IN THE SUPREME COURT OF OHIO

KEVIN R. FLYNN, *et al.*,	:	**CASE NO. 2006-1619**
Plaintiffs/Cross-Appellees,	:	
-vs-	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-050909
WESTFIELD INSURANCE COMPANY, *et al.*,	:	
Defendants/Cross-Appellants.	:	

REPLY BRIEF OF CROSS-APPELLANT WESTFIELD INSURANCE COMPANY

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An insurance policy must be read in its entirety, starting with the declarations pages, and then interpreted as a whole, rather than from its detached parts. *Waste Management, Inc. v. Rice Danis Industries Corp.* (S.D. Ohio 2003), 257 F.Supp.2d 1076 (citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Authority* (1997) 78 Ohio St.3d 353, 678 N.E.2d 519); *DeStephen ex rel. DeStephen v. Allstate Ins. Co.*, 10th Dist. No. 01AP-1071, 2002-Ohio-2091, 2002 WL 757811, discretionary appeal not allowed at 96 Ohio St. 3d 1495). Westfield maintains that when this Court does that, it is obvious that UM/UIM coverage was purchased only for covered autos, not including Flynn's personal car.

Plaintiff Flynn urges the Court to skip the declarations pages and go straight to page 2 of the UM/UIM endorsement, bypassing the very beginning of that endorsement which again makes clear that it applies only to covered autos, and interpret one word ("you") to mean that the parties covered all employees injured within the "scope of employment," even though that phrase appears nowhere in the policy.

I. SCOPE OF EMPLOYMENT IS NOT THE TEST FOR COVERAGE.

Appellee Flynn argues there is only one test to determine UM/UIM coverage; i.e., was the employee in the scope of employment? If "yes", there is coverage. If "no", there is not. This is wrong.

This is not the test for coverage under this policy. This policy does not limit coverage to "scope of employment." In fact, the policy nowhere mentions "scope of employment." That term is not even referenced anywhere in the contract. Nor does the policy grant or restrict any of its coverages (liability, medical payments, uninsured motorist) based on "scope of employment." Under the policy, scope of employment is immaterial.

So where does this argument originate?

A. THE FALLACY OF *SCOTT-PONTZER* AND *EZAWA*.

Appellees' argument is based on the faulty premise underlying *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.,* (1999) 85 Ohio St. 3d 660, 710 N.E. 2d 1116 and *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.,* (1999), 86 Ohio St.3d 557, 715 N.E. 2d 1142 which was later addressed in *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256

The faulty logic originated in *Scott-Pontzer* and *Ezawa* when the Court looked at the four classifications of insureds in a standard UM/UIM endorsement. Originally, the Court concluded that each of the four categories must apply to every named insured, whether the named insured was a corporation, partnership, individual proprietorship or any other form of legal entity. Therefore it concluded that where the named insured is a corporation, "you" in the first category must mean all employees (*Pontzer*), and the second category must include all family members of those employees (*Ezawa*).

Because there was (and is) no requirement in the standard business auto policy that anyone be in the scope of employment for UM/UIM coverage, the results became absurd. By the fall of 2003, this Court had accepted more than 100 cases for resolution of the half dozen or so issues spawned by *Scott-Pontzer* and its progeny.

In *Galatis*, this Court recognized the absurdity of covering all employees and family members (including persons in their own or a friend's car and on a purely personal or social mission), so the Court held that those persons who are not in the scope of employment should be excluded. The Court also appropriately recognized that these four classifications need <u>not</u> always apply in every situation.

> "One who argues a contorted use of an inapposite section of a standard form 'confuses superfluity with inapplicability.'" *Id.* "It is unnecessary for each of the four classifications to apply to every insurance policy as long as the parties to the insurance policy agree upon whether a

claimant is intended to be insured." *Galatis, supra* at ¶ 41.

