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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-1087

CNX GAS COMPANY LLC, as successor in interest to DOMINION EXPLORATION & PRODUCTION, INC. and CNG DEVELOPMENT COMPANY, Defendant Below,

Petitioner,

v.

MARY MAXINE WELCH, Plaintiff Below,

Respondent.

Appeal from the order certified under W. Va. R. Civ. P. 54(b) of the Circuit Court of Ritchie County (03-C-65)

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

Petitioner CNX Gas Company LLC, as successor in interest to Dominion Exploration & Production, Inc. and CNG Development Company, submits this reply in support of its petition for appeal. The circuit court failed to follow the express directions of this Court on the limited remand in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008), by improperly allowing Mrs. Welch to plead additional claims and by determining issues outside the scope of the mandate. Contrary to Mrs. Welch's argument, CNX does not argue that that circuit court erred in entering an agreed order approving a proposed drilling plan for the Flanaghan Lease on March 30, 2009. Unlike the orders entered May 2 and September 16, 2013, which do violate the mandate, the agreed order is entirely consistent with the mandate. CNX did not invite error, and in any event Mrs. Welch has cited to no case where the invited error doctrine excused the circuit court from complying with this Court's express mandate.

Independent of the mandate rule, the circuit court's grant of Mrs. Welch's motion for partial summary judgment on the issue of breach of a drilling agreement was error. First, CNX did not breach the agreed order approving a proposed drilling plan because CNX merely filed a notice of modification of the drilling plan in accordance with its express terms. Contrary to Mrs. Welch's argument, the agreed order provided that she too could file a notice of modification based on changed circumstances. Moreover, the circuit court expressly gave Mrs. Welch the opportunity to petition to modify the drilling plan, but she did not take that opportunity or otherwise present evidence in opposition to CNX's notice of modification to suspend drilling of the final three of eleven wells for a time due to changed economic circumstances. Instead, Mrs. Welch filed her unauthorized amended pleading and moved for summary judgment.

Second, the agreed order is not a compromise, settlement, or other contractual agreement that supplanted CNX's obligation to develop the Flanaghan Lease as a reasonably prudent operator because there was no meeting of the minds or consideration. Mrs. Welch's argument that as consideration for the agreed order she forfeited her right to contest the drilling plan is without merit. As indicated above, the agreed order expressly provides that either party may provide notice of modification. In addition, consistent with the agreed order the circuit court expressly gave Mrs. Welch an opportunity to petition to modify the drilling plan. Mrs. Welch's decision not to contest the drilling plan was purely voluntary and not due to a forfeited right. Moreover, Mrs. Welch does not address the issue of whether there was a meeting of the minds.

Third, Mrs. Welch also does not address the issue of whether the circuit court erred in holding that CNX exercised its option to forego any additional development of the Flanaghan Lease under footnote 18 of *St. Luke's United Methodist Church* by filing a notice of modification of the drilling plan because it only sought to suspend drilling of the final three of eleven wells. Although footnote 18 was central to the circuit court's findings, it is not mentioned in the argument section of Mrs. Welch's summary response.

Finally, Mrs. Welch does not address the issue of whether the circuit court erred in holding that she is entitled to the equitable remedy of partial rescission. Manifestly, she is not entitled to this relief, which was not even requested in her claim for breach of a drilling agreement. There is no proof sufficient to establish that CNX breached the implied covenant of development in connection with the Flanaghan Lease in accordance with the mandate and as required in Syllabus Point 4 of *St. Luke's United Methodist Church*. Therefore, this Court should reverse the circuit court's grant of partial summary judgment to Mrs. Welch and remand this action for further proceedings consistent with its opinion.

II. ARGUMENT

A. The Circuit Court Erred in Failing to Comply with the Mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008).

This Court should reverse the circuit court's May 2, 2013 and September 16, 2013 orders and remand this action for further proceedings because the circuit court erred in failing to comply with the mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008). The circuit court failed to follow the directions of this Court on the limited remand by improperly allowing Mrs. Welch to plead additional claims and by determining issues outside the scope of the mandate.

