IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 11-11166

TERRA PARTNERS,

Plaintiff – Appellant

v.

RABO AGRIFINANCE, INC., and AG ACCEPTANCE CORPORATION,

Defendants – Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION
CIVIL ACTION NO. 2:08-CV-194-J

REPLY BRIEF OF APPELLANT

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RABO AGRIFINANCE, INC., and AG ACCEPTANCE CORPORATION,

Defendants – Appellees

TO THE HONORABLE JUSTICES OF THE
UNITED STATES FIFTH CIRCUIT COURT OF APPEALS:

Appellant Terra Partners ("Terra Partners"), Plaintiff below, hereby submits its Reply Brief in support of its appeal as follows:

PREFATORY REMARKS TO APPELLEES' RESPONSE BRIEF

Appellees continue to cast this case as part of prior protracted litigation between the Veigel entities and themselves. The prior state and federal court litigation between the Veigel entities and Appellees had as their primary focus, the determination of debts owed to Appellees and the foreclosure on realty owned by the Veigel entities that secured such debt. As noted by Appellees and the district court in its opinion[1] granting summary judgment, Terra Partners was not an underlying debtor

[1] Appendix, Tab 2 at 86.

or obligee in these disputes, only an authorized lessee to farm on the properties that was victimized by Appellees' use of an eviction order for the Big Farm to eject Terra Partners from its lawful possession on the 960 acre tract and to convert Terra Partners' owned and leased personal property that was being utilized at the time in farming operations. This litigation also included a determination of Terra Partners' rights from valuable consideration it provided to Robert Veigel in exchange for the assignment of his statutory subrogation rights in the Diversified Judgment which he paid in full to Appellees.

Thus, Appellees' reference to the district court's "familiarity with the underlying facts" concerns matters that generally are unrelated to the merits of Terra Partners' claims in this case.

REPLY POINT ONE:

Terra Partners presented sufficient evidence of damages.

Rabo and Ag Acceptance urge that the district court properly dismissed Terra Partners' conversion claims because it failed to submit proper summary judgment evidence to support its damage theories[2].

First, the final judgment in the Deficiency Suit shows that the judicial sale of the personalty on April 2, 2008 grossed $712,356.54. Although not determinative, this sale amount would be probative of the fair market value at the time of conversion, less adjustments for time, wear and depreciation. See, *Henson v.*

[2] Appellees Brief at 20-30.

Reddin, 358 S.W.3d 428 (Tex.App.–Fort Worth 2012, no pet.). It would be a question for the jury to determine the amount of adjustment for each converted item in determining the fair market value of the converted items at the time of conversion.

Second, the district court had previously entered an order striking Steve Veigel as an expert witness.[3] However, that order expressly made no ruling regarding Steve Veigel's ability to testify as a lay witness as one of the owners of Terra Partner.[4]

Steve Veigel's First Supplemental Report[5] and supporting exhibit 1 provided a comprehensive listing item by item of personal property in which Terra Partners had an ownership, lease, or right to use that was converted by Appellees and referenced that he reviewed and considered the auction receipts for each item subsequently sold at the April 2, 2008 judicial sale. Exhibit 1 to his report provided an estimate of the actual value of the personal property items as of the date of conversion, as well as estimated rental value, and estimated value for property that was not sold (but retained) on April 2, 2009.

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[3] Doc. 87 (7/28/10).

[3] *Id*., at p. 3.
[3] *Id*., at p. 3.

[4] *Id*., at p. 3.

[5] USCA5, 1959–1973.

As noted in the discussion of *Bures v. First National Bank, Port Lavaca,* 806 S.W.2d 935, 939 (Tex.App.-Corpus Christi 1991, no pet.), in Issue Twelve of Appellant's Brief[6], damages for loss of use of property during the interim from time of conversion until the property is returned is usually the cost of renting a replacement, although an actual rental is not required.

