IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-23-03986

Appellate Case No.: 2017-00260

ARCpoint of Tallahassee, Inc., Greg Bowman d/b/a Bowman Lab Solutions, Inc., d/b/a ARCpoint Labs of Nashville; Gary Patrone d/b/a On Trac Holdings, Inc. d/b/a Arcpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs of Phoenix - Black Canyon, Employer's Choice Testing, LLC, Michael Gammel d/b/a Blue Lizard, Inc., Florence Ods, Inc., Myrtle Beach Ods, Inc., 3 Sons Ventures, Inc.; Jumpr2, Incorporated, Neil Seltz and Lesly Datlow d/b/a Shamey, LLC ..... Respondents,

v.

ARCpoint Franchise group, LLC, f/k/a Accudiagnostics,LLC and ARCpoint Occupational Solutions, LLC, ... Appellants.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The present matter before the court commenced upon the Respondents filing of a summons and complaint on June 20, 2017. On July 20, 2017, Appellants filed a motion to dismiss and to compel arbitration. The motion was heard by the Honorable R. Scott Sprouse on August 24, 2017. On September 20, 2017, the trial court entered an order granting in part and denying in part Appellants' motion. This appeal followed.

BACKGROUND

Respondents are the owner/operators of several franchises of AFG. Plaintiffs each signed the ARCPoint Franchise Group, LLC Franchise Agreement and established their franchises as follows:

1. AP Tallahassee entered into a Franchise Agreement with AccuDiagnostics, LLC n/k/a AFG on or about December 21, 2009, pursuant to which ARCpoint of Tallahassee was granted the exclusive franchise to establish, own and operate the ARCpoint Franchise Business in the greater Tallahassee/Leon County, Florida area.
2. Patrone, who does business as On Trac Holdings, Inc., entered into a Franchise Agreement with AFG in approximately November 2011, pursuant to which Patrone d/b/a On Trac Holdings d/b/a ARCpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs of Phoenix-Black Canyon ("On Trac Holdings") was granted the exclusive franchise to establish, own and operate the ARCpoint Franchise Business in the greater Phoenix, Arizona area.
3. Plaintiff, Employer's Choice entered into a Franchise Agreement with AFG on March 14, 2012, pursuant to which Employer's Choice was granted the

exclusive franchise to establish, own and operate the ARCpoint Franchise Business in the greater South San Antonio, Texas area.

4. Michael Gammel d/b/a Blue Lizard entered into a Franchise Agreement with AFG in April 2012, pursuant to which Gammel d/b/a Blue Lizard ("Blue Lizard') was granted the exclusive franchise to establish, own and operate the ARCpoint Franchise Business in a portion of Chicago, Illinois and certain of its Northwestern Suburbs.

5. Florence ODS and Myrtle Beach ODS, two of the first AFG franchises, entered into a "renewal" Franchise Agreement with AFG on February 6, 2013, pursuant to which Florence ODS was granted the exclusive franchise to establish, own and operate the ARCpoint Franchise Business in the greater Florence and Myrtle Beach, South Carolina areas.

6. Joseph M. Regan and his wife, Sally W. Regan entered into a Franchise Agreement with AFG on March 2, 2013, which agreement was then assigned to 3 Sons Ventures pursuant to a March 2, 2013 Addendum and Assignment of the Franchise Agreement. At the same time, 3 Sons Ventures also entered into a March 2, 2013 Addendum to ARCpoint Franchise Agreement and Business Purchase Agreement. As a result of the aforesaid Agreements, 3 Sons Ventures was granted the exclusive franchise to establish, own and operate the ARCpoint Franchise Business in the greater Charleston, South Carolina area.

7. Gregory A. Jump and Robert E. Robert entered into a Franchise Agreement with AFG on July 13, 2013, which agreement was then assigned to JumpR2, pursuant to a July 2013 Addendum to and Assignment of ARCpoint Franchise

Agreement. As result of the aforesaid Agreements, JumpR2 was granted the exclusive franchise to establish, own and operate the ARCpoint Franchise business in the greater Dallas, Texas metropolitan area.