In *State ex rel. Frazier & Oxley v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003) ("*Frazier & Oxley II*"), the Court held:

> Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

Id. at Syl. Pt. 3.

The Court explained the interrelationship between the law of the case doctrine and the mandate rule as follows:

> . . . [H]ere we deal with a case that we remanded. In such circumstances, a special aspect of the law of the case doctrine is implicated – the mandate rule. We have explained that under the mandate rule
>
> > [a] circuit court has no power, in a cause decided by the Appellate Court, to re-hear it as to any matter so decided, and, though it must interpret the decree or mandate of the Appellate Court, in entering orders and decrees to carry it into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed.

Id., 591 S.E.2d at 734 (footnote omitted) (quoting *Johnson v. Gould*, 62 W. Va. 599, 59 S.E. 611, Syl. Pt. 1 (1907)).

In the first appeal in this action, this Court held:

> A trial court may consider the equitable remedy of partial rescission in fashioning the relief to be awarded *upon proof sufficient to establish a breach of the implied covenant of development in connection with an oil and gas lease dispute.*

St. Luke's United Methodist Church, 663 S.E.2d 639, at Syl. Pt. 4 (emphasis added).

The Court concluded with directions to the circuit court as follows:

> In this case, it is clear that Dominion [Exploration & Production, Inc.] has expressed a willingness to develop additional drilling sites on the leased tract. Given the fact that Dominion already has a vested interest in that portion of the tract which is currently producing based on the three existing wells as well as a valid lease arrangement, it stands to reason that Dominion should be given an opportunity to further develop the property. *On remand to the trial court, a reasonable period of time should be established to provide for such additional development efforts on the part of Dominion. If the trial court finds that no significant additional development efforts have been pursued by Dominion at the conclusion of such reasonable period of time, then the trial court should proceed to take evidence on the issue of whether Dominion has breached the implied covenant of further development or whether evidence can be produced on the issue of undue hardship. We agree with the trial court's ruling that the record, as developed, does not suggest any evidence of undue hardship. Depending on the evidence that may be produced in the event of such proceedings, the equitable remedy of partial rescission is an appropriate remedy to be considered if either a breach of the implied covenant of further development or undue hardship can be established and the trial court is convinced that monetary damages alone are an insufficient remedy.*

Id., 663 S.E.2d at 647-8 (footnote omitted) (emphasis added).

The Court noted:

> Obviously, Dominion has the option of foregoing any additional development of the leased tract should it no longer be interested in pursuing the same. In such event, however, it should give up the leased area that is not currently producing oil or gas to allow another entity to engage in exploration and development efforts on the currently undeveloped portion of the leased tract.

Id., 663 S.E.2d 639, 647 n.18.

The mandate issued by this Court thereafter on July 14, 2008, stated:

> The Court, having maturely considered the record, and the oral argument and briefs of counsel thereon, is of the opinion for reasons stated in writing and filed with the record that there is error in the ruling of the Circuit Court of Ritchie County, rendered on the 15th day of November, 2006. It is therefore considered and ordered by the Court that said ruling be, and it hereby is reversed. *AND this action is remanded to the Circuit Court of Ritchie County for further proceedings in accordance with the principles stated and directions given in the written opinion aforesaid and further according to law*; all of which is ordered to be certified to the Circuit Court of Ritchie County.

A.R. at 36.

As discussed in the opening Brief of Petitioner, the circuit court failed to comply with the mandate by allowing the filing of new claims based on new theories in the renewed petition for partial rescission and other relief and by making determinations on issues outside the scope of the mandate in its May 2nd and September 16th orders. Those orders ignore the undisputed facts that CNX has engaged in significant additional development of the Flanaghan Lease, drilling a total of eight wells from 2008 to 2011, under the circuit court approved drilling plan. In addition, Mrs. Welch produced no evidence to support a finding that CNX breached the implied covenant of further development or undue hardship. Moreover, the only remedy prayed for in the second count of Mrs. Welch's petition alleging breach of a drilling agreement is money damages.