The Texas courts have consistently held in conversion cases that the owner of a business may testify as a lay witness as to the market value of his property. See, *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.,* 287 S.W.3d 877, 889 (Tex.App.-Dallas 2009, no pet.). In the *Chevrolet* case, ARCI argued that Grady Chevrolet failed to present sufficient evidence to prove its lost profits. The court of appeals rejected this argument, holding that Grady's testimony concerning the profits he would have received was his calculation of the fair market value of those parts. *Id.* at 891. Exhibit 1 to Steve Veigel's affidavit contained the same type of information, and under the *Chevrolet* case, was more than a scintilla of evidence as to actual damages for conversion. *Id.*

Appellant's Brief discussed the holding of the Texas Supreme Court in *Crisp v. Sec. Nat'l Ins. Co.,* 369 S.W.3d 326 (Tex. 1963)[7], wherein it was held that even an owner's halting and indefinite testimony as to the value of his own property will sustain a verdict when no controverting evidence is presented. Appellees

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[6] Appellant's Brief, p. 42.
[7] Appellant's Brief at 45.

presented no controverting evidence to Steve Veigel's affidavit as to the market value of the converted property; Appellees only sought to exclude it on the basis that Terra Partners, through Steve Veigel, had failed to present evidence of actual lost profits, (which Appellant is not seeking as additional conversion damages), the *Chevrolet* case indicates is shown by evidence of the owner's testimony of the fair market value of the property, which Exhibit 1 to Steve Veigel's affidavit provided.

Appellees rely on *United Mobile Networks L.P. v. Deaton,* 939 S.W.2d 146, 147-48 (Tex. 1997) in stating a plaintiff must prove actual damages before recovery is allowed for conversion. The 5th Circuit in *50-Off Stores, Inc. v. Banques Paribas (Suisse) S.A.,* 180 F.3d 247, 254 (5th Cir. 1999) distinguished *Deaton* because in that case, the plaintiff was seeking lost profits as additional damages, never lost the intangible customer list (which had been copied) and failed to submit evidence that the value of the original list had been lowered by the defendant's conversion. 180 F.3d at 254-55.[8] Like *50-Off,* here there is no dispute of conversion of tangible personalty, some of which was sold by judicial sale held 18 months later on April 2, 2008, whose possession and use (which Appellees

[8] Appellees also rely on *Berry Contracting Inc. v. Coastal States Petrochem. Co.,* 635 S.W.2d 759 (Tex.Civ.App.-Corpus Christi 1982, writ ref'd n.r.e.). *Berry* is distinguishable in that the plaintiff in that case (Coastal) stipulated it did not suffer any lost profits, sales or contracts, and that it was able to perform its existing contracts and supply its existing markets. *Id* at 760, 761-62.

acknowledged and consented to in obtaining an injunction in the Equipment Suit) was lost to Terra Partners and never returned even though repeatedly demanded.[9]

The court of appeals in *Morrison v. Standerfer,* 2010 WL 1137034 (Tex.App.-Ft. Worth 2010, no pet.) recognized that when the property converted is incapable of being returned, then the proper measure of damages is the fair market value of the property, i.e., by making the owner whole "…by essentially selling the property to the person who has converted his property." Like the plane owner in *Standerfer*, Terra Partners cannot obtain return of the property from Appellees, making fair market value the correct measure of damages.

While Appellees repeatedly state Steve Veigel has submitted no proof of actual loss caused by the conversion, such statements are belied by Steve Veigel's testimony that at the time of the conversion they were conducting farming operations and had planted a wheat crop, and that by being unable to use the converted property, they were unable to use it on the 960 acre tract they had a lease to farm, or to lease it to a third party conducting farming operations on the farm following their eviction.[10]

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[9] *Id*. at 56, 93 (all property on farm was converted). See also, report of Steve Veigel (Ex. A to Defendant's Motion) at p. 9; USCA5, 1948-1958; 1959–1973, and USCA5 2472-2484 (Ex. G, Steve Veigel depo., p. 56, lines 13-25; p. 57, lines 1-2; p. 135, lines 1-25; p. 136, lines 1-15; p. 161, lines 16-25; p. 162, lines 1-6). See also, letter from Terra Partners' attorney, Van Northern reaffirming that all of equipment remaining on farm belonged to Terra Partners. USCA5 1811-1813 (Ex. J-59, PACER document No. 35-70).