8. Neil Seltz and Lesly Datlow d/b/a Shamey, LLC ("Shamey") entered into three (3) Franchise Agreements with AFG on June 25, 2013, pursuant to which Neil Seltz and Leslie Datlow were granted the exclusive franchise to establish, own and operate the ARCpoint Franchise Business in the central and southern portion of Chicago, the Western portion of Chicago and its Western and Southwestern Suburbs, and certain of Chicago's Northern/Northwestern suburbs. Lesly Datlow/Shamey also entered into a Franchise Agreement with AFG on October 17, 2013, pursuant to which Lesly Datlow/Shamey was granted the exclusive franchise to establish, own and operate the ARCpoint Franchise Business in a portion of the North Side of Chicago, Evanston and certain other Northern Suburbs of Chicago.

The Franchise Agreements are between the Plaintiffs and AFG. Each franchise agreement was attached to the motion and introduced in the record by AFG and AOS. AOS is clearly not a signatory of the Franchise Agreements. The Plaintiffs have not entered into any agreement with AOS. Further, according to the records of the South Carolina Secretary of State, Defendant ARCPoint Occupational Solutions, LLC did not exist until it was incorporated on November 12, 2013, **(see Online Records of the South Carolina Secretary of State, https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/7df9d9a6-a028-4d7a-a762-c79abc7859ea)**, approximately a month after the latest Franchise Agreement was signed by Shamey on October 17, 2013.

As more fully set forth in the Complaint, AFG has engaged in acts that are in breach of the AFG Franchise Agreement, as well as other activities complained of that violate South Carolina statutory and common law and have and will cause significant damage to the Plaintiffs. AOS, separate and apart from AFG, has engaged in activities more specifically set forth in Plaintiffs' complaint that have and will cause significant damage to the Plaintiffs.

SUMMARY RESPONSE

After a hearing on the merits, specific to this appeal, the trial court held that (1) the arbitration clause in the Franchise Agreements was specifically limited to disputes "between the parties", Respondents and AFG, therefore AOS could not compel arbitration as a non-party. In the alternative, (2) the trial court held that even absent the limitation in the arbitration clause, AOS is not otherwise able to establish its rights to equitable estoppel. Finally, the trial court held (3) that because the Franchise Agreements between Myrtle Beach ODS and Florence ODS and AFG were altered by a mutually agreed jury trial reservation handwritten by Myrtle Beach ODS and Florence ODS which voided the standard arbitration clause, Respondents Myrtle Beach ODS and Florence ODS cannot be compelled to arbitration. In reaching its holdings, the trial court considered and rejected all of the arguments now presented by Appellants. This court should similarly reject the arguments as lacking merit. For the reasons set forth herein, the trial court's order should be affirmed as entered.

ANALYSIS

I. THE TRIAL COURT CORRECTLY HELD THAT RESPONDENTS COULD NOT BE COMPELLED TO ARBITRATE WITH AOS.

A. Because no agreement to arbitrate exists between the Plaintiffs and AOS, the trial court correctly determined that AOS is not entitled to

an order dismissing Plaintiffs' claims against AOS and compelling arbitration.

As AOS is not a signatory to the Franchise Agreements, AOS is asserting its right to compel arbitration through a claim of equitable estoppel. However, as the trial court found, the courts need not reach that question because the contract ultimately controls. Given that the agreement to arbitrate between AFG and the Respondents is limited to those "parties", the Respondents may not be compelled to arbitrate with AOS, a non-party. For this reason more fully set forth below, the trial court's order should be affirmed.

The "**Arbitration**" clause within the Franchise Agreements drafted by AFG is as follows:

> This Agreement evidences a transaction involving commerce and, therefore, the Federal Arbitration Act, Title 9, of the United State Code is applicable to the subject matter contained herein. Except for controversies or claims relating to the ownership of any of Franchisor's Marks, the unauthorized use or disclosure of Franchisor's Confidential Information or covenants against competition, all disputes arising out of or relating to this Agreement or to any other agreements between the parties, or with regard to interpretation, formation or breach of this or any other agreement between the parties, shall be settled by binding arbitration conducted in Greenville County, South Carolina, in accordance with the Commercial Arbitration Rules of the American Arbitration Association then in effect. A single Arbitrator agreed upon by the parties or otherwise appointed by the Circuit Court located in or serving Greenville County, South Carolina, shall conduct the proceedings. The decision of the arbitrator will be final and binding upon the parties. Judgment upon the award rendered by the arbitrator may be entered in any court having personal and subject matter jurisdiction.
>
> Franchisee acknowledges that is has read the terms of this binding arbitration provision and affirms that this provision is entered into willingly and voluntarily and without any fraud duress or undue influence on the part of the Franchisor or any of Franchisor's agents or employees.

