

FILED

No. 302440

MAY 15 2012

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SCHREINER FARMS, INC.,
A Washington Corporation

Appellant,

v.

AMERICAN TOWER, INC., a Delaware Corporation;
NEXTEL WEST CORPORATION, INC. d/b/a NEXTEL
COMMUNICATIONS, a Delaware Corporation; TOWER
ASSET SUB INC., a Delaware Corporation; SPECTRASITE
COMMUNICATIONS, INC., a Delaware Corporation; and
WESTERN OREGON WIRELESS COMMUNICATIONS,
INC., a Oregon Corporation; and WASHINGTON OREGON
WIRELESS, a Washington Corporation.

Respondents.

REPLY BRIEF OF APPELLANT
and
BRIEF OF CROSS-RESPONDENT

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Attorneys for Appellant

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I. INTRODUCTORY STATEMENT

In their opposing Brief Defendants, AMERICAN TOWER, INC., a Delaware Corporation; NEXTEL WEST CORPORATION, INC., d/b/a NEXTEL COMMUNICATIONS, a Delaware Corporation; TOWER ASSET SUB INC., a Delaware Corporation; SPECTRASITE COMMUNICATIONS, INC., a Delaware Corporation; and WASHINGTON OREGON WIRELESS, a Washington Corporation, hereinafter “NEXTEL”, criticize SCHREINER’S FARMS, INC., hereinafter “SCHREINER”, for not providing a “fair statement of the facts without argument.” RAP10.3 (a)(5). In their brief this is referenced as an “objection” to the brief.

In its opening brief SCHREINER provided both a “Summary”, (Appellants Opening Brief, page 3-6) without citations to the record and a Statement of the “Substantive Facts and Procedural Facts” which includes citations to the record,

(Appellants Opening Brief, pages 6- 18). The former is argumentative. The later is not.

The argumentative comments in the “Summary” are a re-characterization of the comments made by the trial judge on this matter in ruling on the SCHREINER’s motion for reconsideration. The judge described NEXTEL’s, argument and subsequently the law, which he believed he had to follow, as ‘Draconian’. (RP August 16th, 2011, page 34)

II. ARGUMENT

1. **The issues on appeal are properly before this Court.**

In their opposition NEXTEL argues that several of the issues raised in SCHREINER’s Opening Brief were not raised below and should therefore not be considered by this court. SCHREINER respectfully submit that each was timely and properly “brought to the attention of the court” (RAP, Rule 9.12) and the facts relevant to each issue were before the court on the original motion for summary judgment. (CP 286-484).

a. The issues were timely raised.

RAP 9.12 limits review to “issues called to the attention of the trial court.” *Mithoug v. Apollo Radion of Spokane*, 128 Wn. 2d 460, 462 (1996). RAP 2.5(a) grants discretion to the reviewing court in deciding whether to review errors below claimed to have not been raised. By using the term “may” RAP 2.5(a) is written in discretionary, rather than mandatory, terms. *Roberson v. Perez*, 156 Wn.2d 33, 39 (2005); *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 649 (2000), overruled on other grounds. Appellate courts have discretion to address issues not raised at trial if the appellate court so chooses. *Smith v. Shannon*, 100 Wn.2d 26, 37 (1982). If an issue raised for the first time on appeal is “arguably related” to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal.” *Lunsford. Saberhagen Holdings, Inc.* 139 Wn. App. 334, 338 (2007).

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As to the three issues identified by NEXTEL in their brief each was timely and properly brought to the attention of the trial court and is, at a minimum, arguably related to the issues in the trial court. In oral argument on NEXTEL's Motion for Summary Judgment, SCHREINER's counsel argued the issue of ongoing breaches occurring over a period of time on the issue of the statute and cited the facts before the court on that issue. (RP May 17th, 2011, page 28).

The quite unusually procedural history of this matter is important to an understanding of when and why the issues arose when they did.

By motion for summary judgment, NEXTEL asked the trial court to dismiss the case, in part, based on the statute of limitation. In their moving papers NEXTEL expressly admitted that there was in fact a "discovery rule" applicable to the running of the statute of limitations in this case. (CP 110- 129). In support of their motion they argued that SCHREINER had failed to establish a material issue of fact as to whether

SCHREINER knew or should have known of the breach of lease in 2000.