Contrary to Mrs. Welch's argument, CNX does not argue that the circuit court erred in entering the agreed order. The agreed order is entirely consistent with the mandate. As required by the mandate, the agreed order establishes a reasonable period of time for additional development efforts by CNX. The agreed order further provides in accordance with the prudent operator standard discussed by the Court in its decision that CNX may modify the drilling plan based upon its review procedure and notify the circuit court and Mrs. Welch of any proposed

changes to future drilling plans. Indeed, Mrs. Welch may also petition for modification of the drilling plan based on changed circumstances. With these provision in particular, the agreed order is flexible enough to take into account the issues of whether CNX has breached the implied covenant of further development or whether Mrs. Welch has suffered undue hardship if the circuit court were to find no significant additional development efforts by CNX at the conclusion of that reasonable period of time. Thus, on its face the agreed order complies with the mandate.

Also contrary to Mrs. Welch's argument the notice of modification of drilling plan provided notice of proposed changes to future drilling plans. After drilling eight wells, CNX proposed suspension of the drilling plan, which called for the drilling of two additional wells in 2012 and a final well in 2013. When CNX filed the notice of modification on November 2, 2012, there were essentially two months left in that year. A.R. at 48-55. The circuit court held a status conference on November 14, 2012, and by order entered on December 3, 2012, Mrs. Welch was given the opportunity to petition to modify the drilling plan herself. A.R. at 56-58. She should have taken that opportunity instead of filing a renewed petition for partial rescission and other relief and moving for partial summary judgment on the issue of breach of drilling agreement. These actions by Mrs. Welch that precipitated the May 2nd and September 16th orders, not the actions of CNX, encouraged the circuit court to fail to effectuate the mandate.

Accordingly, CNX did not invite error as argued by Mrs. Welch. In any event, the cases cited in her summary response do not support an argument that invited error may excuse the circuit court from complying with this Court's express mandate. As discussed in *Frazier & Oxley II*, 591 S.E.2d at 734, the mandate rule actually limits the circuit court's power to hear matters, and any order that is inconsistent with the mandate is erroneous and must be reversed. The circuit court's May 2nd and September 16th orders must be reversed.

B. The Circuit Court Erred in Granting Mrs. Welch's Motion for Partial Summary Judgment on the Issue of Breach of a Drilling Agreement.

1. CNX did not breach the agreed order by modifying the drilling plan.

Even if the agreed order approving a proposed drilling plan were a contract, which as discussed below it is not, CNX did not breach the agreed order, but merely filed a notice of modification of the drilling plan in accordance with its express terms. Moreover, the circuit court erred in holding that the agreed order supplanted CNX's implied obligation to develop the Flanaghan Lease as a reasonably prudent operator.

As discussed in the original Brief of Petitioner, the plain and unambiguous language of the agreed order authorized CNX to file the notice of modification of the drilling plan. In this action, the agreed order expressly provides for lease modification as follows:

> DEPI will reevaluate its site locations and drilling plans following completion of each well based upon the completion reports, production history, and other factors. *DEPI reserves the right to modify the drilling plan based upon this review procedure and agrees to notify the Court and plaintiffs of any proposed changes to its future drilling plans. . . .*
>
> The parties submit this Agreed Order advising the Court that no party opposes DEPI's proposed drilling plan; *subject to the right of any party to reopen this matter for future drilling in the event of changed circumstances; provided that any such motion would not affect any rights to wells drilled prior to the action for reopening.*
>
> *Based upon the foregoing, it is hereby ORDERED that the Motion of Dominion Exploration & Production, Inc. for Approval of Proposed Drilling Plan dated August 19, 2008 is approved by the Court subject to the right of any party to petition the Court to reopen the drilling plan for future drilling in the event of changed circumstances, provided that any and all rights to wells drilled prior to the date any petition is filed shall not be affected.*

A.R. at 45-46 (emphasis added).

