ORIGINAL

NO. 29035

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawai'i; et al.,

Plaintiffs/Appellants/
Cross-Appellees,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I; HAWAII SUPERFERRY, INC., et al.,

Defendants/Appellees/
Cross-Appellants.

CIVIL NO. 05-1-0114 (3)
(Declaratory Judgment)

APPEAL AND **CROSS-APPEAL** FROM (A) FINAL JUDGMENT, filed January 31, 2008;

(B) ORDER GRANTING 1) DEFENDANT STATE OF HAWAII'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; AND 2) DEFENDANT HAWAII SUPERFERRY, INC.'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT, filed November 14, 2007;

(C) ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION, filed October 9, 2007;

(D) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN SUPPORT OF ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION, filed November 9, 2007; and

(E) ORDER GRANTING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF REASONABLE ATTORNEY'S FEES AND

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COSTS [FILED ON JANUARY 15, 2008], filed March 27, 2008

SECOND CIRCUIT COURT

HONORABLE JOSEPH E. CARDOZA
Judge

REPLY BRIEF OF
DEFENDANT/APPELLEE/CROSS-APPELLANT HAWAII SUPERFERRY, INC.

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REPLY BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT HAWAII SUPERFERRY, INC.

Defendant/Appellee/Cross-Appellant Hawaii Superferry, Inc. ("Hawaii Superferry") hereby submits its Reply Brief pursuant to Rule 28 of the Hawai'i Rules of Appellate Procedure. This Reply Brief responds to issues raised in the Answering Brief of Plaintiffs/Appellants/Cross-Appellees/Appellees/Cross-Appellants The Sierra Club, Maui Tomorrow, Inc. and Kahului Harbor Coalition ("Plaintiffs") to the Opening Brief of Hawaii Superferry, Inc. filed August 18, 2008 ("Plaintiffs' AB"). That same date, Plaintiffs also filed an Answering Brief on the issue of attorneys' fees to the Opening Brief filed by the State.[1]

The factual history of this case relevant to attorney's fees and costs is set forth in Hawaii Superferry's Opening Brief filed July 8, 2008 ("Hawaii Superferry's OB").

I. ARGUMENT

A. Plaintiffs Are Not the Prevailing Parties and are Therefore Not Entitled to Attorney's Fees and Costs

That Plaintiffs are not the prevailing parties in this litigation has been addressed in the various briefs filed by Defendants. Hawaii Superferry therefore incorporates those arguments by reference. See Hawaii Superferry's OB at 5-7; State's OB at 11-14; Hawaii Superferry's AB at 4-6.

Plaintiffs incorrectly dismiss opinions by the Hawai'i appellate courts regarding prevailing party determinations as a mere "general rule" and argue for an exception to that rule based on treatises and caselaw from other jurisdictions. Plaintiffs' AB at 3-4. Hawai'i caselaw, however, is controlling and has never recognized any such exception.

Plaintiffs cite two Hawai'i cases in support of their argument that, although judgment was entered against them on all counts, they have nonetheless "prevailed" in this litigation. Plaintiffs' AB at 3. Neither of the cases supports such a proposition. In *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.*, 58 Haw. 606, 620, 575 P.2d 869, 879 (1978), the Supreme Court stated that, "where a party prevails on the disputed main issue, even though not to the extent of his original contention, he will be deemed to be the successful party for the purpose of taxing costs and attorney's fees." Unlike the *Food Pantry* plaintiffs, however, the judgment in this

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[1] The other defendants in this litigation are the Hawai'i Department of Transportation ("HDOT") and two of its officers, collectively referred to as the "State."

