

NO. 34842-0-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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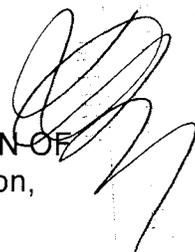
TRINITY LAND DEVELOPMENT, L.L.C., a Washington limited  
liability company,

Respondent,

v.

SUNRISE DEVELOPMENT CORPORATION OF  
WASHINGTON, a Washington Corporation,

Appellant.



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**REPLY BRIEF**

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*P.M. 5-11-07*

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## INTRODUCTION TO REPLY

Trinity's Brief of Respondent is premised on Trinity's trial court theory, which was expressly rejected by the trial judge. Trinity then offers a half-hearted defense of the waiver, equitable estoppel and good faith theories adopted by the trial court, none of which can support the judgment of specific performance.

Trinity begins its statement of facts by quoting the closing argument of Sunrise's trial counsel:

I think that the Court has to find that, ultimately, for Trinity to prevail, I think that the Court would have to find that the parties mutually intended as a material term of the contract that this segregation be done, and that it was required.

BR 1. Trinity claims that the trial court found these facts. BR 2.

To the contrary, in his oral decision, the trial court rejected Trinity's theory that Sunrise's obligation to segregate the property was a material term of the PSA:

There was the agreement with respect to doing something to segregate the 20 acres from the 288-acre parcel that was strictly speaking outside the limits of Exhibit 1 [the PSA], and that part is pretty clear.

RP 708. The trial court concluded that neither the McGowans nor the Corlisses knew at the time they signed the contract whether segregation would even be required, RP 708-10, and observed,

“this was not something that they particularly bargained about. That’s clear to me. And they didn’t.” RP 710.

In light of the trial court’s oral decision, FF 10, that the parties agreed that Sunrise would obtain a segregation, can only mean that Sunrise agreed separately from the PSA that it would segregate the 20 acre parcel. As a result, the deadline in the PSA to provide a correct legal description by June 11 did not apply to the segregation. Thus, Sunrise did not breach the PSA by failing to segregate the property by June 11 or even by September 4.

Without its theory that Sunrise breached the PSA by not segregating by June 11, Trinity must defend the trial court’s theories of waiver, equitable estoppel and breach of the duty of good faith. But as we now show, Trinity’s attempt fails.

#### **REPLY TO RESPONDENT’S STATEMENT OF FACTS**

**A. Trinity fails to defend several key findings to which Sunrise assigned error and argued.**

Trinity impliedly admits that no substantial evidence supports four findings of fact to which Sunrise assigned error.

Sunrise argued that no evidence supports FF 16, CP 425, that “[n]ormally” Pierce County would take approximately sixty days to process a segregation request. BA 18 n. 9. The significance of this finding is that it permitted Trinity to argue that the segregation

would have been completed prior to the 60 day deadline for filing the preliminary plat if Sunrise had filed the segregation request by June 11, the date for removing the feasibility contingency.

Trinity impliedly concedes that FF 16 is false because Trinity fails to identify any evidence that would support it.

Sunrise argued that no evidence supports FF 28, that Clark McGowan told Larson to submit the plat application even without the segregation. BA 16 n. 8. Trinity apparently proposed FF 28 to bolster the theory that McGowan did everything possible to satisfy the requirement of the PSA that the plat application be filed by September 4.

Trinity impliedly concedes that FF 28 is false because Trinity fails to identify any evidence to support it.

Sunrise argued that the evidence contradicts FF 36 that “Clark McGowan of Trinity Land reasonably believed that Sunrise Development would provide an extension of time to file the preliminary plat application.” BA 35-36. Without this finding, Trinity’s equitable estoppel claim fails because reasonable reliance is required to establish estoppel. *Id.*

Trinity cannot point to any evidence that would support FF 36, never defending the finding in its brief. Trinity simply argues in

general terms, without any citation to the record, that Trinity relied on the fact that Sunrise was late in filing the segregation request. RB 34. No evidence supports FF 36.