If, however, there is any ambiguity, CNX's reading of the agreed order is corroborated by parol evidence. In *Jessee v. Aycoth*, 202 W. Va. 215, 503 S.E.2d 528 (1998) (per curiam), the

West Virginia Supreme Court of Appeals affirmed the circuit court's consideration of parol evidence concerning a separation settlement agreement determined to be vague and uncertain. The Court explained as follows:

> If an inquiring court concludes that an ambiguity exists in a contract, the ultimate resolution of it typically will turn on the parties' intent. Exploring the intent of the contracting parties often, but not always, involves marshaling facts extrinsic to the language of the contract document. When this need arises, these facts together with reasonable inferences extractable therefrom are superimposed on the ambiguous words to reveal the parties' discerned intent.

Id., 503 S.E.2d at 531 (quoting *Fraternal Order of Police, Lodge Number 69 v. City of Fairmont*, 196 W. Va. 97, 468 S.E.2d 712, 716 n.7 1996)).

Accordingly, the Court held:

> 1. "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court." Syllabus Point 1, *Berkeley Co. Pub. Ser. Dist. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968).
>
> 2. "Prior or contemporaneous parol statements may not be admitted to vary written contracts, but may be admitted to explain uncertain, incomplete or ambiguous contract terms." Syllabus, *Holliday Plaza, Inc. v. First Federal Savings and Loan Association of Clarksburg*, 168 W. Va. 356, 285 S.E.2d 131 (1981).
>
> 3. "'Extrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important and the court may consider parol evidence in connection therewith with regard to conditions and objects relative to the matters involved. . . .' Syl. Pt. 2, *Berkeley Co. Pub. Serv. Dist. v. Vitro Corp.*, 152 W. Va. [252], [162 S.E.2d 189 (1968)]. Syllabus Point 2, *International Nickel Co. v. Commonwealth Gas Corp.*, 152 W. Va. 296, 163 S.E.2d 677 (1968).

Id. at Syl. Pts. 1-3. *See also Kelley, Gidley, Blair & Wolfe, Inc. v. City of Parkersburg*, 190 W. Va. 406, 438 S.E.2d 586 (1993) (per curiam) (holding extrinsic evidence admissible to assist in ascertainment of meaning of settlement agreement regarding

whether contractor was entitled to entire sum of any grant increase received by city or only contractor's "eligible engineering costs").

In this action, Mrs. Welch does not dispute that her counsel Thomas J. Gillooly sent a memorandum dated February 2, 2009, to counsel for CNX during the negotiation of the terms of the agreed order.[1] The February 2nd memorandum states in pertinent part:

> ¶2: I prefer to characterize my clients' position *as not objecting to entry of the order* (and the draft uses that terminology later). I would also prefer neutral terminology regarding what circumstances might warrant reopening the issue in the future. Our teleconference with Judge Holland was not recorded, of course, *but I don't think that conversation provides a basis to restrict reopening to "changed economic circumstances"* (nor do I know what that means). . . .

A.R. at 117 (emphasis added).

Thus, Mrs. Welch's counsel insisted on changes to specific terms in the agreed order at issue in this action, and CNX made those changes. Those changes made it clear that Mrs. Welch did not agree to the proposed drilling plan, but only did not object to the agreed order. In addition, those changes made it clear that reopening is not restricted to changed economic circumstances, not that changed economic circumstances were insufficient as now argued by Mrs. Welch. Because Mrs. Welch dictated these terms of the agreed order, her reliance on cases construing ambiguous contracts against the drafter actually undermines her argument that the agreed order should be construed against CNX. Pursuant to cases such as *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909, 924 (2011), the Court should construe those provisions in the agreed order against Mrs. Welch.

