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NO. 71867-3 - I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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RED LETTER MINISTRIES,

Appellant,

v.

CITY OF NORTH BEND,

Respondent.

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**BRIEF OF APPELLANT IN REPLY**

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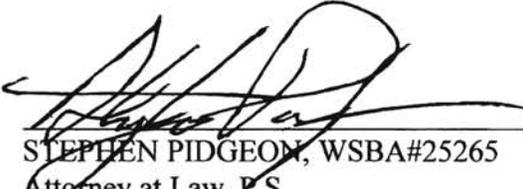
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Signed in Everett, this 26th day of January, 2015.

  
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## **INTRODUCTION**

### **Procedural History**

The King County Superior Court entered an order on summary judgment which dismissed all claims of Red Letter Ministries (hereafter, “RLM”) and dissolving the preliminary injunction on April 2, 2014. The City of North Bend (hereafter, “North Bend”) sought an award of attorney’s fees, and on April 21, 2014, an award denying the application for an award of attorneys’ fees and expenses was denied.

RLM then filed a Notice of Appeal on April 28, 2014, twenty-five days after the Summary Judgment decision. On May 1, 2014, North Bend brought its notice of cross appeal.

North Bend seeks an untimely review of the trial court’s decision on Summary Judgment which was decided on August 27, 2013. All of North Bend’s arguments on this order are untimely.

North Bend seeks an untimely review of the trial court’s decision Denying North Bend’s Motion for Reconsideration, entered on September 16, 2013.

North Bend has brought a timely appeal of the order denying the application for an award of attorneys’ fees and expenses.

North Bend does not appeal the order on summary judgment entered on April 3, 2014.

Because North Bend has failed to timely appeal the trial court’s order of August 27, 2013, and September 16, 2013, RLM will concentrate

its arguments on whether the court was within its discretion to deny the application for attorneys' fees.

### ISSUES

There are but two issues properly before the court: whether the trial court erred in granting summary judgment and dissolving the injunction in its decision of April 3, 2014, and whether the trial court abused its discretion in denying North Bend's application for an award of attorney's fees.

Because an oral contract was alleged by RLM, the non-moving party on summary judgment, the trial court erred in dismissing the action on summary judgment. *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 563 P.2d 211 (1977); citing *Howarth v. First Nat'l Bank*, 540 P.2d 486, 490 (Alas. 1975), *aff'd*, 55 P.2d 934 (Alas. 1976); *Old West Enterprises, Inc. v. Reno Escrow Co.*, 86 Nev. 727, 476 P.2d 1 (1970); *Karnofsky v. 4548 Main St., Inc.*, 192 N.Y.S.2d 577 (Sup. Ct. 1959); *Saluteen-Mschersky v. Countrywide*, 105 Wn.App 846 (2001), *Duckworth v. Langland*, 95 Wn.App. 1, 988 P.2d 967 (1998); *Crown Plaza Corp., v. Synapse Software Sys.*, 87 Wn.App. 495, 962 P.2d 824 (1997).

The court of appeals does not review an award or denial of attorney's fees *de novo*. The standard of review for a decision on attorney's fees is *abuse of discretion*. In order to reverse a fee award, it must be shown that the trial court manifestly abused its discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). This

narrow standard of review has been applied even when the fee award involved carrying out the mandate of the court. *Fisher Properties, Inc. v. Arden-May-fair, Inc.*, 115 Wn.2d 364, 375, 798 P.2d 799 (1990).

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992); *Watson v. Maier*, 64 Wn. App. 889, 896, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992). A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. *See Cooter & Gell*, 496 U.S. at 405.

North Bend makes no showing that the decision of the trial court in equity was based on an erroneous view of the law.

#### **ARGUMENT IN REPLY**

North Bend's attempt to appeal decisions on summary judgment from on August 27, 2013 and the denial of North Bend's Motion for Reconsideration, entered on September 16, 2013 are both untimely.

