spread".

At the time of the original transactions in 1992, Paul Upton ("Mr. Upton" and Kenneth R. Daughtrey ("Mr. Daughtrey") were inexperienced in the oil and gas business. However, they were experienced and familiar with William Wallace Allred ("Mr. Allred") whom they knew to be a local attorney (Collins, MS) and quite experienced in the oil and gas business. Through discussions with Mr. Allred about a potential oil/gas venture, both Mr. Upton and Mr. Daughtrey paid the sum of $26,649.00 for each to own an undivided 1.89% share in the Amoco Mineral Spread. Reportedly, the Amoco Mineral Spread covered 46 counties in the State of Mississippi.

Some months after the money was paid in, Mr. Allred approached Mr. Upton and Mr. Daughtrey with an Agreement ("Contract") wherein each would convey 15% of his original 1.89% share to a C.T. Carden, a resident of Louisiana, within thirty days of payout. Mr. Allred explained that this was a commission fee to Mr. Carden for his work on the deal. Both Mr. Upton and Mr. Daughtrey initially refused to execute the Contract, but after persuasion from Mr. Allred and his assurances that all other investors he had dealt with had signed the same Contract, they both executed the Contract. [Trial Exhibits 9 & 10].

On September 12, 1995, C.T. Carden died and L.J. Cuccia was appointed as

Administrator of the Succession (Estate) of C.T. Carden in the 22nd Judicial District, St. Tammany Parish, Louisiana. Mr. Allred thereafter sought and received an Assignment of the subject Contracts. On February 27, 2000, L.J. Cuccia executed the Assignment [RE-9] of the contracts from the Succession of C.T. Carden to Mr. Allred. This was done without prior approval of the Louisiana Succession Court.

Payout occurred for both Mr. Upton and Mr. Daughtrey in September 1999. As Mr. Carden was deceased, neither Mr. Upton nor Mr. Daughtrey conveyed the 15% interest outlined in the Contract. On February 27, 2003, Mr. Allred filed suit in this matter against Mr. Upton and Mr. Daughtrey based upon the original Contracts signed in 1992 and the Assignment executed in 2000 [RE-9].

SUMMARY OF ARGUMENT

The Chancery Court's findings that Mr. Allred had standing to bring his Complaint against Mr. Upton and Mr. Daughtrey, that the subject contract was enforceable and legal and that the claims were subject to a ten (10) year statute of limitations rather than a three (3) year statute of limitations was an abuse of discretion, manifestly wrong, clearly erroneous and a misapplication of the appropriate the legal standards in this case.

ARGUMENT

STANDARD OF REVIEW

Findings of the Chancellor will not be disturbed nor set aside on appeal "when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Ruff v. Estate of Ruff*, 989 So.2d 366, 369 (Miss. 2008); *Biglane v. Under the Hill Corp.*, 949 So. 2d 9, 13-14 (Miss. 2007); *Cummings v. Benderman,* 681 So. 2d 97, 100 (Miss. 1996). "Nonetheless, if manifest error is present or a legal standard is misapplied, this Court will not hesitate to reverse." *Thompson v. Thompson*, 894 So.2d 603, 605 (Miss. App. 2004); *Tilley v. Tilley*, 610 So.2d 348, 351 (Miss. 1992). Where there is a question of law, the standard of review is *de novo*. *Ladner v. Necaise*, 771 So.2d 353, 355 (Miss. 2000); *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994).

I. THE CHANCERY COURT ERRED IN FINDING THAT WILLIAM ALLRED HAD STANDING TO BRING SUIT PURSUANT TO THE CONTRACT AT ISSUE.

A. ASSIGNMENT OF THE CONTRACT FROM ESTATE OF C.T CARDEN TO WILLIAM ALLRED WAS VOID.

Mr. Upton executed a written Agreement ("Contract") [RE-8] with Charles Thomas Carden ("C.T. Carden") on September 30, 1992 [Trial Exhibit #10]. Mr. Daughtrey also executed an identical Contract with C.T. Carden in September, 1992 [Trial Exhibit #9]. Both Mr. Upton and Mr. Daughtrey did so at the request of and the urging of Mr. Allred. At all relevant times, Mr. Upton and Mr. Daughtrey knew Mr. Allred to be an attorney and believed him to be acting as their attorney in negotiations for the subject Contracts. (*see* RE-7 and Trial Transcript).