Plaintiff Flynn argues for a return to the *Scott-Pontzer* rationale. Flynn's entire argument (that the policy grants coverage for every employee driving his personal auto on company business) is premised on the term "you" and on this Court's modification of *Scott-Pontzer* in *Galatis*. However, the term "you" in this context simply states who is an insured, which in this case is a corporation (LTOC) doing business as a lawfirm (G-F).[1] The single word "you" does not extend coverage to all employees within the scope of employment where the policy clearly provides otherwise.[2]

Here the policy specifically limits coverage to occupants of company owned and company rented vehicles. Flynn is asking this Court to do what the Court in *Galatis* said should not be done—confuse superfluity with inapplicability. The word "you" in this context, is simply inapplicable.

Further, the form UM/UIM endorsement in this case does not conflict with the declarations page, as both are intended to limit UM/UIM coverage to "covered autos." In fact, it

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[1] The lawfirm's name was undisputedly added after the policy was issued because of the shared office space and the desire to provide property insurance for jointly owned copiers, furniture, etc. No evidence was offered that this was intended to add dozens of cars or attorney/partners to the policy, or to amend auto coverage to include their personal vehicles.

Further, there is nothing in the policy that identifies a partnership. The declarations say that the named insured is a corporation, not a partnership, and nothing in the policy indicates G-F is not a corporation. And Flynn was not even a partner at the time the policy was issued.

In *Kiggins v. Allstate Ins. Co.* (Sept. 27, 1997), Franklin App. No. 94APE02-219, 1994 Ohio App. LEXIS 4387, unreported, on which Flynn relies, the named insured there was shown as "M. Yoder and A. Kico, dba T&M Interior Trim." This clearly indicated two individuals in a partnership and the person identified as M. Yoder was one of the plaintiffs in the case. The point is, the insurer in *Kiggins* knew it was this insuring a partnership comprised of two individuals. Here, the policy specifically says the named insured is a corporation.

[2] *Galatis* recognized that a policy could exclude from coverage even employees acting in the scope of employment, if the policy specifically provided. *Galatis* held "Absent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured and underinsured motorist coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the scope of employment." *Galatis, supra,* at syllabus 2.

reinforces the language of the Declarations Page, for the UM/UIM endorsement provides at the beginning of that endorsement:

> **"OHIO UNINSURED MOTORIST COVERAGE – BODILY INJURY**
>
> For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in Ohio, this endorsement modifies insurance provided under the following:"

(UM/UIM Endorsement at p. 1 of 4, Supp. p. 7).

B. WHY UM/UIM COVERAGE IS LIMITED TO COMPANY VEHICLES.

If "scope of employment" is not a requirement under the policy to obtain UM/UIM coverage, what is the test under the policy to be eligible for UM/UIM coverage? That question is answered in the first instance by the declarations page.

A policy declarations page is the road map to determine which coverages the insured has selected and was willing to purchase. Those declarations state very simply that:

> **Each Of The Coverages Will Apply Only To Those Autos Shown As Covered Autos.**

(See Declarations Page, at Supp. p. 1).

LTOC asked to purchase UM/UIM coverage only for owned autos (Symbol 2) and hired autos that are not borrowed from employees or partners, e.g. rental cars (Symbol 8). The owned autos are scheduled and specifically listed on page two of the declarations, along with the specific premium cost for UM/UIM coverage for each vehicle LTOC wanted covered.

The policy says nothing about scope of employment. Thus, all occupants of covered company autos are entitled to get UM/UIM coverage simply by their status of occupying a covered vehicle. This is true whether they are in the scope of employment or not. Occupants of covered autos do not even need to be employees to be covered.

Flynn now argues that this Court should ignore the declarations page. Flynn argues that it is superfluous that the declarations page limits UM/UIM coverage to owned or hired autos. Flynn argues it is superfluous that those vehicles to be covered for UM/UIM are specifically identified. And Flynn argues that it is superfluous that premiums are based on the number and type of vehicles intended to be covered for UM/UIM. Instead, Flynn asserts that the Court should adopt a "scope of employment" test that appears nowhere in the policy.

If Flynn's argument were accepted, the UM/UIM premiums calculated for each company car would now need be to extended to include all personal vehicles ever driven by employees on company business, even if that includes 100 or 500 or 2000 employees, and regardless of the number of personal vehicles being driven. This is illogical, as no premium was ever calculated or charged or considered for such a significant and unintended risk.