litigation did not "find in favor" of Plaintiffs on a single claim. *Id.* It is also not the case here that Plaintiffs obtained a judgment even though they did not "sustain their entire claim." *MFD Partners v. Murphy*, 9 Haw. App. 509, 514, 850 P.2d 713, 716 (1992). The judgment entered by the trial court in this litigation did not "find in favor" of Plaintiffs on a single claim, nor did it sustain any of Plaintiffs' claims. Plaintiffs are therefore not the prevailing parties in this litigation because there was no judgment entered in their favor. *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 126, 176 P.3d 91, 125 (2008); *Wong v. Takeuchi*, 88 Haw. 46, 49, 961 P.2d 611, 614 (1998); *Mist v. Westin Hotels, Inc.*, 69 Haw. 192, 201, 738 P.2d 85, 92 (1987). *See also* Black's Law Dictionary (defining "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded (in certain cases, the court will award attorney's fees to the prevailing party. – Also termed *successful party*"), cited with approval in *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001).

Plaintiffs cannot, and have not, cited any Hawai'i authority for the proposition that either the passage of Act 2 or the injunction of limited duration was sufficient to render them "prevailing parties." *See* Hawaii Superferry OB at 7 and *Sole v. Wyner*, 127 S.Ct. 2188, 2196 (2007) (a party who secures a preliminary injunction, then loses on the merits is not a prevailing party). Although courts have awarded fees in limited circumstances under the "catalyst theory," a theory positing that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct, the catalyst theory itself was soundly rejected by the United States Supreme Court six years ago. *Buckhannon*, 532 U.S. at 600 ("The question presented here is whether [the term "prevailing party"] includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not."). Moreover, Plaintiffs' challenge in this appeal to the constitutionality of Act 2 is adequate evidence that Act 2 was not the change they sought to bring about through their lawsuit.

B. The Trial Court Erred in Awarding Fees and Costs Pursuant to HRS § 607-25

Hawaii Superferry has already addressed the issue of why Plaintiffs are not entitled to an award of fees and costs against Hawaii Superferry pursuant to HRS § 607-25 and incorporate that argument by reference. *See* Hawaii Superferry's OB at pp. 7-10.

1. Plaintiffs Did Not Prevail on Any Claim that Would Allow an Award of Fees Under HRS § 607-25

As a threshold matter, Plaintiffs' claim that they prevailed on their HRS § 607-25 claim is incorrect. Plaintiffs' AB at pp. 5-6. Although the First Amended Complaint refers to HRS § 607-25 as the basis for an award of attorneys' fees and costs, it does not assert a separate count related to HRS § 607-25. ROA1:55-103 at 97, ¶¶ 200-202.[2] In addition, the trial court entered judgment against Plaintiffs on Count IV of their First Amended Complaint, the count containing the paragraphs regarding an award of fees and costs. R11:3718-22, App. F.

2. Act 2 Precludes a Fee Award Under HRS § 607-25

Even assuming, for the sake of argument, that Plaintiffs had asserted a claim under § 607-25, it is incorrect that such a claim was "unaffected by Act 2." Plaintiffs' AB at 5. As to Count IV, the trial court ruled the entire count "moot and dismissed with prejudice in its entirety" both "by virtue of the Legislature's enactment of Act 2 and this Court's Order Granting Motions to Dissolve." R11:3718-22, App. F. Since HRS § 607-25(e) only allows an award of reasonable fees and costs "to the prevailing party," it was error for the trial court to award fees and costs to Plaintiffs who were *not* prevailing parties, having failed to obtain a judgment on any of the counts they asserted.

That any entitlement to fees under HRS § 607-25 was affected by the passage of Act 2 is clear from Act 2 itself. HRS § 607-25 defines "permits or approvals required by law" to include requirements for approvals established by Chapter 343. Act 2, however, provides that a large capacity ferry vessel company shall have the right to operate and the right to utilize Kahului harbor improvements "[n]otwithstanding chapter[] . . 343." *See* Act 2 at Section 3, App. B.

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[2] The Record on Appeal in Civil No. 05-1-0114(3), as amended, is cited with reference to its PDF page number. The Record is cited as R[volume]:[PDF page number(s)]. Appendices attached to Hawaii Superferry's Opening Brief are referenced as "App. [letter]."