Mrs. Welch has made no attempt to distinguish *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d 731 (N.D.W. Va. 2012), *aff'd sub nom. Wittenberg v. First Independent*

[1] Mrs. Welch notes on page 5 of her summary response that at some point between the October 2008 status conference and entry of the agreed order on March 30, 2009, Mr. Gillooly withdrew from participation at the circuit court level. Despite the attempt to distance Mr. Gillooly from the agreed order, there is no dispute that he authored the February 2nd memorandum.

Mortgage Co., Nos. 12-1323, 13-1366, 2013 WL 3929082 (4th Cir. July 31, 2013). As discussed more fully in the original Brief of Petitioner, the court in that case granted the defendant's motion for summary judgment on a breach of contract claim. The plaintiff in that case alleged that the defendant had denied a permanent loan modification even though it had promised one if the plaintiff paid three trial payments. The court held that the plaintiff failed to present a genuine issue of material fact that the defendant breached the agreement when it decided not to give her a permanent loan modification upon successful completion of the trial period because it was acting within its rights under the plain and unambiguous terms of a special forbearance agreement. *Id.* at 749.

Similar to *Wittenberg*, CNX did not breach or violate its duties or obligations under the agreed order, but rather acted within its rights.

2. The agreed order approving a proposed drilling plan is not a compromise, settlement, or other contractual agreement that supplanted CNX's obligation to develop the Flanaghan Lease as a reasonably prudent operator.

The circuit court erred in holding that the agreed order approving a proposed drilling plan is a compromise, settlement, or other contractual agreement that supplanted CNX's obligation to develop the Flanaghan Lease as a reasonably prudent operator because there was no meeting of the minds and no consideration. Both of these elements are necessary for a valid contract, but only one of them is even addressed by Mrs. Welch in her summary response.

Mrs. Welch does not argue that there was a meeting of the minds, which is a requirement that has been recognized by this Court as specifically applicable to settlement agreements. *See, e.g., Triad Energy Corp. of W. Va., Inc. v. Renner*, 215 W. Va. 573, 600 S.E.2d 285 (2004). "'It is well understood that "[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot

be predicated on equivocal actions of the parties." 15A C.J.S. *Compromise & Settlement*, sec. 7(1) (1967)[.]'" *O'Connor v. GCC Beverages*, 182 W. Va. 689, 391 S.E.2d 379, 381 (1990) (citations omitted).

In this action as discussed above, the agreed order was only "Approved for Entry" by Mrs. Welch's counsel. A.R. at 46. That Mrs. Welch did not even affirmatively agree to or accept the agreed order is clear from the language of the agreed order and also the February 2nd memorandum from Mr. Gillooly to CNX's counsel. A.R. at 117. Mrs. Welch does not even argue in her summary response that there was a meeting of the minds. Manifestly, there was not.

In any event, the element of consideration has not been met. Consideration is "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by another." *First Nat'l Bank of Gallipolis v. Marietta Mfg. Co.*, 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967).

In this action, consideration cannot be found in the fact that Mrs. Welch agreed to have the drilling plan approved by the circuit court because contrary to her argument she did not forego the right to contest the drilling plan. As discussed above, pursuant to the agreed order any party had the right to reopen the drilling plan. A.R. at 45-46. Thus, Mrs. Welch could have petitioned the circuit court for modification of the drilling plan if she were affected by changed circumstances. Also as discussed above, after CNX filed its notice of modification of the drilling plan the circuit court expressly gave Mrs. Welch the opportunity to petition to modify the drilling plan, but she did not take that opportunity. A.R. at 56-58. Moreover, as Mrs. Welch has noted on page 6 of her summary response she still has pending damage claims against CNX in this action, so there is no settlement.

3. CNX did not exercise its option to forego any additional development of the Flanaghan Lease by modifying the drilling plan.

As discussed in the opening Brief of Petitioner, the circuit court further erred in concluding that by electing not to further develop the Flanaghan Lease pursuant to the agreed order CNX has exercised its option to forego any additional development of the leased tract as specifically provided for in footnote 18 of *St. Luke's United Methodist Church.* As discussed above, CNX drilled a total of eight wells on the Flanaghan Lease under the agreed order before it served the notice of modification to suspend drilling due to depressed economic circumstances and a negative return on investment. Importantly, CNX has also made a proffer of ongoing and continued plans to develop the Marcellus formation under the Flanaghan Lease.