The AFG arbitration clause provides in pertinent part: "...all disputes arising out of or relating to this Agreement or to any other agreements **between the parties**, or with

regard to interpretation, formation or breach of this or any other agreement **between the parties**, shall be settled by binding arbitration conducted in Greenville County, South Carolina, ..." (emphasis added). It is undisputed that the parties to the AFG arbitration clause are the Plaintiffs and AFG. The Plaintiffs are not a party to any agreement to arbitrate with AOS. As set forth above, the public record provides conclusively that AOS did not even exist at the time the Plaintiffs entered into their Franchise Agreements with AFG.

It is this court that determines questions of arbitrability and enforceability of the arbitration clause and the limits of the arbitration agreement, if enforceable, between AFG and the Plaintiffs. "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement." Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010). In this matter, AOS is not able to take advantage of the AFG arbitration clause because the arbitration clause is clearly, unambiguously and specifically limited to "disputes ... between the parties" to the Franchise Agreement. Because the arbitration clause is so restricted and AOS is clearly not a party to the Franchise Agreement and arbitration clause, the court must deny AOS' motion to dismiss and compel arbitration. This issue was recently before the United States Court of Appeals for the Eleventh Circuit in the matter of Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc., 854 F.3d 1351 (11th Cir. 2017).

In Kroma, Kimberly, Kourtney and Khloe Kardashian (collectively the "Kardashians") moved to compel arbitration of Plaintiff Kroma's trademark infringement claims. In addition to the Kardashians, two other parties to the dispute were Boldface

Licensing + Branding, Inc. and Lee Tillet, Inc. Lee Tillet, Inc. and the Kardashians moved to compel arbitration. Lee Tillet, Inc.'s motion was based upon the arbitration clause between itself and Plaintiff. The Kardashians proceeded under a theory of equitable estoppel. Lee Tillet, Inc.' s motion was granted. The Kardashians motion was denied. Id. at 1353-54. The arbitration clause provided as follows: "... the Parties agree that the disputes arising between them ...". Id. at 1353. The court reasoned and held that the arbitration clause was limited to "the parties". The therefore compel arbitration, the court would be "effectively ... rewriting the agreement between the signatories about which disputes they would arbitrate to require one of them to arbitrate disputes that they had not agreed to. That would violate the basic principle that parties can be forced to arbitrate only disputes that they have agreed to arbitrate." Id. at 1356. The court continued:

> This does not mean that equitable estoppel can never be used by a non-signatory to force a signatory to the agreement to arbitrate a dispute involving the agreement. If the parties had consented in the arbitration clause to arbitrate any disputes concerning the validity, interpretation, etc., of the contract, instead of consenting to arbitrate only "disputes arising between them" concerning the validity, interpretation, etc., of the contract, the Kardashians may have been able to use equitable estoppel to require Kroma EU to arbitrate the dispute between it and them. But, as the "between them" language shows, that is not what the parties to the agreement consented to do in the arbitration provision.
>
> Our holding is that Florida's doctrine of equitable estoppel permits a non-signatory to an agreement to avail herself of an arbitration clause only when the claims asserted against her fall within the scope of the clause that the signatories had agreed upon. This is consistent with the reasoning behind the doctrine, which is that "[o]ne cannot both take advantage of contract provisions to seek to impose liability . . . and at the same time avoid another contract term or provision for which it has no use." One does not avoid or violate an arbitration clause by refusing to arbitrate a dispute that is not covered by the clause. (internal citations omitted).

Id. at 1356; see also, World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc., 517 F.3d 1240, 1247, (11th Cir. 2008) (holding "the arbitration provisions in the

Franchise Agreements are expressly limited to the immediate parties (Volvo Rents and World Rentals), and they expressly exclude any affiliates such as Volvo Finance. In other words, the language of the arbitration provisions expressly and unambiguously exclude from their scope any dispute between the World Parties and Volvo Finance. Thus, we are constrained to conclude that the district court correctly refused to compel Volvo Finance to arbitrate on an incorporation-by-reference theory. Any other result would not only "unduly stretch," but completely rewrite the arbitration clause, and compel a non-party to arbitrate in the absence of ever having agreed to do so in the first place.").[1]