Without a requirement for any "approvals" pursuant to Chapter 343, HRS § 607-25 is inapplicable.

The Final Judgment contained language, as Plaintiffs allege, "authorizing Plaintiffs to, by separate motion, file a request for the reimbursement by HSF of their reasonable attorney's fees and costs and costs incurred." R11:3718-22, App. F. This language, however, did not itself *award* the requested fees and costs. It merely authorized Plaintiffs to file a motion seeking those costs. It was error for the trial court to dismiss all Chapter 343 claims, and later award fees and costs against Hawaii Superferry under HRS § 607-25 based on a Chapter 343 "approval" that was not required.

3. "Development" at Kahului Harbor Was Only Undertaken Based on a Written Statement by the State that the Development Was Exempt From Chapter 343.

Plaintiffs are incorrect in their allegation that Superferry undertook "development" at Kahului Harbor without a required Environmental Assessment. *See* Plaintiffs' AB at 8-17. The Hawai'i Supreme Court has already determined that Hawaii Superferry was neither an "action" nor a "project initiated by an applicant" that was required to comply with procedural requirements in Chapter 343. Hawaii Superferry OB at 8-9. Without any finding that Hawaii Superferry had to comply with the procedural requirements in Chapter 343, fees and costs cannot be awarded under HRS § 607-25. Plaintiffs' argument also ignores the fact that to the extent Hawaii Superferry undertook any "development," these actions were taken in reliance not only on Department of Transportation's exemption determination, but also concurrence from OEQC, and the 2005 judgment entered against Plaintiffs by the trial court. [3] *See* Hawaii Superferry OB at 9-10.

HRS § 607-25 states that a "court *shall not* award attorneys' fees and costs to any party" if the party undertaking development "failed to obtain the permit or approval due to reliance in good faith, upon a written statement, prepared prior to the suit on the development, by the government agency responsible for issuing the permit or approval which is the subject of the civil action, that the permit or approval was not required to commence the development."

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[3] Plaintiffs argue that the OEQC letter and the order and judgment entered by the trial court in 2005 are "irrelevant." *See* Plaintiffs' AB at 20. They are not. These documents both further support the fact that Hawaii Superferry's reliance on the exemption determination was in "good faith."

(emphasis added). Up until the Supreme Court's August 23, 2007 determination that the Department of Transportation's issuance of the exemption was erroneous, Hawaii Superferry relied in good faith on the exemption, on the OEQC's concurrence with the exemption and on the Third Circuit's dismissal of all claims challenging that exemption. Indeed, even Plaintiffs concede that it was not until the Supreme Court's August 23, 2007 order that they became "vested" in a "panoply of environmental rights and protections." Plaintiffs' AB at 12. Plaintiffs do not allege, and the record does not indicate that any construction at Kahului Harbor occurred after August 23, 2007. An award of fees HRS § 607-25 against Hawaii Superferry is therefore prohibited.

4. Commencement of Operations by Hawaii Superferry Does Not Constitute "Development" Under HRS § 607-25

Plaintiffs argue that any violation of Chapter 343 that occurred, even during the limited time that elapsed between the Supreme Court's August 23, 2007 order and the passage of Act 2 on November 2, 2008, entitles them to an award of fees under HRS § 607-25. Plaintiffs' AB at 12-13. HRS § 607-25, however, only permits an award of fees where "development" is undertaken without the necessary Chapter 343 approvals. Nothing in the statute allows an award of fees for use of an already constructed development.

Hawaii Superferry's use of improvements at Kahului Harbor during its two days of operation on August 26 and 27, 2007 did not constitute "development" for which fees may be awarded under HRS § 607-25. "Development" is narrowly defined in HRS § 607-25 to include only:

> (1) The placement or erection of any solid material or any gaseous, liquid, solid, or thermal waste;
>
> (2) The grading, removing, dredging, mining, pumping, or extraction of any liquid or solid materials; or
>
> (3) The construction or enlargement of any structure requiring a discretionary permit.