A party is allowed 30 days in which to file a notice of appeal. RAP 5.2(a). This 30-day time limit can be extended due to some specific and narrowly defined circumstances (none of which apply here). RAP 5.2(a). It can also be prolonged by the filing of "certain timely post-trial motions", including a motion for reconsideration. RAP 5.2(a), (e). A motion for reconsideration is timely only where a party both files and serves the motion within 10 days. CR 59(b). A trial court may not extend the time period for filing a motion for reconsideration. CR 6(b); *Schaefer v. Gorge*

*Commission*, 121 Wn.2d 366, 368, 849 P. 2d 1225 (1993); citing *Moore v. Wentz*, 11 Wn. App. 796, 799, 525 P.2d 290 (1974).

When an appellant fails to timely perfect an appeal, the disposition of the case is governed by RAP 18.8(b). *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978). That rule states:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal.... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b). North Bend has not provided any excuse for its failure to file a timely notice of appeal, nor has it demonstrated sound reasons to abandon the preference for finality. When a case is transferred to the Court of Appeals, if the appeal “has not been properly perfected, this court upon transfer will consider such a defect and take appropriate action.” *Glass v. Windsor Nav. Co.*, 81 Wn.2d 726, 727, 504 P.2d 1135 (1973).

North Bend is attempting to litigate facts before the court for which it has failed to timely assign error. North Bend’s failure to assign error to the facts entered by the trial court precludes the Court of Appeal’s review of these facts and renders these facts binding on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P. 2d 313 (1994); *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 24 L.Ed.2d 440, 90 S.Ct. 461 (1969);

*Tomlinson v. Clarke*, 118 Wn.2d 498, 501, 825 P.2d 706 (1992); *State v. Christian*, 95 Wn.2d 655, 656, 628 P.2d 806 (1981).

North Bend has but one timely cross-appeal before the court, which is whether the trial court abused its discretion in denying attorney's fees. There is no assignment of error by North Bend as to any factual holding in the course of the summary judgment decision, and North Bend has raised no appeal of that decision.

Nonetheless, North Bend makes a number of arguments which asks the court to find facts that trial court did not.

For instance, North Bend seeks to argue that Salli DeBoer is a proper party before the court. North Bend's Answer, Affirmative Defenses and Counterclaims, however, asserts all counterclaims against Red Letter: "North Bend accordingly asserts the following causes of action against Red Letter." CP 400. Salli DeBoer was never lawfully joined as a party.

A void judgment exists whenever the issuing court lacks personal jurisdiction. *Marley v. Dept. Labor and Industries*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994).

Civil Rule 13 provides as follows: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom

the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.” CR 13(a).

At no time did North Bend seek joinder of Salli DeBoer as a party to the action in its counterclaims. CP 400-401. While joinder may have been possible for North Bend under CR 13(f) at the trial court level, North Bend took no action that would have joined DeBoer as a party. North Bend, under CR 15, would be required to seek leave of court to amend its pleadings to include DeBoer as a party. It is foreclosed from doing so here.

Next, North Bend makes hay that Red Letter Ministries was in fact the sole proprietorship of Salli DeBoer, and therefore liability should attach to DeBoer. North Bend’s tax status arguments fail here as well.

The First Amendment to the United States constitution protects an establishment of religion and the free exercise thereof. First Amendment, United States Constitution. Similarly, Article I, Section 11 of the Constitution of the state of Washington renders similar protections.

The Internal Revenue Code also grants broad leeway to religious organizations. For instance, 26 U.S.C. § 508(a) provides that “New organizations must notify Secretary that they are applying for recognition

of section 501(c)(3) status; Except as provided in subsection (c), an organization organized after October 9, 1969, shall not be treated as an organization described in section 501 (c)(3).” Under subsection (c) we find the following language: Subsections (a) and (b) shall not apply to (A) churches, their integrated auxiliaries, and conventions or associations of churches.”

In short, an organized ministry need not obtain statutory limits to liability under the state’s corporation act to obtain a recognized tax status under the Internal Revenue Code.

North Bend appears to be making an attempt to ask the court of appeals to pierce the religious veil of the entity named as the sole opposing party in this action based on North Bend’s assumption of the tax status of RLM. A novel concept, to be sure, but wholly outside the scope of this appeal.