Sunrise argued that no evidence supports FF 10 that the parties “did not intend that the purchase and sale agreement would include all the terms of their agreement regarding the subject property.” BA 11-12. Trinity fails to defend FF 10.

**B. Trinity unsuccessfully tries to defend other findings of fact to which Sunrise assigned error and argued.**

Sunrise showed in its opening brief that no evidence supports FF 11 that, “The parties agreed that Sunrise Development would have the duty of having the subject property segregated from its larger parent parcel of 288 acres.” BA 11-14. Sunrise acknowledged that Carl Halsan said that it would be the responsibility of Sunrise to segregate the property, BA 12-13, but showed that everyone knew that Halsan had no authority to agree on behalf of Sunrise to any terms of the PSA. *Id.* Sunrise also pointed out that no one ever said that Sunrise had any duty to segregate the property prior to any specific date, and that the trial judge stated in his oral decision that, “this was not something that

they particularly bargained about. That's clear to me. And they didn't." BA 14, quoting RP 710.

Unable to answer these points, Trinity spends several pages of its brief establishing the point that Sunrise forthrightly acknowledged in its opening brief, that Halsan said during the negotiations that Sunrise would segregate the parcel. BR 3-7. But Trinity never responds to the undisputed facts that: Halsan had no authority to enter into any agreement on behalf of Sunrise; the Corlisses both testified that they had no discussion about segregation; the McGowans had no idea that segregation was allegedly required before filing the plat application until shortly before the deadline for filing the application. BA 10, 12-14. Clark McGowan testified, not that he thought the parties had agreed that Sunrise would segregate the property, but that the duty to segregate arose from Sunrise's obligation to provide a correct legal description. BA 13-14.

Trinity relies on a statement in closing argument by Sunrise's trial counsel that "there was a segregation discussed at the time of the negotiations." BR 7, quoting RP 683. Aside from the obvious point that statements of counsel are not evidence, discussing

segregation is different from agreeing to segregate the property, and to do so before the deadline for filing the plat application.

Sunrise showed that the evidence fails to support FF 33 that Kamieniecki would have rejected the preliminary plat application if the segregation had not been completed. BA 16 n. 7. Sunrise pointed out the logical flaw in jumping from the fact that Kamieniecki thought segregation was required to the conclusion that Kamieniecki would have rejected the plat application. *Id.* As Sunrise noted, Kamieniecki testified that he would have made further inquiries before rejecting the plat. *Id.*

Trinity clings to its logically flawed argument, trying to defend FF 33 based solely on the evidence that Kamieniecki believed that segregation was required. BR 18-20. Trinity points to the closing argument of Sunrise's trial counsel, who said that Kamieniecki thought segregation was required, BR 18, totally ignoring counsel's subsequent statement that Kamieniecki would not have rejected the plat application, but would have consulted with his supervisor, who knew that the application should be accepted. RP 692-93. The trial court found that the supervisor would have accepted the plat application, FF 34, CP 428, and the evidence fails to support FF 33 that Kamieniecki would have rejected the application.

Sunrise assigned error to FF 35 that it was reasonable for Trinity to rely on Kamieniecki in concluding that the plat application would not be accepted without having completed the segregation. Sunrise's point is that the reasonableness or unreasonableness of Trinity's reliance or beliefs has nothing to do with whether or not the PSA became null and void on the deadline. BA 45.

Sunrise showed in its opening brief that the evidence (and the trial court's oral decision) both contradict FF 41 that, "[t]hrough September 2003, both parties believed that Trinity Land could not submit the preliminary plat application to Pierce County without the subject property first being segregated from the larger parcel." BA 10-11 (emphasis in original). Carl Halsen believed that the deadline for segregation was anytime prior to closing, not prior to the plat application. RP 117-18. Neither Harry Corliss, Scott Corliss, Clark McGowan, nor Ryan McGowan knew that segregation was required. BA 10. Carl McGowan testified that he first heard (incorrectly, as it turns out) that Pierce County would not accept a plat application without segregation seven to ten days before September 4, about four months after signing the PSA. BA 10. Based on this evidence, the trial court concluded in his oral decision that neither Trinity nor Sunrise knew that tax segregation

was required in order to file a preliminary plat application. BA 10, citing RP 709-10.