HRS § 607-25(a). Hawaii Superferry's operation on August 26 and 27 did not involve any activities which could be described as "development" under the statutory definition. Where it cannot be shown that Hawaii Superferry ever "under[took] any development without obtaining

all permits or approvals required by law from government agencies," HRS § 607-25 does not authorize an award of fees.

5. Superferry Relied in Good Faith on the Exemption Determination

Hawaii Superferry's good faith reliance on the State's exemption determination has already been briefed in this appeal, and Hawaii Superferry incorporates that briefing by reference. *See* Hawaii Superferry's OB at 10; Hawaii Superferry's AB at pp. 9-10.

a. HRS § 607-25(e)(3) Prohibits an Award of Fees

To the extent Plaintiffs are arguing that the good faith reliance exemption in HRS § 607-25(e)(3) does not apply because Plaintiffs chose not to provide a written notice to Defendants pursuant to HRS § 607-25(e)(2), *see* Plaintiffs' AB at 20, nothing in the statute supports this argument. The statute allows an award of fees and costs in the limited circumstance where "development" occurs without a required approval. HRS § 607-25(e)(1). The statute also prohibits an award of fees if there is good faith reliance on a written statement that an approval is not required. HRS § 607-25(e)(3). This prohibition is not limited to the circumstance where Plaintiffs provide written notice in advance of filing suit.

The statute also contradicts Plaintiffs' argument that the written statement on which Hawaii Superferry relied cannot "be the document that is the triggering event for litigation itself." *See* Plaintiffs' AB at 20. Approvals required by Chapter 343 are included within the approvals identified in HRS § 607-25. *See* HRS § 607-25(c). Further, "compliance with the procedural requirements established by chapter 343 and rules pursuant to chapter 343 constitute a discretionary agency approval for development." HRS § 607-25(d). The Hawai'i Administrative Rules contain procedural requirements for issuance of an exemption. Haw. Admin. R. § 11-200-8. The Department of Transportation's exemption determination was therefore a "discretionary agency approval" under HRS § 607-25 because it was a procedural requirement established by Chapter 343. It is nonsensical for Plaintiffs to argue that a document subject to legal challenge under Chapter 343 is not the sort of "written statement" contemplated by HRS § 607-25(e), because not only exemption determinations, but also environmental assessments, findings of no significant impact and even environmental impact statements can all be challenged under Chapter 343. HRS § 343-7. All of these documents, including exemptions themselves, are part of the procedural requirements of Chapter 343. There is no authority in

HRS § 607-25, its legislative history, or otherwise to support Plaintiffs' argument that because a Chapter 343 exemption can be challenged, it is not an "approval" on which a developer may rely.

b. The Trial Court Correctly Declined to Consider Documents Offered by Plaintiffs Regarding Hawaii Superferry's Good Faith Reliance on the Exemption Determination

Nothing in the fifteen documents Plaintiffs obtained from the Honolulu Advertiser, *see* ROA11:3802-3824, establish that Hawaii Superferry's reliance on the exemption determination was anything other than in "good faith." *See* Hawaii Superferry's AB at 9-10. Briefly summarized, these documents were not authenticated, were not admissible and the court did not consider them. Plaintiffs have waived these issues on appeal.

Furthermore, all fifteen documents predate the Department of Transportation's February 23, 2005 exemption determination. Nothing in these documents indicates that Hawaii Superferry's reliance on the exemption determination, once issued, was anything other than good faith reliance. Finally, but for one document dated nearly four months before the exemption was issued, nothing in the record indicates that Hawaii Superferry was sent or received any of these documents. Plaintiffs are flatly incorrect in their allegation that these fifteen documents are "e-mails by and between HDOT officials and Superferry officials." *See* Plaintiffs' AB at 25.