In opposition SCHREINER successfully convinced the trial court that there was a material issue of fact as to the date of discovery of the breach and therefore denied the motion for summary judgment. (RP June 7th, 2011, page 7-9). Any alternative dates for breach were irrelevant to the issue raised by NEXTEL's motion.

Thereafter NEXTEL filed a motion for reconsideration limited to arguing that despite what they argued in the motion for summary judgment, there was no discovery rule applicable to this case. (CP 549-551). SCHREINER opposed the motion defending the original decision of the trial court interpreting *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566 (2006). The only issue presented to the court on NEXTEL's, motion was whether there was a discovery rule in Washington. SCHREINER's response was limited to the narrow issue raised by NEXTEL, ET AL.

Only after the trial court reversed its prior ruling and granted the motion for summary judgment based on the statute of limitation did the issue of when the breach occurred become in dispute. SCHREINER's motion for reconsideration was therefore the first occasion in which the issues now challenged by NEXTEL were relevant to the matter before the trial court.

The 'failure to cure' issue and the "continuing breach" issue were based on facts that were before the court in the original motion for summary judgment (CP 286-484) and were clearly raised in SCHREINER's Motion for reconsideration. (CP 739-749; 750-776). As mentioned above, during oral argument on the summary judgment motion the issue of breaches occurring after 2000 was raised and facts cited. (RP May 17th, 2011, page 28).

It seems inappropriate for this court to hold that it may not review these arguments now due to SCHREINER's failure to more fully articulate them in opposition to the motion for summary judgment where, due to NEXTEL's admission that

the discovery rule applied, such arguments were not directly relevant. Such a holding would allow a party to change their legal theory, as NEXTEL did, in their reply brief and impose upon SCHREINER a duty to raise all possible issues in oral argument for the first time.

In addition to the arguments set forth above, the “equity, fraudulent concealment/estoppel argument” was in fact raised in connection with the original motion for summary judgment and was therefore (before the court). (RP June 7th, 2011, pages 8-9).

b. The facts giving rise to these issues were before the trial court.

The facts necessary for review of these three challenged issues were before the trial court and are before this court. (CP 286-484). A reviewing court should consider a new argument on appeal “if the record has been sufficiently developed to fairly consider the grounds.” *Blueberry Place Homeowners*

Ass'n v. Northward Homes, Inc. 126 Wn. App. 352, 362
(2005).

Here, even if this Court were to decide that the issues should have been more fully brought to the attention of the trial court on the motion for summary judgment, it is clear from the record that the facts relevant to when the breach occurred, or was triggered was before the trial court and are before this court. Therefore, respectfully, this Court should consider these issues on appeal.

2. NEXTEL's opposition fails to meaningfully respond to the issues raised by SCHREINER.

a. The trigger issue.

The underlying action is one for declaratory relief, not breach of contract. (CP 89-94) The issue for which a judicial declaration was sought is not when did the breach occur but rather when NEXTEL were in default under the ground lease. By the very term of the contract, the default occurs only when

NEXTEL with notice of the claimed default from SCHREINER fails to cure the default. (CP 328-335).

NEXTEL's, opposition ignores this as the relief sought and instead suggests that SCHREINER, is asking the Court to terminate the lease due to breach. This mischaracterization of the action allows NEXTEL to argue that the cause of action accrued at the time of the lease inception and NEXTEL's placing equipment on the property without notice or permission of SCHREINER.

NEXTEL's argument herein would only have merit if SCHREINER were suing for damages arising from the breach. In the context of seeking a judicial determination of default, it has no application.

The ultimate issue before this Court is whether SCHREINER's inability to discover the breach, and therefrom inability to give notice of the default should immunize NEXTEL from responsibility for their wrongful conduct. Under the contract, unless and until SCHREINER gives

NEXTEL notice of the default and NEXTEL does not cure the default (remove the offending equipment/users) within the time allowed, SCHREINER cannot terminate the contract, ever. (CP 328-335). The declaratory relief action was intended to establish the default and therefore form the legal basis for the termination of the contract.