Flynn's arguments are not only inconsistent with the terms of the policy, but they are inconsistent with the pre-accident actions of the company and contrary to the expressed intent of the parties.

If LTOC had wanted to cover Mr. Flynn's car for UM/UIM, it could easily have listed his car and paid a premium. Or the company could have purchased the coverage that expressly included "autos owned by employees or partners" (Symbol 9).[3] And certainly Mr. Fletcher would not purchase "Drive Other Car Coverage" if he believed he was already covered simply by his status as an employee or partner. The company had already rejected UM/UIM for umbrella coverage and was removing vehicles from the policy in an attempt to reduce company premiums, not trying to expand to include vehicles the company did not even own in order to pay

[3] This option of purchasing coverage for employees' or partners' cars would be meaningless if, as Flynn argues, all employees' and partners' cars are covered by reason of the employee's status as "you".

even more premiums. (Wheeler Affidavit, ¶ 13, Supp. p.13.) In fact, the company had never listed or paid a premium for any vehicle other than those specific vehicles titled in the company name.

The interpretation now urged by Flynn is not only inconsistent with the policy, but is also inconsistent with the expressed intent of the parties.

Mr. Fletcher, an owner of LTOC and managing partner of G-F, admitted:

> **Q: Those employees who were not provided with vehicles titled in Lawyer's Title were expected to obtain their own insurance?**
>
> **A: If they had their own cars.**

(Fletcher Depo. p. 43, Supp. p. 75.)

LTOC's office manager, Diane Bedinghaus was in charge of insurance and agreed:

> **Q: And those folks who had vehicles other than Lawyer's Title vehicles knew that they had to go get their own coverage.**
>
> **A: Yes.**

(Bedinghaus Depo. p. 42, Supp. p. 82.)

Further, Mr. Flynn never testified that he asked LTOC to cover his personal car, or that he expected to be covered by Westfield, or that anyone told him he would be covered, or that coverage was even discussed. And LTOC's own insurance agent made this clear.

> **At no time prior to February 22, 2002, was my agency ever told:**
>
> - **That Kevin Flynn was to be added as a driver.**
> - **That Kevin Flynn wanted his personal Jaguar on the policy.**
>
> **In fact, neither LTOC nor G-F alerted me that Kevin Flynn was an employee of either entity for purposes of commercial auto coverage.**

* * *

> **The UM coverage on this policy was expressly limited to Symbol 2 and Symbol 8 in order to keep the premium costs down as desired by the parties.**

(Wheeler Affidavit, ¶¶ 18-19, Supp. pp. 14-15.)

Courts have been rightfully reluctant to provide coverage which insureds did not select or pay for, or to interpret the standard UM/UIM endorsement to include vehicles specifically not covered by the policy:

> To construe the language in the manner Williams' suggests, or any other manner, is unreasonable as it would provide coverage for any number of owned autos, while a premium is only paid for specifically described autos in the policy. The endorsement at issue does not add or remove covered vehicles, rather it modifies coverage for vehicles that are already covered autos. Given the policy language as a whole, we find that there is no ambiguity in the endorsement or the BAP (Business Auto Policy) and that the endorsement is extended to the covered autos specifically described in the BAP.

Western Reserve Mut. Cas. Co. v. Williams, 10th Dist. No. 05AP-120, 2005-Ohio-4250, 2005 WL 1953062. Stated another way:

> An insured gets the coverage he pays for, and, if the coverage is to be increased beyond that which he needs or for which the policy provides, the premiums will necessarily be increased. Therefore, the plaintiff who is not a party to the contract is not in a position to urge a construction of the contract which would be detrimental to both parties to the contract.

Cook v. Kozell, (1964), 176 Ohio St. 332, 199 N.E.2d 566.

Flynn asks this Court to extend coverage to include an unlimited number of company employees driving an unlimited number of personal cars, even though extending the coverage for that significant risk could easily cause the company UM/UIM premiums to double or triple or worse. It would also be inconsistent with LTOC's actions just before the accident in removing

cars from coverage and putting them on personal policies to reduce company premiums. (Wheeler Affidavit, ¶¶ 11, 12, Supp. p.13.)