As in the Kroma matter, the language in the AFG Franchise Agreement's arbitration clause is identically restricted to "the Parties". To compel the Plaintiffs to arbitrate with AOS, the court would be required to go outside of the scope of the arbitration clause. As the 11th Circuit held, "[s]uch a holding would be, well, inequitable." Id. For this reason, AOS' motion to dismiss and compel arbitration should be denied. AOS attempts to the confuse the issue by citing cases that apply equitable estoppel and arguing that the arbitration clause is a "broadly worded" clause because it applies to "all disputes arising out of or relating to this Agreement or to any other agreements **between the parties**, or with regard to interpretation, formation or breach of this or any other agreement **between the parties**, shall be settled by binding arbitration conducted in Greenville County, South Carolina, ..." (emphasis added). However, this argument is without merit and the attempt is nothing more than merely highlighting language the court reviewed and considered, but has no significance to the issue before the trial court or this court. As the trial court determined, the reach and scope of the

[1] The World Rentals court likewise extended its reasoning to deny a motion to compel arbitration with a non-signatory on theories of "Agency and Veil-piercing" and "Estoppel". See World Rentals, 517 F.3d at 1248, 1249.

arbitration clause is qualified by and limited to "between the parties". AOS does not fall into that category and the claims against it were properly excluded from the scope of the arbitration clause. For this reason, the trial court's order should be affirmed.

B. Alternatively, the trial court correctly determined that AOS could not otherwise compel arbitration through the application of equitable estoppel.

Alternatively, the trial court correctly determined that even assuming the question of equitable estoppel is reached, AOS's assertions similarly fail. For these reasons, the trial court's determination was correct.

AOS' sole theory to compel arbitration relies on equitable estoppel and specifically on the assertion that the Plaintiffs claims rely on terms of the written agreement and the claims against AFG and AOS are substantially interdependent. AOS' assertions are inaccurate. Plaintiffs' claims against AOS are only tangentially related to AFG. At best, the claims against AOS only require that Defendants not deny the existence of the Franchise Agreements. Otherwise, the claims against AOS are independent of the Franchise Agreement. AOS is an independent actor in the claims against it. AFG and the Franchise Agreement play only a factual role in Plaintiffs' claims against AOS. The harm suffered by the Plaintiffs by the acts of AOS is independent of the harm Plaintiffs suffer from AFG.

More specifically, the only claims asserted by Respondents against AOS are civil conspiracy and tortious interference with contract. Respondent's arguments are without merit for the reasons that follow:

1. AOS did not exist and was not within the contemplation of AFG and the Respondents at the time of execution of the Franchise Agreement.

Despite Appellant's claims to the contrary, the fact that AOS did not exist when the Franchise Agreements were executed is relevant to the application of equitable estoppel. In equity, AOS is seeking to enforce an arbitration agreement of which they are not a party because AOS did not exist, at the time of execution of the Franchise Agreement, AOS could not have in any way been contemplated by the parties to the agreement. The trial court rightfully considered this factual finding in its application of equity. Appellants assert two arguments in opposition to the trial court's consideration. First, they argue that the fact that the Franchise Agreement were all executed prior to the existence of AOS was not established in the record. This assertion lacks all merit given that the fact is clearly established by the mere comparison of the public records and the Franchise Agreements placed in the record by Appellants. Second, Appellants claim that the factor is irrelevant because there is no case law where the exact facts herein were considered. This assertion is illogical. The facts are potentially unique and not found in the published case law. That does not render the fact irrelevant to consideration. In fact, as the trial court determined, the fact that no party to an arbitration clause could not in any way contemplate an arbitration clause being extended to a particular non-party has relevance in equity.

2. The claim of civil conspiracy does not rely on the terms of the written agreement or on acts substantially interdependent.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff." LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 69, 370 S.E.2d 711 (1988). "[I]t is not necessary for a plaintiff asserting [sic] civil conspiracy [sic] to allege an unlawful act in order to state a cause of action, although a civil conspiracy may be furthered by an unlawful act. Thus, lawful acts may become actionable as a civil conspiracy when the

object is to ruin or damage the business of another." Id. (internal citations and quotations omitted).

To prove civil conspiracy, Respondents do not need a valid and enforceable agreement, need not rely on the agreement and do not require that the court otherwise interpret the agreement. The existence and validity of the Franchise Agreement is no more than factual. It is tangential to the civil conspiracy claim against AOS. Further, AFG is not a necessary party to the claim of conspiracy against AOS. AFG is merely the other party to AOS in the claim. The relationship between AOS and AFG shows opportunity and the potential exchange of knowledge. While not necessary to the claim, given the allegations of harmful acts and injuries, it is factually compelling to the trier of fact. In this case, the complaint asserts that two parties combined for purposes of injuring the Respondents and caused injury and special damages, which sets forth a *prima facie* case of civil conspiracy. The claim against one is independent of the other. For this reason, the trial court's order was correct and should be affirmed.