In the face of this overwhelming evidence to the contrary, Trinity claims that Sunrise must have believed that segregation was necessary because Harry Corliss stated at one point that McGowan should be given more time because Sunrise did not get the segregation completed in a timely manner, and that there was some sense that Sunrise wanted the segregation accomplished “as quickly as possible.” BR 21-22. But Sunrise had an obvious reason for wanting to file the segregation request -- Sunrise had already missed the deadline for providing a correct legal description.

Finally, Trinity argues that Sunrise must have thought that segregation was necessary before filing the plat application because neither Halsen nor the Corlisses told Trinity to the contrary. BR 22-24. “[S]ilence is acceptance only where there is a duty to speak.” ***Saluteen-Maschersky v. Countrywide Funding Corp.***, 105 Wn. App. 846, 853, 22 P.3d 804 (2001).

## REPLY ARGUMENT

- A. **The findings and evidence fail to support the trial court's conclusion that Sunrise waived compliance with the 60 day deadline to file the preliminary plat application by missing the 30 day deadline for supplying a correct legal description, where Sunrise neither intended nor communicated any intention to waive.**

The parties agree on the legal principles governing waiver.

Trinity labors valiantly to bring the facts of this case within the legal doctrine, but the facts remain stubbornly contrary to a waiver theory. Little wonder that Sunrise never pled waiver.<sup>1</sup>

Trinity and Sunrise agree on the legal description of waiver.

Trinity states:

Waiver is the intentional abandonment or relinquishment of a known right. It must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive. ***Dep't of Rev. v. Puget Sound Power & Light Co.***, 103 Wn.2d 501, 505, 694 P.2d 7 (1985).

BR 25-26. *Accord*, BA 25-26.

Trinity tries to convert this into a factual appeal, arguing that, “[t]he trial court found, as a factual finding, that Sunrise waived its right to enforce the time is of the essence provision of the contract.”

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<sup>1</sup> Trinity argues that the trial court was free to find waiver because the factual disputes were “fully explored at the trial court level.” BR 33. Sunrise’s argument is not that the trial court was prohibited from finding waiver, but that Trinity’s failure to plead waiver strongly suggests that neither Trinity nor its counsel believed that there was a waiver.

BR 29, also 30-31. To the contrary, the trial court did not find waiver as a matter of fact, but as a conclusion of law, C/L 11, CP 432, and the facts fail to support waiver.

The parties agree, as stated above, that waiver must be intentional, but there is not a shred of evidence to support any intent by Sunrise to waive the null and void date in ¶ 8 of the PSA. There is no finding of intent because the evidence is so clearly contrary to intent. Trinity has no response to the undisputed fact that Scott Corliss was unhappy with the PSA and determined to watch the deadlines closely in hopes that Trinity would fail to meet the deadlines in the contract. BA 29-30. The trial court expressly found that Scott Corliss was unhappy with the agreement and was seeking a way to get out of the PSA. FF 38, CP 429.

Nor does Trinity have any answer to the fact that both Clark and Ryan McGowan knew that Scott Corliss was unhappy and decided that they must meet the deadline for waiving the feasibility contingency and depositing the earnest money even though Sunrise had not yet provided the legal description. BA 30-31. Nor does Trinity respond to Sunrise's argument that no evidence supports FF 36 that Trinity reasonably believed that Sunrise would agree to an extension of time, as argued above.

Nor is there any evidence of waiver after the null and void date passed. To the contrary, the trial court found that upon the expiration of the null and void date Scott Corliss immediately had a letter drafted and delivered to Trinity informing it that Sunrise considered the PSA null and void. FF 37, CP 429. The trial court also found that ten days later Sunrise once again stated its position that the contract was terminated. FF 40, CP 429.