[10] Steve Veigel deposition (Exhibit 1) at 27-29, 68; USCA5, 2473 and 2476.

The gravamen of Appellees' argument is that the threshold requirement to recover for conversion is proof of actual damages shown by proof of lost profits, which according to Appellees, is tied to whether or not Terra Partners had operated on a profitable basis prior to the conversion. Proof of lost profits is not an element of conversion. However, proof of lost profits may be shown as additional conversion damages when the property is returned, or in addition to the fair market value of the property when the property is not returned. See, *Wells Fargo Bank NW, N.A. v. RPK Capital XVI, LLC,* 360 S.W.3d 691 (Tex.App–Dallas 2012, no pet.) (a party who loses the opportunity to accrue earnings from the use of the equipment may also be entitled to recover loss of use damages in the form of lost profits).

Steve Veigel used a proper methodology to determine Terra Partner's conversion damages—the value of the tangible property converted, or the contributory value of the property to the farming operations, all of which were referenced in his report[11] and deposition testimony.[12] Such opinions are based on his knowledge of the equipment lost, including its cost, utility, wear and tear, depreciation/appreciation, and replacement value based on his experience in valuation as part of farming operations for nearly thirty years, and the prices of the equipment that was sold at the April 2, 2008.

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[11] Report of Steve Veigel (Ex. A to Defendants' Motion) at 10-11; USCA5, 1957-1958.
[12] SV Depo (Exhibit 1) at 30-31, 57, 80-81, 83, 93; USCA5, 2474, 2475, and 2477.

Accordingly, his opinions met the qualification and reliability tests under Rule 702, and his opinion testimony should not have been stricken on this basis. See, *Alan Acceptance Corp. v. E. Tex. Nat'l Bank,* 109 S.W.3d 511, 516 (Tex.App.-Tyler 1998, no pet.) (expert had firsthand knowledge of converted equipment and knew from experience as a dealer how two months of wear and tear would devalue equipment).

Further, as a result of the court's order on Appellee's motion to compel production of Terra Partners' financial statements, Terra Partners presented evidence of actual losses during the years in which the conversion took place.[13]

Therefore, Terra Partners presented sufficient evidence of its damages such that summary judgment should not have been granted on this ground.

REPLY POINT TWO:
There Is a Factual Dispute Whether Terra Partners Refused to Identify Its Property

Appellees urge that dismissal of Terra Partners conversion claims was proper because Terra Partners "steadfastly refused" to identify the property which it claimed.[14]

There are two problems with this argument. As noted in Appellant's Brief[15], the issue of a qualified refusal to identify ownership of the property presents an

[13] USCA5 2887-2906.

[14] Appellees' Brief at p. 30.

[15] Appellant's Brief at 18.

issue of fact for the jury. See, e.g., *Smith v. Maximum Racing, Inc.,* 136 S.W.3d 337, 344 (Tex.App.-Austin 2004, no pet.).

More importantly, Terra Partners submitted summary judgment evidence that it did not refuse to identify its property. At and during the eviction, Steve Veigel informed Appellees' counsel, Cliff Walston, and Deputy Ginter that all of the personal property located on the farms belonged to Terra Partners.[16]

Further, Terra Partners submitted the final judgment in the Equipment Suit[17] which included the farm inventory conducted by Appellees' agents shortly after the conversion in which the ownership of major items were identified, including those owned by Terra Partners.

Additionally, Terra Partners submitted as summary judgment evidence a fax letter from its counsel dated October 26, 2006, demanding the return of all personalty on the farms.[18]

This evidence certainly created an issue of fact that the jury had to resolve per the holding in *Smith* and other cases cited in Appellant's Brief.