Thus, this Court should limit coverage to covered autos, as the policy reflects, and not expand it by means of an "employment test" never agreed to in the contract.

II. RESPONSE TO MISCELLANEOUS ARGUMENTS RAISED BY FLYNN.

A. THE ACCIDENT.

Flynn's brief claims he was "forced" off the road by another driver (Appellee's Brief, page 1). However, the record demonstrates that a vehicle ahead of Flynn was beginning to change lanes but never got more than 2-3 feet into the left lane when Mr. Flynn decided to accelerate his Jaguar, which was already traveling 65-70 m.p.h. (Michael Clauss Depo. pp. 64-65, T.d. 154.) This was done in an attempt to pass the other vehicle on the left-hand berm of the highway. (*Id.*) It was this maneuver that caused Flynn to lose control and drive across the median, striking another car head-on. (*Id.*, p. 40, Supp. p. 89.)

B. THE CROSS-APPEAL IS NOT MOOT.

Plaintiff Flynn previously filed a Motion To Dismiss in this Court, arguing that the case was "moot" since Flynn is automatically covered as a G-F partner. This Court overruled that Motion. For brevity purposes, Westfield incorporates herein its Memorandum Contra Flynn's Motion To Dismiss filed March 6, 2007. The issue raised in this appeal is not moot.

1. Westfield Did Not Fail To Argue This Issue Below.

Flynn argues that Westfield never preserved the argument that Flynn was not driving as a partner of G-F. (Flynn Brief at p. 6.) This is not true. This issue was specifically presented to the trial court at page 13 and 14 of Westfield's Reply Brief.[4] The trial court found in favor of

[4] See, T.d. 178. On pages 13 and 14, footnote 18, Westfield specifically presented this issue as

Westfield below without the need to ever resolve this factual issue. The Court of Appeals found that it was undisputed Flynn was acting on behalf of LTOC, so it did not need to reach a specific determination whether he was also driving as a partner of G-F.

2. **There Has Never Been A Determination That Flynn Was Driving As A Partner Of G-F, Rather Than An Employee Of LTOC.**

The record below indicates that, at the time of the accident, Flynn was delivering certain documents to a real estate closing because LTOC's courier had forgotten to deliver them the day before. Thus, the papers were to have been delivered by an LTOC courier in an LTOC car, and Flynn (who was also an employee of LTOC), stepped in to do this job for LTOC. (See footnote 4, above.) The parties agree that Flynn was driving as an employee of LTOC and the Appellate Court below so noted. (Court of Appeals Decision, attached at Appx. pg. 6 to *Memorandum In Support Of Jurisdiction Of Cross-Appellant Westfield Insurance Company*). However, the fact that Flynn had status as a partner in G-F does not change his role at the time of the accident as an LTOC employee. While the Appellate Court below noted that Flynn was insured as a partner of G-F, that Court made no determination that Flynn was actually acting on

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follows:

"If the Court were to accept Mr. Flynn's argument that he is entitled to coverage because he was driving as a partner of G-F, Westfield denies this allegation and a material factual issue exists as to this claim. Mr. Flynn claims to have been delivering documents to a real estate closing. The person supposed to take these documents was an LTOC employee, not a G-F employee (Stahl Depo. at p.5; Fletcher Depo. at pp.67-68). It was this LTOC employee, Mr. Stahl, who failed to get this done (Bedinghaus Depo. at p.19; Stahl Depo. at p.8). The three delivery persons at the time of Mr. Flynn's accident, for whom Mr. Flynn was substituting, were all LTOC employees, not G-F employees (Fletcher Depo. at pp.64-65; Bedinghaus Depo. at p.70). Thus, Mr. Flynn was delivering documents that an LTOC employee was to take, and for which LTOC employee couriers would have been involved, and LTOC received compensation for its role in the closing (Bedinghaus Depo. at pp.18-19). Further, Mr. Flynn's worker's compensation claim was accepted only as an employee of LTOC, not G-F. (Walls Affidavit, ¶3, attached hereto as Exhibit A, and Exhibit 1 attached thereto.) Thus, a jury could reasonably conclude that Mr. Flynn was driving for LTOC, not G-F."

behalf of G-F at the time of his accident. (Court of Appeals Decision, attached at Appx. pg. 6 to *Memorandum In Support Of Jurisdiction Of Cross-Appellant Westfield Insurance Company*).