The single email sent to Hawaii Superferry, ROA11:3810, contained an indication from a single HDOT planner, Fred Pascua, that "an environmental document will be required." ROA11:3810. One month later, this statement was contradicted by OEQC. ROA3:827-828. Four months later, Mr. Pascua's statement was contradicted by his supervisor when Barry Fukunaga, the Deputy Director of Harbors for the Department of Transportation, issued the exemption determination. ROA3:946-948. Nine months later, Mr. Pascua's statement was contradicted by the Circuit Court of the Second Circuit. ROA4:1502-1505 and 1506-1509. Nothing in Mr. Pascua's email precluded Hawaii Superferry's good faith reliance on determinations made by two state agencies and the circuit court. The existence of the exemption determination and Hawaii Superferry's good faith reliance on that document preclude an award of fees under HRS § 607-25.

c. No Other Documents or Actions Permit an Award of Fees

Plaintiffs attempt to confuse the Department of Transportation's preparation of the administrative record in this appeal with Hawaii Superferry's good faith reliance on the

exemption determination. Plaintiffs' AB at 25. Plaintiffs never sought any discovery from Hawaii Superferry in this litigation and Hawaii Superferry had no obligation to prepare an administrative record. There is nothing to indicate that the adequacy of the administrative record has anything to do with Hawaii Superferry's good faith reliance on the exemption determination.

There is also no authority to support Plaintiffs' argument that their legal challenge to the exemption determination was of itself sufficient to deny Hawaii Superferry's good faith reliance under HRS § 607-25(e)(3). *See* Plaintiffs' AB at 27-28. HRS § 607-25 contains no exception for reliance on documents that are the subject of legal challenge, and it is the nature of litigation that the parties are in disagreement as to the matters at issue. Nothing in HRS § 607-25 or otherwise indicates that Plaintiffs' lawsuit itself formed the basis for a fee award.

Plaintiffs disingenuously argue that footnote 50 of the Hawai'i Supreme Court's opinion precluded Hawaii Superferry's good faith reliance on the exemption determination. First, the Supreme Court's opinion was not issued until August 31, 2007, and any "development" that occurred was prior to that date. Second, although footnote 50 discusses the lack of evidence in the record regarding a management plan sufficient to support an exemption under DOT's exemption Class 6 item 8, the exemption determination itself refers to Class 6 item 8 as one of two alternative bases for the exemption. ROA2:946-948 at 947. Third, Plaintiffs did not challenge the exemption determination on the basis that a management plan was lacking, presumably because Plaintiffs themselves knew of the existing master plans for Kahului Harbor. ROA1:55-103 at 67-68 (Plaintiffs' First Amended Complaint at ¶ 50 describing the Kahului Harbor Master Plan); ROA1:106-123 at 109 (Hawaii Superferry's Answer to First Amended Complaint admitting the existence of the master plan); ROA1:124-138 (State's Answer to the First Amended Complaint admitting the existence of the master plan).

Likewise, nothing in the PUC approval or the Operating Agreement was sufficient to preclude Hawaii Superferry's good faith reliance on the exemption determination. *See* Plaintiffs' AB at 28-29. The PUC's Decision and Order No. 21524, ROA2:615-648, was issued on December 30, 2004, one month before Department of Transportation issued its exemption determination. Nothing in the PUC's Decision and Order indicated that if an exemption determination was issued, Hawaii Superferry's reliance on the exemption determination would be anything other than in "good faith." Nothing in the Operating Agreement, Exh. HSF 9, indicated that Hawaii Superferry should be doubtful about its reliance on the exemption

determination. Likewise, although various county councils had passed resolutions demanding an EIS, Chapter 343 itself grants no authority to county councils to make such a determination. *See* HRS § 341-3 (appointing the director of environmental quality control to perform duties under Chapter 343). Even if these documents were, as Plaintiffs incorrectly argue, adequate to put Hawaii Superferry "on notice" that it was acting at its "own risk," HRS § 607-25 does not allow an inference of a lack of good faith to be presumed from being placed "on notice."