Because DeBoer was never named as a party in this action, and was never properly before the court, the court had no personal jurisdiction to assign liability to her in an award of attorney’s fees. The court recognized this in its final decision on fees, and therefore the court’s decision was not an abuse of discretion, but a rightful division of the law.

Because RLM has brought an appeal of the trial court’s decision on summary judgment, and North Bend has brought a timely appeal of the trial court’s denial its application for attorneys’ fees, RLM responds to those argument as follows:

### **The Trial Court Erred in Granting Summary Judgment**

The court reviews decisions on summary judgment *de novo*.

*Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). In this review, the court is required to construe all facts and reasonable inferences most favorably to the non-moving party. *Id.*

RLM is the non-moving party in this case. RLM has asserted its view of the facts from the record of the trial court. Most importantly, RLM asserts that a contractual offer was made by the mayor of North Bend orally concerning the house in question. CP 130. The offer was accept by Salli DeBoer on behalf of RLM. CP 130. The Mayor made further offers orally, including that the city would “give you the house, and a city lot for one dollar per year lease on the land next to the sewer plant.” CP 131.

The terms of this offer were accepted by DeBoer. CP 131.

The facts alleged by the non-moving party, in applicable part here, is that an oral contract was made involving a house (and additionally, a to-be-perfected land lease).

The facts alleged by the non-moving party, who was the plaintiff in the trial court action, is that DeBoer accepted the offer on behalf of RLM. This inference is reasonable, because the lawsuit was brought by RLM in RLM’s name, and all counterclaims were leveled at RLM. RLM is therefore the real party in interest for purposes of summary judgment.

Because an oral contract was alleged by RLM, the non-moving party on summary judgment, the trial court erred in dismissing the action on summary judgment. *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 563 P.2d 211 (1977); citing *Howarth v. First Nat'l Bank*, 540 P.2d 486, 490 (Alas. 1975), aff'd, 55 P.2d 934 (Alas. 1976); *Old West Enterprises, Inc. v. Reno Escrow Co.*, 86 Nev. 727 , 476 P.2d 1 (1970); *Karnofsky v. 4548 Main St., Inc.*, 192 N.Y.S.2d 577 (Sup. Ct. 1959); *Saluteen-Mschersky v. Countrywide*, 105 Wn.App 846 (2001), *Duckworth v. Langland*, 95 Wn.App. 1, 988 P.2d 967 (1998); *Crown Plaza Corp., v. Synapse Software Sys.*, 87 Wn.App. 495, 962 P.2d 824 (1997).

**The Trial Court Did Not Abuse Its Discretion in Denying the Application for Attorney Fees and Expenses**

The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is "better positioned than another to decide the issue in question." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 L.Ed.2d 359, 110 S.Ct. 2447 (1990) (quoting *Miller v. Fenton*, 474 U.S. 104, 114, 88 L.Ed.2d 405, 106 S.Ct. 445 (1985)). Further, the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to `reduce the reluctance of courts to impose sanctions'.... If a review de novo was the proper standard of review, it could thwart these purposes; it could also have a chilling effect on the trial court's willingness to impose ... sanctions." *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742-43, 770

P.2d 659 (1989) (quoting Fed. R. Civ. P. 11 advisory committee note, 97 F.R.D. 198 (1983)).

Because North Bend failed to add Salli DeBoer as a party; failed to name Salli DeBoer in its counterclaims; failed to seek leave to amend their pleadings to add Salli DeBoer as a party; and failed to litigate the issue of whether she should be a party at the trial court level, the court was without jurisdiction to enter an award of attorney's fees against a non-party, and to the extent that the order on summary judgment does so order, the court erred.

The trial court then went on to completely deny North Bend's application for fees, having knowledge of the full set of facts before it and the performance of the litigants over the course of the litigation. The decision was rightly in the hands of the trial court, and North Bend does not plead any instance of the trial court basing its decision on unreasonable or untenable grounds, nor does it argue that the trial court had an erroneous view of the law. Instead, it argues equity, which, as a matter of law, is insufficient to overturn the trial court's decision.