The cause of action of SCHREINER, seeking a declaration that NEXTEL is in default, does not arise until the event of NEXTEL's failure to cure and therefore the issue of whether the discovery rule applies is irrelevant and SCHREINER's action was timely filed. (CP 388-390) (Letter notice to NEXTEL of request to cure, dated April 25th, 2007).

b. The continuing breach issue.

In their opposition NEXTEL cites several non-Washington cases, none of which involve actions for declaratory relief. Each involves claims for damages associated with a breach which immediately gave rise to a claim for

damage. In those cases the party tried to claim that each day they were damaged, a new statute of limitation arose.

That is not the argument raised by SCHREINER herein. In our case, SCHREINER's failure to request the equipment removal, even if it knew it was there, is not a waiver of SCHREINER's right to subsequently request the removal. (CP 329, contract section 10). The contract allows SCHREINER to determine when to demand removal. The breach occurs when it is not removed. Because SCHREINER's right to request cure is continuing and not lost if not exercised, the breach is continuing. Quite simply, there is no deadline for SCHREINER to request a cure under the contract.

c. The fraudulent concealment/equity issues.

While it is accurate, as stated by NEXTEL that a cause of action for damages arising from fraudulent concealment was not pled in the complaint (no action for damages was pled), that fact is irrelevant to the issue raised on appeal.

It is SCHREINER's contention on this issue that an exception to the "no discovery rule" should apply where there is evidence that NEXTEL's fraudulently concealed the breach. In its original ruling on the motion for summary judgment the trial court discussed this issue in denying the motion. (RP June 7th, 2011, pages 8-9).

This issue involves an equitable defense to the statute of limitations, not affirmative relief. The absence of a fraud cause of action does not preclude the equitable defense.

Citing *Burns v. McClinton*, 135 Wn. App. 285 (2006) the trial court found that the discovery rule can apply when a defendant has fraudulently concealed a material fact from a plaintiff, depriving the plaintiff of the knowledge of the accrual of the cause of action. (CP 668, p. 6, lines 7-13)The trial court also found that a material fact as to that very issue was present. (CP 863).

In their opposition NEXTEL does not cite or discuss *Burns*. SCHREINER respectfully submits that the equitable

relief as to the statute of limitation arises herein from tort, more than contract. While the obligations of the parties arise from the contract, the right to equitable relief claimed herein arises from the tortuous conduct of NEXTEL established as being at issue by facts presented to the trial court.

3. **The discovery rule applies to the present case after 1000 Virginia Ltd. Partnership v. Vertecs Corp.**

NEXTEL's argument in opposition to SCHREINER's appeal on this issue is primarily a recitation of the arguments made before the trial court.

In its opposition brief, NEXTEL suggests that SCHREINER has "re-characterized" its case as one for Declaratory Relief to avoid the breach of contract statute of limitation. (Citing *Eastwood v. Cascade Broadcasting Co.* 106 Wn2d 466, 469 (1986)). In reality, it is NEXTEL who re-characterized SCHREINER's action not SCHREINER. The essence of the allegations in the complaint are for declaratory relief and declaratory relief alone. (CP 3-7; 89-94)

SCHREINER sought only a judicial finding of its right to declare NEXTEL in default under the contract so the remedies arising from the ground lease contract could be pursued. Without the declaratory relief action SCHREINER would have been required to expose itself to a breach of contract action by NEXTEL for terminating the contract without cause. No breach of contract damages were sought by SCHREINER. (CP 89-94).

On the actual issue of the correct application of *Vertecs*, NEXTEL disregards the language of that decision cited by SCHREINER in its opening brief. It is the intent of *Vertecs* that is at issue here, not a selective citation of one or two conclusionary sentences or cites to prior decisions.

SCHREINER respectfully incorporates herein the argument and authority cited by SCHREINER in its opening brief. The decision of the trial court on this issue should be reversed. The language of the Supreme Court manifests an intent on the part of the Court, in *Vertecs*, to empower the lower

courts to apply the discovery rule where the guidelines and principles of equity they outlined in their decision so compel.