3. Who Flynn Was Driving For Is Irrelevant.

Whether Flynn was within the scope of employment for either entity (LTOC or G-F) is irrelevant. Flynn was not driving a company car, nor one borrowed or rented from a non employee. If coverage is limited to covered autos, as Westfield urges, it is irrelevant whether or not Flynn was in the scope of employment of either entity.

The policy at issue specifically allowed LTOC to select and purchase coverage for Mr. Flynn's business use of his personal Jaguar if the company had wanted coverage for the vehicles of employees or partners. That coverage is contained in Symbol 9 (not selected for coverage here).

Symbol	Description Of Covered Auto Designation Symbols	
	* * *	
9	Nonowned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or your personal affairs.

(Emphasis Added.)

This specific coverage for employees' or partners' cars was not purchased. Thus, regardless of whether Flynn is an employee of LTOC, a partner of G-F, or both, the policy clearly precludes UM/UIM for autos neither owned nor hired by the insured, and for which no premium was paid (unless Symbol 9 coverage is selected, which did not occur here).

As one Ohio court noted:

> "Insofar as only corporation-owned vehicles were "covered autos" for purposes of UM coverage, we find that the issue of whether appellee was within the scope of his employment is irrelevant in determining whether he was entitled to UM coverage. The

inquiry ends after determining that appellee was not occupying a corporation-owned vehicle at the time of his accident."

Olmstead v. New Hampshire Ins. Co., 6th Dist No. E-04-017, 2005-Ohio-39, 824 N.E.2d 158, ¶ 17.

Thus, an employee's eligibility for UM/UIM benefits is not determined by scope of employment, but rather by whether or not the car is a covered "auto" for UM/UIM.[5]

C. THIS CASE WAS PROPERLY ACCEPTED.

The parties previously briefed the importance of the issue in this case, and this Court has already ruled thereon and accepted the issue. Plaintiff Flynn now argues against jurisdiction once again.

The issue in this case needs to be decided, and this Court has properly recognized that fact. The reasons are as follows.

Employees and partners regularly drive their own cars on company business. Employers regularly purchase UM/UIM coverage for company cars only, because employers want to keep premiums down by excluding personal cars of employees or partners.

Because of the standard forms used for this coverage, and because of the differing decisions being reached by Ohio Courts addressing this issue, guidance from this Court is needed.

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[5] For other cases holding that scope of employment is irrelevant when an insured purchases UM/UIM for listed or scheduled cars only, see: *Weyda v. Pacific Employers Insurance Co.*, 1st Dist. No. C-020410, 2003-Ohio-443, 151 Ohio App. 3d 678, 785 N.E.2d 763; *The Westfield Group v. Cramer*, 9th Dist. No. 04CA008443, 2004-Ohio-6084, 2004 WL 2600450; *Wright v. Small*, 3d Dist. No. 13-02-34, 2003-Ohio-971, 2003 WL 728943; *Klocinski v. American States Ins. Co.*, 6th Dist. No. L-03-1353, 2004-Ohio-6657, 2004 WL 2849054; *Desmit v. Westfield Insurance Company*, 9th Dist. No. 04CA008419, 2004-Ohio-5167, 2004 WL 2244313; *Nentwick v. Erie*, 7th Dist. No. 03 CO 47, 2004-Ohio-3635, 2004 WL 1533251; *Progressive Insurance Co. v. Heritage Insurance Co.* (Sept. 3, 1996), 8th Dist. No. 69264, 113 Ohio App.3d 781, 682 N.E.2d 33.