Instead of working with CNX to plan for further development, however, Mrs. Welch continues to resist those attempts as the Court noted she was doing at the time of the first appeal. *St. Luke's United Methodist Church*, 663 S.E.2d at 641-42. The Court did not condone Mrs. Welch's resistance to CNX's efforts to develop the Flanaghan Lease in the first decision, stating just before its specific instructions for the limited remand as follows:

> In this case, it is clear that Dominion has expressed a willingness to develop additional drilling sites on the leased tract. Given the fact that Dominion already has a vested interest in that portion of the tract which is currently producing based on the three existing wells as well as a valid lease arrangement, it stands to reason that Dominion should be given an opportunity to further develop the property.

Id., 663 S.E.2d at 647.

This statement is all the more true now – after CNX has drilled an additional eight wells at substantial expense. Mrs. Welch should not be allowed to continue to resist CNX's efforts to develop the Flanaghan Lease. Mrs. Welch, however, does not even address this issue or mention footnote 18 in the argument section of her summary response.

C. The Circuit Court Erred in Holding that Mrs. Welch is Entitled to Partial Rescission.

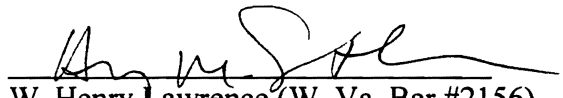
Finally, the circuit court erred in holding that Mrs. Welch is entitled to partial rescission on her claim for breach of a drilling agreement. As discussed in the original Brief of Petitioner, even if CNX breached a drilling agreement, which it did not, Mrs. Welch did not seek the equitable remedy of partial rescission on this claim. Moreover, Mrs. Welch has presented no evidence of undue hardship as required by Syllabus point 4 and the mandate in *St. Luke's United Methodist Church v. CNG Development Co.*, 222 W. Va. 185, 663 S.E.2d 639 (2008). In any event, the circuit court's remedy would have to be limited to partial rescission of the alleged drilling agreement claimed to have been breached, not the Flanaghan Lease. Accordingly, the circuit court erred in granting partial rescission of the Flanaghan Lease, when partial rescission was not even requested as a remedy for the alleged breach of a drilling agreement.

Mrs. Welch does not address this assignment of error in her summary response. Although Mrs. Welch expressly notes that the argument beginning on page 12 addresses assignments of error B and C, in fact she never discusses assignment of error C. Whether Mrs. Welch requested or would be entitled to a remedy of partial rescission on her claim for breach of the alleged drilling agreement and the proper scope of any such remedy is never mentioned in the argument. Although a summary response need not comply with all the requirements of a brief, it must contain an argument responsive to the assignments of error. *See* W. Va. R. App. P. 10(e). As set forth in West Virginia Rule of Appellate Procedure 10(d), "[i]f the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue."

III. CONCLUSION

For all of the foregoing reasons and for the reasons in the opening Brief of Petitioner, this Court should reverse the circuit court's grant of partial summary judgment to Mary Maxine Welch on the issue of breach of a drilling agreement and remand this action for further proceedings. The Court should further order that on remand the circuit court strike Mrs. Welch's renewed petition for partial rescission and other relief and approve CNX Gas Company LLC's notice of modification of the drilling plan.

Dated this 4th day of April, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2014, I caused true and accurate copies of the foregoing "Reply Brief of Petitioner" to be deposited in the U.S. Mail contained in postage-paid envelopes addressed to all other parties to this appeal as follows:

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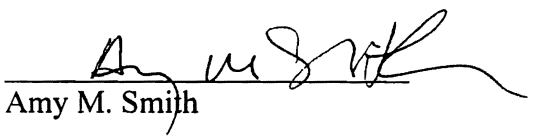

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