III. SCHREINER'S OPPOSITION TO NEXTEL'S CROSS-APPEAL

1. Introductory Statement.

By their cross-appeal NEXTEL seeks to reverse the trial courts' findings that material issues of fact existed as to the substantive issue upon which SCHREINER sought declaratory relief. The four claimed errors, none of which were raised in NEXTEL's motion for reconsideration, relate to a claim that there was no evidence that NEXTEL was in default or in breach of the lease.

2. Standard of Proof.

In reviewing the order denying NEXTEL's motion for summary judgment all reasonable inferences must be drawn in favor of the non-moving party. *Hanson v. Friend* 118 Wn.2d 476, 485 (1992). In addition, NEXTEL must present evidence

from which a trier of fact could reach but one conclusion after considering all of the evidence in the light most favorable to NEXTEL *Id.*

3. Counter Statement of the Case.

On August 28, 1999, SCHREINER (Lessor) and Respondent NEXTEL (Lessee) executed a Communications Site Lease Agreement (“Ground Lease”). (CP 328-337.)

During the negotiations, NEXTEL provided a form contract that it typically uses when leasing property to install and maintain its cell phone communication equipment. (CP 309-313.) Prior to the execution of the Ground Lease, SCHREINER raised various issues with NEXTEL’s form contract as written, and the parties mutually agreed to several changes based upon specified justifications as memorialized in memorandums prepared by NEXTEL entitled “Lease Modifications Requested with Justifications.” (CP 292-296; CP 298-303; CP 305-307; *see also* CP 309-313.)

First, SCHREINER insisted that the property be used by only *one* wireless communication company at a time. (CP 298-302; 309-313.) Changes were thereby made to NEXTEL's form contract to guarantee that only one company would be utilizing the site, no equipment of any kind other than that expressly authorized by the Ground Lease or subsequently specifically authorized by Schreiner Farms would be placed on the property. (CP 321.) Moreover, SCHREINER was "adamant about limiting subleasing or licensing without consent" (CP 302). Changes were made in which the Ground Lease that allowed NEXTEL to assign the Ground Lease but *only* by transferring *all of its rights and obligations* to a new entity and only to an entity that would be using the property for "provision of *a* radio communications facility" (CP 323.) Documents evidencing the negotiations, requested changes, and reasons for the requested changes to the NEXTEL form contract unequivocally establish the parties' mutual understanding and intent in this regard. (CP 292-326.)

Specifically, as reflected in the final Ground Lease, the paragraph setting forth the permissible use of the property was changed to reflect an “*a*” as emphasized above, added at the insistence of SCHREINER along with limiting the use to operations specific to Lessee’s communications system only:

2. Use. The Premises may be used by Lessee for any activity in connection with the provision of *a* radio communications facility from which *Lessee* can provide radio communications services *specific to Lessee’s operations.* (CP 328.) (emphasis added)

In addition, the following other changes were made as indicated:

6. Facilities; Utilities; Access. *No additional structures* beyond those proposed and depicted in Exhibit B can be considered part of this Agreement *unless previously approved by Lessor in writing,* which approval shall not be unreasonably withheld, but *may cause Rent to change.* In connection therewith, Lessee has the right to do all work necessary to prepare, maintain and later the Premises for Lessee’s business operations and to install transmission lines connecting the antennas to the transmitter and receivers. Title to the Lessee Facilities shall be held by Lessee. All of Lessee Facilities shall remain Lessee’s personal property and are not fixtures. (CP 328.) (emphasis added)

Moreover, Paragraph 14 of the NEXTEL form contract was amended at the request of SCHREINER to prevent assignments or subletting of a portion of the property as noted in the right margin of the 7/10/98 draft and subsequent versions of Paragraph 14 including the final. (CP 312.) Accordingly, paragraph 14 of the Ground Lease allows full and complete assignments of the Ground Lease *only* if NEXTEL assigns *all* of its rights and obligations to the assignee who thereafter assumes all rights and obligation, including the above requirement that the assignee use the Ground Lease solely to operate *a* wireless communications system specific to its operation:

14. Lessee may assign this Agreement to an entity upon written notification to Lessor by Lessee, subject to the assignee assuming *all* of Lessee's obligations herein. Upon assignment, Lessee which shall be relieved of all-future performance, liabilities, and obligations under this Agreement. Lessee shall not have the right to sublet or license the Premises or any portion thereof without Lessor's consent. (CP 330.)