REPLY POINT THREE:
Appellees Did Not Have A Superior Interest in the Personal Property

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[16] USCA5 2472-2484 (Ex. G, Steve Veigel depo., p. 56, lines 13-25; p. 57, lines 1-2; p. 135, lines 1-25; p. 136, lines 1-15; p. 161, lines 16-25; p. 162, lines 1-6). See also, letter from Terra Partners' attorney, Van Northern reaffirming that all of equipment remaining on farm belonged to Terra Partners. USCA5 1811-1813 (Ex. J-59, PACER document No. 35-70).
[17] USCA5 4157-4187. [Pacer Doc. 129-14].
[18] USCA5 1811-1813. [Pacer Doc. 35-70].

Appellees acknowledged and consented to Terra Partners' actual possession and use of the personal property on the farms subject to Rabo's security interest[19] in obtaining the temporary restraining order[20] and injunction in the Equipment Suit.[21]

The non-judicial foreclosures by Ag Acceptance on the Big Farm and the 75% interest in the 960 Acres in 2003 prior to the eviction, and Rabo Agrifinance's subsequent execution on the 25% interest in the 960 Acres only passed title to the realty (and fixtures affixed to the realty), and gave no legal title or right of immediate possession to the personal property located on the farms. A valid judgment, execution *and sale* is required to pass title to such personalty. See, *3-C Company v. Modesta Partnership*, 668 S.W.2d 741, 748 (Tex.App.-Austin 1984, writ ref'd n.r.e.) *citing Griggs v. Montgomery,* 22 S.W.2d 688, 694 (Tex.Civ.App. 1929, no writ). Following execution on the farms, Appellees had, at most, a lien *with no right of possession* to the personal property. *Id.* Until a judicial determination was made that such property was subject to the security agreements of Appellees and a sale held, Appellees did not have a superior right to possess such property, particularly, since Terra Partners was actively in possession

[19] As per the findings in the Equipment Suit and Deficiency Suit, Ag Acceptance reassigned all of its interests to the notes and security interests to Rabo Agrifinance's predecessor, Ag Services of America sometime prior to October 2004, such that Ag Acceptance had no contractual rights to enforce in October 2006 when the conversion occurred and only Rabo Agrifinance held any debt or security interests although Ag Acceptance maintains title to the realty it foreclosed upon.
[20] USCA5 1753-1763 [Pacer Doc. 35-61, 35-62, & 35-63].
[21] USCA5 1764-1792 [Pacer Doc. 35-64 & 35-65].

of such property and using it for farming operations on the farms as part of maintaining the status quo in the temporary restraining order and injunction Appellees obtained in the Equipment Suit.

Upon being advised that the property belonged to Terra Partners, which at the time owed no debt to Appellees, the continuing possession and refusal to release such property by Appellees established the necessary elements of conversion of Terra Partners' property under Texas law. See, *Burns v. Rochon,* 190 S.W.3d 263, 266-70 (Tex.App.-Houston [1st Dist.] 2006, no pet.) (lessor's right to lockout holdover tenant failed to authorize conversion of lessee's leased equipment).

As noted in Appellant's Brief[22], Texas courts have long held that public policy prohibits the enforcement of any contractual waiver of illegal acts such as conversion. *Zapata v. Ford Motor Credit Co.,* 615 S.W.2d 198, 201 (Tex. 1981). Appellees assert that under Tex. Bus. & Com. Code § 9.603 specifically permits waiver of conversion claims.[23] To the contrary, § 9.603 allows a secured party and debtor or obligor (of which Terra Partners was neither) to determine by agreement the standards governing fulfillment of the rights and duties of a debtor or obligor and secured party "…if the standards are not manifestly unreasonable." Waiver of illegal acts, particularly by a non-signatory who is not a debtor or obligor, do not

[22] Appellant's Brief at p. 38-39.
[23] Appellees' Brief at p. 36.

meet this standard. Moreover, both § 9.602(6) and § 9.603(b) do not allow a waiver of a secured party taking possession of collateral to not breach the peace.[24] Section 9.624 makes it clear that permitted waivers regarding disposition of collateral may be made "…only by agreement to that effect entered into and authenticated *after* default." [emphasis added] Appellees presented no summary judgment evidence that the purported waivers signed by Veigel entities other than Terra Partners complied with § 9.624(a)-(c).