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992); *Watson v. Maier*, 64 Wn. App. 889, 896, 827 P.2d 311, *review denied*, 120 Wn.2d 1015 (1992). A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law. *See Cooter & Gell*, 496 U.S. at 405.

### **The Issue Before The Court Is Not Moot**

North Bend claims that the issue before the court – whether summary judgment should be granted pursuant to CR 56, because, viewing the facts and inferences in a light most favorable to the non-moving party, the court determines that there are no genuine issues of fact, and that the moving party is deserving of judgment as a matter of law, is moot because the city destroyed the house that arguably belonged to RLM immediately following the filing of this appeal by RLM.

RLM's argument as set forth in its complaint before the court goes to the existence of an oral contract, which cannot by rule be dismissed on summary judgment. North Bend pretends that Appellant sought no other relief other than injunctive relief, although the facts as set forth in the complaint allege an oral contract and a breach thereof. "BREACH OF CONTRACT" appears in 12 point font and in bold on the fourth page of the complaint. CP 4.

Even absent the written and court admissions by the parties that an oral lease and option to purchase agreement existed, where there is substantial evidence before the jury of part performance, part performance will support an action for damages. *Powers v. Hastings*, 20 Wn. App. 837, 845; citing *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971).

Part performance – the moving of the house at the expense of RLM, a fact which is readily conceded by North Bend, is found here, and will support an action for damages.

A case is moot only if a court can no longer provide effective relief. *In re Cross*, 99 Wn.2d 373, 376-7, 662 P. 2d 828 (1983); *State v. Turner*, 98 Wn.2d 731, 658 P.2d 658 (1983). However, the trial court can most assuredly grant effective relief for the breach of contract, and, given that North Bend continued to damage RLM even after the appeal here had been filed, RLM is at liberty to amend its complaint to conform to the evidence pursuant to CR 15(b).

In addition, further contract remedies are well within the ability of the trial court to grant relief. "If the performance of a condition precedent to liability, whether or not contained in an option or other contract, is made impossible by a premature notice of forfeiture, the innocent party is entitled to remedies for breach of contract." *Highlands Plaza, Inc. v. Viking Inv. Corp.*, 72 Wn.2d 865, 435 P.2d 669 (1967). See Restatement of Contracts § 295 (1932). The remedy for breach may consist of restitution of payments made. See *Golob v. George S. May Int'l Co.*, 2 Wn. App. 499, 468 P.2d 707 (1970); 17 Am.Jur.2d Contracts § 445 (1964).

The rule is that a positive refusal to perform a contract before performance is due may be regarded as a breach, and the injured party can bring an action without delay. *Casey v. Murphy*, 143 Wash. 17, 18, 253 Pac. 1078 (1927), see, also, *McFerran v. Herroux*, 44 Wn.2d 631, 269 P.2d 815 (1954), and Restatement of Contracts, § 318.

"The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties." *Berg v. Hudesman*, 115

Wn.2d 657, 667-9,801 P. 2d 222 (1990); *citing* Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L. Quar. 161, 162 (1965). 4 S. Williston, *Contracts* § 601, at 306 (3d ed. 1961). *See Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987); *In re Estates of Wahl*, 99 Wn.2d 828, 830-31, 664 P.2d 1250 (1983); *Dwelley v. Chesterfield*, 88 Wn.2d 331, 335, 560 P.2d 353 (1977).

Extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent. Restatement (Second) of Contracts §§ 212, 214(c) (1981).

Parol evidence is generally not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake. But, as stated in *Olsen v. Nichols*, 86 Wash. 185, 149 P. 668 [(1915)], parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. If the evidence goes no further than to

show the situation of the parties and the circumstances under which the instrument was executed, then it is admissible. *Berg v. Hudesman*, 115 Wn.2d 657, 667-9, 801 P. 2d 222 (1990); citing *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944).

Ambiguous language is construed against the drafter's client. *Berg v. Hudesman*, *op. cit.*, citing *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966); *Universal/Land Constr. Co. v. Spokane*, 49 Wn. App. 634, 638, 745 P.2d 53 (1987); Restatement (Second) of Contracts § 206 (1981).