The Ground Lease thereby expressly limits the use of the Premises by Lessee to operation of Lessee's radio communications services specific to Lessee's business. It also expressly identifies the location of and number of towers, antenna arrays and ground buildings permitted on the Premises.

Almost immediately after the Ground Lease was executed in August of 1999, NEXTEL, along with its co-Respondents herein, executed a series of assignments which on their face appear to be proper and authorized under the Ground Lease. (CP 423-431.) NEXTEL appeared to have assigned its rights to Respondent TOWER ASSETS, which, through NEXTEL's affiliate Respondent SPECTRASITE, assigned the ground lease to Respondent AMERICAN TOWER. (*Id.*)

Each of the "assignments" was in violation of the Ground Lease in that NEXTEL did not actually assign "all" of "its rights and obligations" but only licensed or subleased, without the knowledge and consent of SCHREINER, the Power Pole. In addition, the assignees were merely in the business of

maintaining and subleasing power poles to other wireless communications systems such as Respondent WASHINGTON OREGON WIRELESS for money. (CP 343-355). In discovery NEXTEL admitted that only Respondents Nextel and Washington Oregon Wireless are operating wireless communication services from the property. (CP 371.) Thus, other than Respondents Nextel and Washington Oregon Wireless, none of the Respondents are in the business of operating wireless communication services as required by the Ground Lease.

In addition, the admission that NEXTEL is still operating a wireless communication network from the tower is a fact wholly inconsistent with their having fully assigned their rights to American Tower. It is also inconsistent with American Tower operating a wireless communication network from the tower as required by the lease of any assignee.

What was secretly going on was that NEXTEL, behind the back of SCHREINER, was creating entities to operate the

power pole as a profit center, entering into contracts with entities like Respondent WASHINGTON OREGON WIRELESS to allow that wireless communications company to erect additional equipment and facilities on the property to operate another separate wireless communication network from the tower. (CP 339; CP 357-368; CP 423-426; CP 428-431.) For example, Respondent SPECTRASITE, not a party to the Ground Lease, contracted with Washington Oregon Wireless for the latter to erect antenna arrays and other equipment on the property of the Ground Lease without the knowledge and consent of SCHREINER. (CP 343-355.) The Ground Lease provided for no new equipment or facilities without the written consent of SCHREINER and an adjustment to the rent. (CP 328.) SCHREINER supposed “consent” was obtained by Respondent SPECTRASITE via a misleading and fraudulent request for consent which merely stated that a company named “Western Oregon Wireless” was taking over the lease and would be complying with the terms of the Ground Lease. (CP

339.) This letter does not in any way indicate that a second wireless communications company would be operating from the facility or that any new equipment would be erected.

The trial court rejected the arguments made herein by NEXTEL. It found that material issues of fact existed as to whether the lease was intended to allow more than one wireless company to operate at the site. It also found that on all of the other issues, material issues of fact existed. (RP June 7th, 2011, page 10-11).

4. Argument.

a. The use/assignment/consent issues.

In denying the motion for summary judgment, the trial court concluded that to grant the motion it would have to find that the lease contained no ambiguities and that as a matter of law it must be interpreted in NEXTEL's favor. (RP June 7th, 2011, page 10).