In short, the trial court never found that Sunrise intended to waive the null and void date in the contract. The Conclusion of Law on waiver is contrary to findings 37, 38 and 40 that Sunrise intended to adhere to the strict deadlines of the contract and advised Trinity that the PSA was null and void immediately after Trinity missed the deadline.

Nor do the cases cited by Trinity support the trial court's waiver conclusion. Trinity devotes four pages of its brief to discussing the facts and holdings of *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 483 P.2d 880 (1971). *Reynolds Metals* is unhelpful for Trinity because it affirms a trial court's finding that there was no waiver by the party seeking to enforce the contract. 4 Wn. App. at 699-702. Like this case, there simply was no evidence of intent to waive.

Trinity attempts to justify the trial court's waiver conclusion by taking a fragment of the **Reynolds Metals** case out of context. Trinity argues that **Reynolds Metals** holds that, "If a contract requires performance by both parties, the party asserting non performance by the other must establish his own performance." BR 27. Trinity adds, "Here, Sunrise fails to meet this initial requirement." *Id.* at footnote 3.

The statement from **Reynolds Metals** is inapplicable to waiver and inapplicable to this case. Reynolds entered into a contract under which it would supply copper and aluminum components to Electric Smith, which would in turn fabricate, assemble, and deliver complete "pot bus assemblies" to Reynolds. BR 26. Reynolds initially breached the contract, causing a delay in Electric Smith's production schedule. Reynolds then terminated the contract and Electric Smith sued for damages (not specific performance). The trial court found that Reynolds' actions substantially and materially contributed to Electric Smith's delay, and that, "the total effect leads to an inescapable conclusion that [Reynolds' actions] did constitute a serious, substantial and material cause of the delay in the Electric Smith production

schedule.” 4 Wn. App. at 698. The Court of Appeals concluded that this finding was supported by substantial evidence. *Id.* at 699.

The difference between ***Reynolds Metals*** and this case is that Sunrise’s delay in providing the legal description to Trinity did not cause Trinity to miss the deadline for filing for plat application. As discussed above, no evidence supports FF 16 that, normally “Pierce County . . . would take approximately sixty days” to process a segregation request. CP 425. Moreover, there is no finding that any delay by Sunrise caused Trinity to fail to file the plat application. The segregation request would not have been processed without some special request from Sunrise or Trinity, as discussed at BA 17-18. Trinity did not attempt to file the plat application, did not ask the County to accelerate the request, and did not discuss the matter with Sunrise. Thus, the delay by Sunrise in providing the legal description was not a cause of Trinity’s failure to file the plat application.<sup>2</sup>

In a similar vein, Trinity seizes upon one statement in ***Mid-Town Ltd. P’ship v. Preston***, 69 Wn. App. 227, 232, 848 P.2d

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<sup>2</sup> Trinity states in a footnote that Sunrise’s delay “was a cause of Trinity not meeting the deadline to file the preliminary plat application which is the only basis for Sunrise terminating the contract.” BR 25 n.1. Trinity neither argues this statement nor supports it with any evidence or finding.

1268, *rev denied*, 122 Wn.2d 1006 (1993). BR 31. In ***Mid-Town P'ship***, the Court noted that the defendant was never in breach of the sale agreement. *Id.* Although this is one of the facts in ***Mid-Town P'ship***, the Court did not rely on the lack of any breach, but on the failure of the plaintiff to prove any intent to waive. 69 Wn. App. at 233-34. As in this case, there was no evidence of intent to waive.

**B. The findings and evidence fail to support the trial court's conclusion that Sunrise was estopped from holding Trinity to the 60 day deadline to file the preliminary plat application where: Sunrise never said it would accept late performance; Trinity knew Sunrise would not accept late performance; and Trinity did not rely on the actions of Sunrise.**

Trinity does not seriously defend the equitable estoppel theory, which was neither pled nor proven nor included in the trial court's oral decision. BR 33-34. Trinity simply repeats the elements of equitable estoppel and then asserts without citation to findings or the record that each element of equitable estoppel was satisfied. This half-hearted effort is insufficient to support a theory of equitable estoppel.