C. The Trial Court Erred in Awarding Fees Against Hawaii Superferry Pursuant to the Private Attorney General Doctrine

Hawaii Superferry incorporates the extensive briefing already submitted in this appeal regarding the trial court's error in awarding fees under the private attorney general doctrine. *See* Hawaii Superferry's OB at 11-19; State's OB at 14-22; Hawaii Superferry's AB at 5.

Plaintiffs concede that they are primarily seeking fees against Hawaii Superferry under the "narrow" and "specific" provisions of HRS § 607-25, and at the same time argue that if their 607-25 claim should fail, they are entitled to fees under the private attorney general doctrine. Plaintiffs' AB at 31. This second bite at the apple must fail. The private attorney general doctrine has never been adopted in Hawai'i and is, in fact, a doctrine that has been rejected by the United States Supreme Court and a majority of state courts. Hawaii Superferry's OB at 11. HRS § 607-25 is the narrow and specific statute that either allows or prohibits an award of fees in Chapter 343 litigation. *Id.* at 12. As a matter within the prerogative of the legislature, attorney's fees should not be awarded against Hawaii Superferry, a private party. To award fees under this doctrine against Hawaii Superferry would be a significant and unprecedented expansion of the private attorney general doctrine, exactly the type of "judicial legislation" that the Hawai'i Supreme Court has cautioned against. *Id.* at 13.

D. The Trial Court Erred in Awarding Costs to Plaintiffs

Although Plaintiffs now concede that the trial court's award of costs should be reduced by $910.35, *see* Plaintiffs' AB at 34-35, the trial court should not have awarded any costs at all. Plaintiffs were not the prevailing parties in this litigation and they were therefore not entitled to costs under either HRS § 607-25 or the private attorney general doctrine. *See* Hawaii Superferry's OB at 19-21.

Although Plaintiffs argue that they are entitled to costs under HRS § 607-9, they unsuccessfully argued this statute as the basis for a cost award before the trial court.

ROA10:3517-3643 at 3528-3529 (requesting fees based on § 607-9); ROA12:4115-4117 at 4116, App. G (awarding fees and costs based on § 607-25 and the private attorney general doctrine, but not § 607-9). Plaintiffs failed to appeal the denial of their request for fees under § 607-9 and, since this point was neither raised on appeal nor argued in their opening brief, it is deemed waived. HRAP Rule 28(b)(7).

II. RELEVANT STATUTES AND RULES

Statutes and rules pertinent to the points presented are set forth in the appendices attached to Hawaii Superferry's Opening Brief.

III. UPDATE TO STATEMENT OF RELATED CASES

Since the time that Hawaii Superferry filed its Opening Brief on July 8, 2008, a stipulation for dismissal with prejudice was filed in *Maui Tomorrow Foundation, Inc., et al. v. The Department of Transportation, et al.*, Civil No. 06-1-0027 (1), Civil No. 06-1-0027(1), on August 19, 2008.

IV. CONCLUSION

Based on the reasons and authorities stated in this reply brief, the arguments presented in the opening briefs filed by Hawaii Superferry and the State on July 8, 2008, the arguments presented in the answering briefs filed by Hawaii Superferry and the State on July 21, 2008 and August 18, 2008, and the State's reply brief filed September 15, 2008, Hawaii Superferry respectfully requests that the Intermediate Court of Appeals reverse the award of fees and costs to Plaintiffs in its entirety.

DATED: Honolulu, Hawai'i, September 15, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing document were duly served upon each of the following parties via email and U.S. mail, postage prepaid, on the date noted below.

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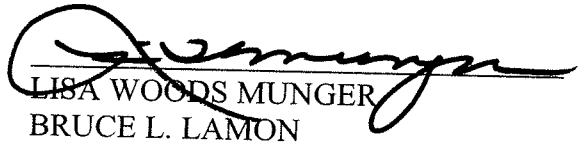

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