Some years after the Contracts were executed, C.T. Carden died and L.J. Cuccia was appointed as Administrator of the Succession (Estate) of C.T. Carden in the 22nd Judicial District, St. Tammany Parish, Louisiana. Thereafter, on February 27, 2000, L.J. Cuccia executed the Assignment [RE-9] of the two contracts (and others) from the Succession of C.T. Carden to Mr. Allred. This was done **without** prior approval of the Louisiana Succession Court.

On February 27, **2003**, Mr. Allred filed suit in this matter against Mr. Upton and Mr. Daughtrey based upon the Assignment [RE-9]. In their Answers, both Mr. Upton and Mr. Daughtrey raised as an affirmative defense that Mr. Allred is not a proper party to the action. Nonetheless, the trial court permitted the matter to proceed to trial. At the conclusion of the trial, after the issue had been raised once again by counsel for Mr.

Upton and Mr. Daughtrey, the trial court held his ruling in abeyance to permit Mr. Allred and his counsel to obtain an Order from the Louisiana Court of Succession to authorize the Assignment. On January 8, **2007**, after this matter was tried to it conclusion, L.J. Cuccia filed a Petition for Authority to Execute Assignment and Conveyance of Mineral Leases to William Wallace Allred in the Louisiana court. A Judgment was entered [RE-10] which authorized L.J. Cuccia to execute the Assignment date February 27, 2000. The date of this document is unclear as the Clerk of the Court hand writes and stamps it filed on January 30, 2007, however the Judge signs and dates it on February 1, 2007.

It is black letter law in Mississippi that a court appointed Administrator must seek permission from the estate court before transferring assets, including contracts, of the estate. Miss. Code Ann. §91-7-229 provides,

> **§91-7-229. Claims may be sold or compromised.**
>
> The court or chancellor in vacation, on petition for that purpose, may authorize the executor or administrator to sell or compromise any claim belonging to the estate which cannot be readily collected; but an order authorizing a sale of any claim shall not be made until after six months from the grant of the letters. The court or chancellor shall specify the terms, conditions, and notice of such sale. In compromising any claim, the executor or administrator may receive property, real or personal, in his name as such, and he shall account for the same as assets of the estate. The executor or administrator shall report, in writing, all sales and compromises to the next term of the court.

The simple fact of the matter is that when Mr. Allred filed his Complaint in 2003, he was neither a representative of the Estate of C.T. Carden nor a valid owner of the Contracts which were the basis of his Complaint. Likewise, when the trial court heard

testimony and examined documents on the issue of liability in September 2006, Mr. Allred was not a valid owner of the subject Contracts. As evidenced by the steps taken after trial, the trial court and Mr. Allred realized that the Assignment dated February 27, 2000 was not valid without prior Louisiana court approval. Nonetheless, the trial court sought to breathe life into the original Assignment by permitting Mr. Allred (nearly 4 years after the Complaint was filed, after discovery and after a two day trial) to obtain court permission seven (7) years after the fact. With no valid assignment, Mr. Allred had no standing to file his Complaint in February 2003 and his Complaint should have been dismissed by the trial court.

B. THE FRACTIONAL SHARES OF OIL/GAS/MINERAL RIGHTS MADE THE BASIS OF WILLIAM ALLRED'S CLAIMS ARE SECURITIES WHICH WERE NOT REGISTERED IN VIOLATION OF THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934

Mr. Allred's Complaint [RE-6] is based upon his claims that he is entitled to compensation (15%) for the transfer of fractional interests in oil, gas and/or mineral rights to Daughtrey and Upton. Assuming arguendo that the aforementioned assignment to Mr. Allred was valid and enforceable, the subject contract is invalid as it is in violation of Federal law.

Securities

"Security" is defined to include "fractional undivided interest in oil, gas or other mineral rights" by the Securities Act of 1933, which regulates the issuance of securities

in interstate commerce.[1] Furthermore, the Securities Exchange Act of 1934, which regulates broker-dealers and the interest distribution of securities, defines "Security" to include "certificate of interest or participation in... any oil, gas or other mineral royalty or lease."[2]

"The term security has the same meaning for purposes of both the 1933 Securities Act and the 1934 Securities Exchange Act." *Adena Exploration, Inc. v. Sylvan*, 860 F.2d 1242, 1244 (5th Cir. 1988); *Youmans v. Simon*, 791 F.2d 341, 344 (5th Cir.1986); see also *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S.Ct. 2297, 2301 n. 1, 85 L.Ed.2d 692 (1985) ("[T]he definitions of 'security' in [both Acts] are virtually identical and will be treated as such in our decisions dealing with the scope of the term"). In discussing the issue of security, the *Adena* Court further found that "[t]he Securities and Exchange Commission has consistently espoused the view that any fractional undivided interest in oil and gas is subject to regulation under both the 1933 and 1934 Acts, and adheres to that position in an amicus brief filed in this case. *Adena* at 1244; S.E.C. Br. at 6-10; Securities Act Release No. 185 (June 20, 1934), 11 Fed.Reg. 10951.