FF 36 purports to address the reasonable reliance element of equitable estoppel: "Clark McGowan of Trinity Land reasonably believed that Sunrise Development would provide an extension of

time to file the preliminary plat application.” As discussed above, Sunrise challenged this finding as contrary to the evidence, BA 35-37, and Trinity fails to defend the finding or identify any evidence to support it. Nor does any finding support the first and third elements of equitable estoppel. BA 34, 37. Without any evidence, the trial court erred in concluding that Sunrise was equitably estopped.

**C. The trial court erred in finding that Sunrise breached the duty of good faith because the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract.**

Sunrise showed in its opening brief that the duty of good faith “does not extend to obligate a party to accept a material change in the terms of its contract.” BA 39, quoting *Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991).

Trinity’s brief again fails to tie the duty of good faith to any requirement in the contract. Rather, Trinity’s argument is that Sunrise’s failure to provide the legal description by June 11 requires Sunrise to agree to a change in the null and void date: “The issue is whether, once Sunrise failed to abide by the first deadline of June 11 to provide a correct legal description, does the duty of good faith and fair dealing prevent Sunrise from terminating

the contract based upon an interim deadline that did not affect the ultimate closing date.” BR 34-35.

There is no authority for the proposition that the duty of good faith requires a party that breaches one clause of a contract to agree to a change in a different clause of a contract. Trinity relies on the statement in **Badgett** that the parties must cooperate “so that each may obtain the full benefit of performance,” but **Badgett** also says that a party need not accept a material change in the terms of the contract, the duty of good faith does not “inject substantive terms into the parties’ contract,” and “the duty arises only in connection with terms agreed to by the parties.” **Badgett** at 569-70. Nothing about the duty of good faith required Sunrise to agree to an extension of the null and void date.

Trinity argues that, “[e]vasion of the spirit of the bargain is a violation of the duty of good faith and fair dealing.” BR 35, citing **Scribner v. WorldCom, Inc.**, 249 F.3d 902, 910 (9<sup>th</sup> Cir. 2001). Trinity has taken this fragmentary statement out of context. Plaintiff Scribner was an employee of defendant WorldCom, holding stock options exercisable if WorldCom terminated him “without cause.” WorldCom terminated Scribner, not because of any shortcomings in his performance, but because WorldCom sold the division of the

company in which Scribner worked. WorldCom claimed that the termination was “with cause” because it facilitated the sale of Scribner’s division. WorldCom relied on a portion of the option plan giving broad discretion to the company to interpret contract terms.

249 F.3d at 909. The Ninth Circuit held:

Good faith limits the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses. . . . [A]lthough WorldCom acknowledges that the Committee’s discretion could not be wholly unfettered, it has never explained what, exactly, fettered its discretion. Instead, it has simply argued that cause does not mean what Scribner thinks it means. This lack of explanation leads us to conclude that the Committee, like Humpty Dumpty, felt that the word “cause” could mean whatever it wanted it to mean. Even granting that the Committee had broad discretion to interpret the contract, we find this to be an unreasonable result that Washington courts would disfavor.

249 F.3d at 910-11.

Sunrise has not offered a Humpty Dumpty interpretation of the contract. Rather, Sunrise relies on the specific provision of the contract that it became null and void when Trinity failed to file the plat application within 60 business days.

This case would be different if Sunrise’s delay in providing the correct legal description had actually prevented Trinity from filing the plat application. But, as discussed above, that is not the case. The segregation would not have been accomplished within

60 business days even if Sunrise had filed the segregation request earlier. BA 17-18. The segregation could have been accomplished earlier if Trinity had asked that it be expedited, but Trinity did not do so. *Id.* Moreover, Vicky Diamond, the supervisor of the Planning and Land Services Department for Pierce County would have permitted Trinity to file the plat application even without the segregation. FF 34, CP 428. Accordingly, Sunrise's delay in providing the legal description and submitting the segregation request did not prevent Trinity from complying with its obligations under the contract. Trinity simply fails to show a breach of the duty of good faith.