Further, Appellees ignore the fact that their security agreements (to which Terra Partners was not a party or signatory) could not encompass personal property that was *owned* by Terra Partners and used on the farms. See *Morrison v. Standerfer,* 2010 WL 1137034 (Tex.App.-Ft. Worth 2010, no pet.) (mem. op.) *and cases cited* ("…Texas law generally does not permit two parties to agree to place a lien on the property of a third party who does not consent to the lien").

Additionally, given the findings in the Equipment Suit and the Deficiency Suit that Ag Acceptance had reassigned all of its interest in the notes and security back to Rabo Agrifinance's predecessor, Ag Services of America, sometime prior to October 2004, Ag Acceptance subsequently held no contractual rights under any security agreement as a defense to its conversion of personalty at the time of the eviction in 2006.

[24] Appellant's Brief noted that Terra Partners presented evidence of a breach of the peace by Appellees during the eviction process. See p. 35-38.

Therefore, the district court improperly granted summary judgment on this basis.

REPLY POINT FOUR:

The District Court Incorrectly Applied Texas Law on Collateral Estoppel to Bar Terra Partner's Conversion Claim for Property Not Sold

Terra Partners relies on its prior briefing[25] of Issue Six in rebuttal to Appellee's contention that collateral estoppel prevented Terra Partners from relitigating the issue of sale credits in the Deficiency Suit (to which Terra Partners was not a party).

REPLY POINT FIVE:

The District Court Erred in Denying Terra Partners' Subrogation Rights

Terra Partners relies on its prior briefing on Issues Two-Five[26] in rebuttal to Appellee's argument that the district court correctly denied Terra Partners' statutory subrogation rights, except to note that Terra Partners cited in its initial brief[27] case authority that holds courts cannot use their equitable powers to prevent a surety from its statutory right to reimbursement. There appears to be no direct Texas authority construing statutory subrogation rights in the context of a judgment debt.[28]

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[25] Appellant's Brief at pp. 28-30.
[26] Id. at pp. 19-28.
[27] Appellant's Brief at p. 20-21.
[28] This may make it appropriate for this Court to consider certifying a question to the Texas Supreme Court whether Texas law allows equitable consideration, such as prejudice to inferior lienholders, to be considered in the application of statutory subrogation rights to a judgment.

REPLY POINT SIX:

The District Court Incorrectly Determined that Robert Veigel's Transfer of his Subrogation Interest in the Diversified Judgment to Terra Partners was Fraudulent

Although Appellees's counterclaim for fraudulent transfer under Tex. Bus. & Com. Code §§ 24.005(a) and (b), 24.006(a), and 24.006(b), Appellees only moved for summary judgment on their 24.006(b) claim [PACER Doc. 120-2 at page 12] which is subject to the one year statute of repose provided by Tex. Bus. & Com. Code §24.010(a)(3).

With respect to Appellees' assertion that the Texas revival statute made timely its counterclaim seeking declaratory relief that the Veigel transfer was fraudulent, Appellees incorrectly fail to recognize the distinction between a statute of limitations, which can be revived under limited circumstances, and a statute of repose, which acts as a complete bar to actions filed outside its stated period. See, *Galbraith Eng. Consultants, Inc. v. Pochucha,* 290 S.W.3d 863, 866-69 (Tex. 2009). The period set forth in Tex. Bus. & Com. Code § 24.010(a)(3) is a statute of repose. See, *Cadle Co. v. Wilson,* 136 S.W.3d 345, 350 (Tex.App.-Austin 2004, no pet.).