The evidence presented in opposition to the motion for summary judgment raised issues as to each of the following facts:

- Whether the language of the contract, drafted by NEXTEL, allows partial assignments and more than one wireless communication company to be lessee at the same time; (CP 298- 303)
- Whether the Respondent's, other than NEXTEL were using the property in a manner allowed by the language of the Ground Lease; (CP 327- 337; 369- 372)
- Whether, if the parties disagree as to the interpretation of the terms of the Ground Lease, the parties intended to allow more than one wireless communication company to operate from the property at the same time; (CP 298-303)

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- Whether the assignees were authorized users (wireless communication service providers) as required by the Ground Lease; (CP 369-372)
- Whether equipment and facilities were installed on the property by NEXTEL in violation of the Ground Lease and without the express written consent to such additions by SCHREINER; (CP 338- 340 & 342-355).
- Whether the “authorization” to license the property to WASHINGTON OREGON WIRELESS was a knowing and informed consent. (CP 338- 340 & 342-355)

NEXTEL’s arguments in the cross-appeal ignore the findings and conclusion of the trial court that it could not hold that the contract language was unambiguous and could not interpret the language in favor of the moving party. (RP June 7th, 2011, page 10, lines 19-24). This is a correct statement of

the law as to the standard of review for a motion for summary judgment. *Hanson v. Friend* 118 Wn.2d 476, 485 (1992).

The “use” language of the contract, and the written negotiations, clearly show intent on the part of the parties to limit use to one company providing their own wireless communication service. (CP 292,321,343;) (*See* CP 292 where NEXTEL’s agent for negotiating the contract states: “Delete “communications services”; Replace with “a radio communications facility”; Justification: Landlord requested limiting this language because he is only approving the one Nextel facility and he thinks ‘communications services’ is too broad”). Evidence that the multiple assignors were not wireless communications service providers was submitted. (CP 327-337 & 369-372). Evidence that NEXTEL licensed the power pole to another wireless communication company was before the trial court. (CP 343-349).

NEXTEL also argue that limitations on use should be strictly construed. However the trial court correctly recognized

that there was evidence to support a finding that the parties intended the use to be limited to one wireless transmission tower, no additional equipment and only full assignments could be given.

b. The acceptance of rent issue.

NEXTEL argues that because SCHREINER accepted rent no material issue of fact exists as whether NEXTEL violated the terms of the lease.

In their opposition NEXTEL argues that the court erred in finding a question of material fact concerning breach by NEXTEL's. NEXTEL cites a series of cases in Washington which basically find a waiver of claims can arise from conduct such as accepting rent or performance with actual knowledge of the alleged breach. (Citing *Evans v. Laurin*, 70 Wn2d 72, 76 (1966); *Douglas Northwest, Inc. v. Bill O'Brien & sons Const., Inc.*, 64 Wn. App. 661, 675-76 (1992); *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 362 (1911).

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Each of these cases, however, involved disputes in which the plaintiffs were aware of the breach. Such knowledge is a necessary element to any claim of waiver. *See e.g.* WPI 302.07: “A waiver is the intentional giving up of a known right.” “An implied waiver may be based only on unequivocal, rather than doubtful or ambiguous, statements or conduct.” The party asserting the defense has the burden of proof. *See* Comment, WPI 300.03. Intent cannot be inferred from doubtful or ambiguous factors. *Wagner v. Wagner*, 96 Wn. 2d 94, 102 (1980).

In the present case the trial court expressly found that there was a question of fact as to whether NEXTEL’s fraudulently concealed the breach. Even if the “concealment” was unintentional it would suffice to defeat a claim of waiver.

Certainly within the context of this appeal it cannot be said that NEXTEL met its burden of proof on this issue.

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III. CONCLUSION

For the foregoing reasons, SCHREINER respectfully requests this Court to reverse the Superior Courts' grant of summary judgment and to hold that SCHREINER's declaratory relief claims are not barred by the statute of limitations; and, accordingly, to remand this matter to the Superior Court for further proceedings. SCHREINER further submits that NEXTEL has failed to meet the very heavy burden of establishing that the trial court erred in denying their motion for summary judgment on the substantive issues presented therein.

DATE: 5/14/12

Respectfully submitted,

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PROOF OF SERVICE OF
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PROOF OF SERVICE

I hereby certify that a true and correct copy of the REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-RESPONDENT with corrections to the reference "CR" as now "CP" referencing "Clerk's Papers" filed herein was served by the method indicated below to the following the 14th day of May, 2012:

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