The U.S. Supreme Court and Circuit Courts across the country have long established that such interests are securities. "In total, at least five circuits and the Supreme Court have accepted or suggested, by express statement or by apparent implication, that a fractional undivided interest in oil and gas is a security." *Adena* at 1244; *SEC v. C.M. Joiner*, 320 U.S. 344 (1943); see also *Pinter v. Dahl*, 108 S.Ct. 2063,

1. Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1) (2006).

2. Securities Exchange Act of 1934 § 3(a)(10), 15 U.S.C. § 78c(a)(10) (2006).

100 L.Ed.2d 658 (1988); *Penturelli v. Spector, Cohen, Gadon & Rosen*, 779 F.2d 160 (3d Cir.1985); *Moses v. Michael*, 292 F.2d 614 (5th Cir.1961); *Whittaker v. Wall*, 226 F.2d 868 (8th Cir.1955); *Simon Oil Co., Ltd. v. Norman*, 789 F.2d 780, 781 (9th Cir.1986); *Woodward v. Wright*, 266 F.2d 108 (10th Cir.1959). "We have not found any circuit court decision denying security status to an instrument properly denominated a fractional undivided interest in oil and gas." *Adena* at 1244-45. The law is clear and without doubt that the fractional interests at issue herein were and are securities.

Sale/Delivery of Unregistered Security Unlawful

The Securities Act of 1933 provides that,

> (a) Sale or delivery after sale of unregistered securities.
> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly -
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 USCS § 77e

Allred provided no scintilla of proof at trial that the securities at issue were registered. There was also no proof before the trial court that Allred was a registered broker-dealer of such securities. What is clear, is that he brokered a deal with the Estate of C.T. Carden in Louisiana, returned to Mississippi and sought to collect from Daughtrey, Upton and others. Allred was clearly dealing in interstate commerce.

As a result and as a matter of law, the entire transaction from which Allred basis

his claim to compensation is in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934. The trial court erred in finding that the contract and subject assignment were enforceable as the foundation, the contract, was illegal and therefore void. Furthermore, the trial court erred in awarding damages based upon an illegal and void contract.

II. THE CHANCERY COURT ERRED IN FINDING THAT THE 10 YEAR STATUTE OF LIMITATIONS APPLIED TO THE CLAIMS MADE IN THE COMPLAINT.

Assuming arguendo that Mr. Allred had standing to bring his underlying Complaint and that the subject contracts are not illegal and are enforceable, Mr. Allred's claim was barred by the statute of limitations. Relevant to that issue, on the issue of liability, the trial court made the following findings:

> 2.
>
> "Payout" as defined in the Agreement of Paul Upton (Trial Exhibit "10") occurred on September 29, 1999 (Trial Exhibit "38"). "Payout" as defined in the Agreement of K.R. Daughtrey (Trial Exhibit "9") occurred on September 23, 1999 (Trial Exhibit 39). Within thirty days of payout, each Defendant was obligated to assign in writing by recordable instrument 15% of the interest he originally acquired in the Amoco Minerals. Neither defendant at any time gave notification of payout nor executed a written Assignment in favor of C.T. Carden, his successors or assigns, of 15% of the interest originally acquired in the Amoco Minerals.
>
> 5.
>
> The Plaintiff filed each of the above captioned actions on February 27, 2003. The three year "catch-all" statute of limitations in Miss. Code Ann. § 15-1-49 applies to the Plaintiff's claim for recovery of a percentage of income and proceeds from production paid to the Defendants. A ten

year period of limitations provided in Miss. Code Ann. § 15-1-7 and § 15-1-9 applies to the Plaintiff's claims for recovery of a percentage of the Defendants' interests originally acquired in the Amoco Minerals. The Defendants should each provide an accounting for all income and production proceeds attributable to their respective interests in the Amoco Minerals from and after September 30, 1999 to date.

RE-12, pp 2-3.