Both Appellees and the district court in holding that Robert Veigel was insolvent at the time of the transfer of the Diversified Judgment ignored the fact that Robert Veigel paid off the Diversified Judgment held by Appellees, and

further ignored the provision of Tex. Bus. & Com. Code § 24.003(e), which provides:

> (**e**) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

The question of insolvency is determined as of the time of the conveyance. *Jackson Law Office, P.C. v. Chappell,* 37 S.W.3d 15, 25 (Tex.App.-Tyler 2000, pet. den.). Appellees did not submit *any* summary judgment to support a determination of Robert Veigel's insolvency at the time of the transfer of the Diversified Judgment to Terra Partners. Instead, Appellees and the district court relied on unpaid judgments against the Veigel entities, including Robert Veigel, in determining as a matter of law that he was insolvent at the time of the transfer to Terra Partners. The unpaid judgments were secured by liens on the properties foreclosed on by AAC, and the underlying debts were also secured by mortgage liens on such properties, including the Big Farm in which Robert Veigel and his wife, Ella Marie Veigel, claimed a homestead interest. The district court could not include these unpaid debts under Tex. Bus. & Com. Code § 24.003(e), in the determination of Robert Veigel's insolvency. There was simply no evidence to support the matter of law determination by the district court that the transfer of the Diversified Judgment to Robert Veigel was fraudulent.

Terra Partners also relies on its prior briefing on Issues Seven-Nine[29] in rebuttal to Appellees' contention that the district court correctly declared that the transfer of his subrogation interest by Robert Veigel to Terra Partners was fraudulent.[30]

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Terra Partners prays that the district court's grant of the three summary judgments be reversed, and the case remanded for a trial on the merits.

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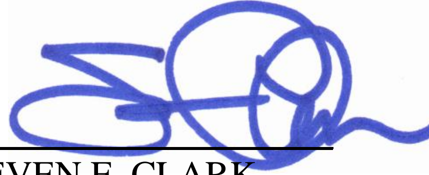
[29] Appellant's Brief at pp. 30-35.

[30] Terra Partners also filed a motion to dismiss Appellees' counterclaim because Appellees lacked capacity to bring such an action in Texas since they were de facto operating as a banking business and were not registered to do so in Texas. [R. at USCA 1115-1121]. Terra Partners reserved this issue for further briefing in Appellant's Brief [PACER Doc. 00511804653 p. 42 fn. 46]. The District Court erred in holding that even if Appellees were engaged in unauthorized banking and were violating the Texas Finance Code, Appellees were nonetheless registered to do business in Texas and that Appellant had not proved that Appellees had failed to pay all taxes, penalties, and interest and thereby had legal capacity to bring their counterclaims. However Tex. Corp. Act. Art. 2.001(B) states that it is unlawful to be organized under the Act, or to obtain authority to transact any business under the Act, if any one of the purposes for transaction of business is expressly prohibited by any law of the State of Texas, or which requires the issuance of a state license (e.g., Appellees failure to obtain license to conduct banking or to sell insurance), including operating a bank or doing banking in Texas. Bus. Corp. Act 31.004(B)(1) and (4), Tex. Fin. Code §31.005, 31.0045. If Appellees lacked capacity, then the District Court also erred in ruling for Appellees on their counterclaim for declaratory relief, including the fraudulent transfer claim.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct electronic copy of Appellant's Brief has been served in accordance with Fed.R.App.P. 25 and 5thCir.R. 25 upon Appellees' counsel of record designated below on this 18th day of June, 2012.

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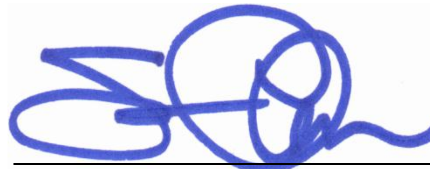

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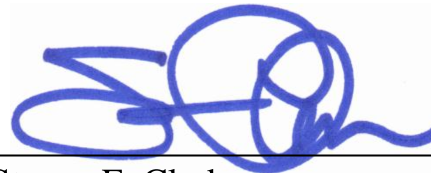
CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 4,689 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97-2003, Times New Roman, font size 14 for text, and size 12 for footnotes.

Dated this 18th day of June, 2012.



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