The importance of this issue is confirmed by the fact that this is a standard business policy based on ISO forms, used not only throughout Ohio, but also nationally. In fact, the universal nature of these forms was what led to the affidavit of Alan Windt, a nationally known expert in insurance and the author of a definitive insurance coverage book; one which has been cited by over 200 courts across the country. (Windt Affidavit, ¶¶ 1-3, Supp. pp. 41-42.) Mr. Windt noted that these ISO forms are used nationwide in order to assist insurers and insureds in attempting to standardize policies, and to create understandings of what is or is not being covered when insurance policies are issued. (Windt Affidavit, ¶ 5, Supp. p. 42.) Mr. Windt notes that Flynn's argument would greatly increase the risk to the insurers and would even lead to coverage for complete strangers to the insured's business who are riding in personal vehicles of employees. (Windt Affidavit, ¶ 10, Supp. pp. 43-44.) He noted that LTOC could easily have covered Flynn's car by simply paying a premium and:

1. Purchasing UM/UIM for Symbol 1 cars;
2. Buying UM/UIM coverage for Symbol 7 and then listing Flynn's vehicle under Symbol 7; or
3. Covering employees' and partners' cars under Symbol 9.

(Windt Affidavit, ¶ 11, Supp. p. 44.)

It is important to the insurance companies, the agents, the insureds and the public that these standardized and commonly-used insurance forms be uniformly applied and clearly understood. It is also important to businesses that they not be required to pay for coverages neither desired nor intended, as happened with UM/UIM premiums for corporate insureds back in the *Scott-Pontzer* days.

Westfield denies there is an "ambiguity" between its declaration page and the standard UM/UIM endorsement. The endorsement is simply inapplicable to Flynn's accident. However,

even if there were an ambiguity, Plaintiff Flynn is not the one to challenge it. The ambiguity he argues would result in detriment to his employer.

> "Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." Likewise, where "the plaintiff is not a party to [the] contract of insurance * * *, [the plaintiff] is not in a position to urge, as one of the parties, that the contract be construed strictly against the other party."...This rings especially true when expanding coverage beyond a policyholder's needs will increase the policyholder's premiums.

Westfield v. Galatis, supra at ¶ 14. (All citations omitted.)

III. CONCLUSION.

The basic difference between these parties is that Appellant Westfield would have the Court start at the beginning of the policy, its Declarations, and never leave it. The reason is because Flynn's personal Jaguar was not a covered company auto, and because LTOC never paid a premium to provide UM/UIM coverage for that car. Appellees, on the other hand, would have this Court completely ignore the Policy's declarations and move straight to the UM/UIM Endorsement, and find coverage solely because Flynn was in the scope of his employment when he was injured.

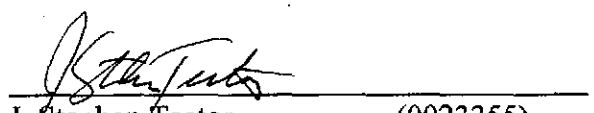
Flynn's argument is based on the logic and rationale of *Scott-Pontzer* and *Ezawa*. *Scott-Pontzer* and *Ezawa* took insurance out of the contract world and headed it down a path upon which the Court never should have started. This Court recognized that in *Galatis* and addressed half the problem, i.e., those not in the scope of employment and their family should not be covered absent an express agreement to do so. In so doing it resolved not only the *Galatis* case

but the remaining 100 pending appeals involving employees and their family members injured while occupying cars not owned by the employer/named insured.

This case addresses the remaining issue. Those who are not in company cars are not covered when the policy is limited to company cars. Companies are entitled to keep their premiums down by selecting what coverages they want and what vehicles they want it for. Insurers are entitled to sell them what they ask for, without fear that coverages will be expanded to situations neither they, nor their named insureds, ever intended.

Any remaining vestige of *Scott-Pontzer* should be overruled, and the law of insurance should return to contract law governed by the intent of the parties.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, on this 16th day of May, 2007, upon the following:

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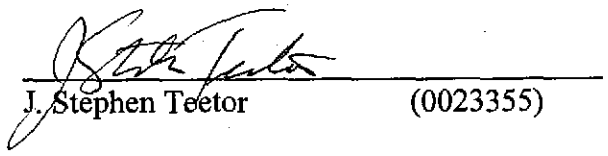

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