The trial court initially gets it right in ¶2 above reciting the obligations of Mr. Upton and Mr. Daughtrey under the terms of the contract, that is that "Within thirty days of payout, each Defendant was obligated to assign in writing by recordable instrument 15% of the interest he originally acquired in the Amoco Minerals.". Likewise, Mr. Upton and Mr. Daughtrey do not dispute the dates established by the Court as each of their "payout" dates.

The trial court commits error in its application of the law in ¶5 where the trial court loses focus of the allegations and actual claims made by Mr. Allred. In his Complaint [RE-6], Mr. Allred makes claims for (1) Breach of Contract, (2) Constructive Trust, (3) Unjust Enrichment, (4) Defamation and (5) Intentional Interference with Business. In the Judgment on liability [RE-9], the trial court specifically dismisses (4) and (5). As to "unjust enrichment" and "constructive trust", neither term is found in said Judgment. Likewise, there is no discussion of "unjust enrichment" nor "constructive trust" during the trial court's bench ruling [Tr. 285-292]. As such, the trial court clearly finds for Mr. Allred based solely upon his claim of breach of contract.

As stated by the trial court, Mr. Upton and Mr. Daughtrey were "within thirty days of payout obligated to assign in writing by recordable instrument 15% of the interest he

originally acquired in the Amoco Minerals." The trial court found that they did not and found that Mr. Upton's payout was September 29, 1999 and that Mr. Daughtrey's payout was September 23, 1999. Based upon the finding of the trial court, both Mr. Upton and Mr. Daughtrey were obligated to assign a 15% interest to Mr. Allred no later than October 30, 1999 and October 24, 1999 respectively. By the finding of the trial court that neither did, the court determined that both men were be in breach of the Contract and Mr. Allred's statute of limitations would begin to run on these dates.

The statutes of limitation cited by the trial court read, in pertinent part, as follow:

§15-1-49. Limitations applicable to actions not otherwise specifically provided for.

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

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§15-1-7. Limitations applicable to actions to recover land.

A person may not make an entry or commence an action to recover land except within ten years next after the time at which the right to make the entry or to bring the action shall have first accrued to some person through whom he claims, or, if the right shall not have accrued to any person through whom he claims, then except within ten years next after the time at which the right to make the entry or bring the action shall have first accrued to the person making or bringing the same. However, if, at the time at which the right of any person to make an entry or to bring an action to recover land shall have first accrued, such person shall have been under the disability of infancy or unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of ten years hereinbefore limited shall have expired, make an entry or bring an action to recover the land at any time within ten years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have

first happened. However, when any person who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed, by reason of the disability of any other person, to make an entry or to bring an action to recover the land beyond the period of ten years next after the time at which such person shall have died.

15-1-9. Limitations applicable to suits in equity to recover land.

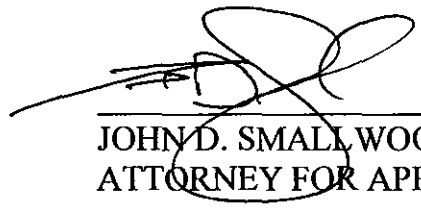
A person claiming land in equity may not bring suit to recover the same except within the period during which, by virtue of Section 15-1-7, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such an estate, interest, or right in or to the same as he shall claim therein in equity. However, in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered.

Miss. Code Ann. §15-1-49 is clearly the statute of limitations applicable to a claim for breach of contract. §§15-1-7 and 15-1-9 are for recovery of land not for percentage of mineral rights claimed through a theory of breach of contract. A Plaintiff in our courts is subject to the well-pled complaint doctrine. *Luckett v. Mississippi Wood, Inc.*, 481 So.2d 288, 290 (Miss.1985). Mr. Allred is well versed in this area of law (see *Allred v. Fairchild*, 785 So. 2d 1064 (Miss. 2001). Mr. Allred made his claims clear. Likewise, the trial court made itself clear that it found for him on his claim of breach of contract, nothing more. Applying §§15-1-7 and 15-1-9 as the applicable statutes of limitation was erroneous and a misapplication of the appropriate legal standard.

CONCLUSION

Based upon the foregoing, this Court should reverse and render the findings by the trial court that William Allred had a valid assignment, that the subject contract was enforceable and/or that the 10 year statute of limitations applied to the claims made in the Complaint.

Respectfully submitted:



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ATTORNEY FOR APPELLANTS

CERTIFICATION OF SERVICE

I do hereby certify that I served a copy of the foregoing Brief of Appellants on all parties to this matter by first class mailing to the attorneys and on the date listed below:

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This the 8th day of January, 2009.

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