In the Conclusion of its brief, Trinity offers the peculiar argument that the deadline for filing the preliminary plat application was not for the benefit of Sunrise and that Sunrise breached the duty of good faith by failing to extend the filing deadline. BR 39. Trinity argues incorrectly that, "this was not a contract that tied the closing date to a certain number of days after the preliminary plat application was filed or a certain number of days after the preliminary plat application was granted." *Id.*

Trinity's interpretation of the PSA is incorrect. The closing date for the transaction was 30 days after approval of the

preliminary plat and any governmental appeals, as well as other governmental approvals, but in any event, no later than twelve months after removal of the feasibility contingency. PSA ¶ 10.A. Accordingly, the sooner Trinity filed the preliminary plat application, the sooner Pierce County was likely to grant approval. The sooner Pierce County approved the application, the sooner the sale would close and Sunrise would be paid. Nothing about the duty of good faith required Sunrise to give up its reliance on the filing deadline. In any event, whoever might be benefited by the filing deadline, the deadline was a condition precedent to the enforceability of the Purchase and Sale Agreement.

**D. Trinity's duty to file the plat application was both a duty and a condition precedent, the failure of which excused Sunrise from any further performance under the PSA.**

Sunrise showed in its opening brief that the null and void date of paragraph 8 is a condition precedent, one of "those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." BA 43 (quoting *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 79, 96

P.3d 454 (2004) (quoting *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964)).

Trinity argues half-heartedly and briefly that there is no finding that the parties intended the null and void date to be a condition precedent. BR 36. Trinity offers a fragmentary quote from *Tacoma Northpark* to justify its argument, stating:

As Sunrise acknowledges, “whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depend upon the intent of the parties.”

BR 36. Trinity has misquoted the *Northpark* case, omitting the second half of the sentence. The full quote is as follows:

Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances.

*Tacoma Northpark*, 123 Wn. App. at 79 (quoted at BA 44) (emphasis on the portion of the sentence omitted by Trinity). The interpretation of the null and void date is an issue of law reviewed de novo, *Tacoma Northpark*, 123 Wn. App. at 80, not a factual question.

The language in the PSA is:

In the event Purchaser does not meet this deadline, then this agreement shall be null and void, unless otherwise extended by mutual agreement of both Seller and Purchaser . . .

PSA ¶ 8. The only fair and reasonable construction of ¶ 8 is that filing the plat application within 60 business days is a condition precedent to the right to performance under the PSA. There is no testimony to the contrary, and it is difficult to conceive of testimony that could establish anything else.

As discussed in Sunrise's opening brief, the trial court's findings of "reasonableness" are irrelevant to the expiration of the null and void date as a condition precedent. Trinity failed to comply with ¶ 8 and the PSA terminated. It was error to award specific performance.

**E. The parties agree that the prevailing party on appeal is entitled to recover its attorneys fees and costs.**

Both sides acknowledge that the prevailing party in this appeal should recover attorney fees and costs. BA 47, BR 38.

**CONCLUSION**

Trinity fails to show that Sunrise intentionally waived the null and void date of ¶ 8 of the PSA. Trinity fails to prove any of the element of equitable estoppel, especially failing to prove that it reasonably relied on Sunrise's untimely providing a legal description when Trinity failed to file the plat application in a timely manner. Trinity fails to show that Sunrise had any good faith obligation to extend the null and void date under the contract.

Trinity has failed to prove its case. This court should reverse  
and award attorney fees to Sunrise for trial and appeal.

RESPECTFULLY SUBMITTED this 11th day of May 2007.

WIGGINS & MASTERS, P.L.L.C.

A handwritten signature in cursive script, reading "Charles K. Wiggins", with a horizontal line extending to the right from the end of the signature.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing REPLY BRIEF postage prepaid, via U.S. mail on the 11 day of May, 2007 to the following counsel of record at the following addresses:

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