Subsequent acts and conduct of the parties to the contract are admissible to assist in ascertaining their intent. *Berg v. Hudesman*, 115 Wn.2d 657, 667-9, 801 P. 2d 222 (1990); citing *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973); *Carlyle v. Majewski*, 174 Wash. 687, 690, 26 P.2d 79 (1933); Restatement (Second) of Contracts § 202(4) (1981).

The evidence of an oral contract between North Bend by and through its Mayor, with RLM is on the record. North Bend has liability on the basis of vicarious liability. Vicarious liability, otherwise known as the doctrine of *respondeat superior*, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf. *Niece v. Elmview Group Home*, 131 Wash.2d 39, 929 P. 2d 420, 425-6 (1996); citing *Kuehn v. White*, 24 Wash.App. 274, 277, 600 P.2d 679 (1979).

Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that “such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior.” *Niece v. Elmview Group Home, supra, Scott v. Blanchet High Sch.*, 50 Wash.App. 37, 43, 747 P.2d 1124 (1987) (quoting 53 Am.Jur.2d Master and Servant § 422 (1970)), *review denied*, 110 Wash.2d 1016 (1988).

### **CONCLUSION**

The King County Superior Court entered an order on summary judgment which dismissed all claims of Red Letter Ministries (hereafter, “RLM”) and dissolving the preliminary injunction on April 2, 2014. The City of North Bend (hereafter, “North Bend”) sought an award of attorney’s fees, and on April 21, 2014, an award denying the application for an award of attorneys’ fees and expenses was denied.

RLM then filed a Notice of Appeal on April 28, 2014, twenty-five days after the Summary Judgment decision. On May 1, 2014, North Bend brought its notice of cross appeal. However, in its brief, North Bend seeks

an untimely review of the trial court's decision on Summary Judgment which was decided on August 27, 2013, and an untimely review of the trial court's decision Denying North Bend's Motion for Reconsideration, entered on September 16, 2013. North Bend did not file a notice of appeal on those matter. North Bend did bring a timely appeal of the order denying the application for an award of attorneys' fees and expenses.

Because RLM set forth a breach of contract claim in its complaint, and argued during the course of litigation the existence of an oral agreement to sell and deliver the house.

- There is evidence of an oral contract on the record;
- There is evidence of offer and acceptance on the record;
- There is evidence of part performance on the record, as RLM moved the house;

Therefore, the trial court erred in deciding the issue on summary judgment when an oral contract was alleged, the terms, conditions, and performance of which is rightly for a trier of fact. RLM therefore respectfully asks this court to deny North Bend's motion for summary judgment de novo, and remand this case to the Superior Court for trial.

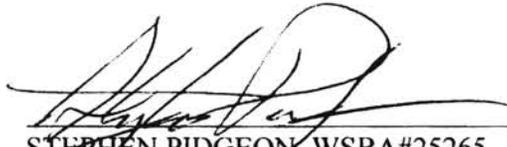
Additionally, North Bend's appeal of the decision of the trial court to deny its application for attorney's fees should likewise be affirmed, because the court did not abuse its discretion in rendering the decision.

Finally, because it is well within the purview of the trial court to fix a remedy for North Bend's breach of oral contract, and to award

damages to RLM for all losses proximately caused thereby, the issue before this court is not moot, but is an issue for a jury.

RLM respectfully asks this court for an award of attorney's fees on appeal pursuant to RAP 18.1.

Signed in Everett, this 23rd day of January, 2015.

A handwritten signature in black ink, appearing to read "Stephen Pidgeon", is written over a horizontal line.

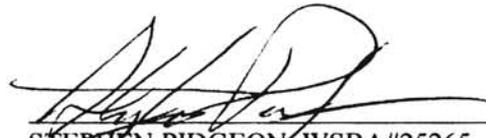
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**CERTIFICATE OF SERVICE**

The undersigned now certifies that a true copy of Appellants' Brief in Reply in this action was served on the following:

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by electronic mail, and by first class, U.S. Mail, postage prepaid, this 23<sup>rd</sup> day of January, 2014.



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