3. *The claims of tortious interference of contract asserted against AOS do not rely on the terms of the written agreement or on acts substantially interdependent.*

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304 (1993). Once again, AFG is not a necessary party to these claims against AOS. The Franchise Agreement's existence and validity is all that is necessary. Presumably, given that AOS attached the Franchise Agreements to their motion and made them part of the record, Respondents do not anticipate that element one to the tortious interference claim against

AOS will be in dispute. The relationship between AOS and AFG and the common leadership plead in the complaint does no more than demonstrate the "knowledge" element and certainly makes it difficult for AOS to deny knowledge. In establishing this tortious interference, Respondents need not rely on the terms of the written agreement to assert their claims against AOS. The claims against AOS are independent claims of tortious interference against AFG. The allegations against AOS may stand on their own and do support AOS' assertion that the claims against AFG and AOS are substantially interdependent and allege concerted misconduct by both. For this reason, the trial court's order was correct and should be affirmed.

C. The trial court correctly held that because Plaintiffs Florence ODS, Inc. and Myrtle Beach ODS, Inc., are specifically entitled to a jury trial, which cannot be provided in arbitration, AFG's arbitration is unenforceable against Plaintiffs Florence ODS, Inc. and Myrtle Beach ODS, Inc.

As the trial court correctly determined, Plaintiffs Florence ODS, Inc. and Myrtle Beach ODS, Inc. cannot, by specific agreement between themselves and AFG, be compelled to arbitrate. Specifically, the court held "[b]y including this term, Florence ODS and Myrtle Beach ODS did definitively reserve the right to a jury trial as their means of dispute resolution. By signing the addendum, AFG agreed to the term. The court therefore finds as a matter of law Florence ODS and Myrtle Beach ODS' jury trial reservations valid and enforceable." For the reasons herein, the trial court's order is correct.

As factually determined by the Franchise Agreements and accompany documents placed in the record by AFG, in its addendum to the February 6, 2013 Franchise Agreement with AFG, Florence ODS, Inc. included the following handwritten term: "I do not wish to waive our right to a jury trial". The addendum was signed by company

President Felix Mirando on behalf of AFG. **(Ex. 6, pg. 66, Def.'s Mot. to Dismiss.)** In its addendum to the February 6, 2013 Franchise Agreement with AFG, Myrtle Beach ODS, Inc. included the following handwritten term: "Do not wish to waive our rights to a jury trial". The addendum was signed by company President Felix Mirando on behalf of AFG. **(Ex. 7, pg. 67, Def.'s Mot. to Dismiss.)**

> Article I, section 14 of the South Carolina Constitution provides as follows:
>
> The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury ...

As the trial court found, Florence ODS and Myrtle Beach ODS specifically included a term in their Franchise Agreements that they were not waiving their right to a jury trial. By including this term, Florence ODS and Myrtle Beach ODS did definitively reserve the right to a jury trial as their means of dispute resolution. By signing the addendum, AFG agreed to the term. As the trial court determined, the right to a jury trial conflicts directly with an agreement to arbitrate. The mutually negotiated term in the addendum trumps any agreement to arbitrate included within the standard/default language of the AFG Franchise Agreement. Given that the right to a jury trial cannot be preserved in arbitration, the court must provide the right to a jury trial over and above a separate, conflicting agreement to arbitrate. As a result, the arbitration clause in the Myrtle Beach ODS and Florence ODS Franchise Agreements is null and void.

As they did before the trial court, Appellants unjustifiably seek to limit the "handwritten" and latter reservation of Myrtle Beach ODS and Florence ODS by arguing that the reservation only preserves the jury trial for those items not specifically subject to arbitration. This assertion was considered and rejected by the trial court, goes against well-established canons of contract interpretation and is not justified by the documents

themselves. The record stands before the court unaltered from the trial court. For this reason, as determined by the trial court, the handwritten, latter reservation of the jury trial by Myrtle Beach ODS and Florence ODS is valid, enforceable and renders the arbitration clause void and unenforceable. For these reasons, the trial court's order is correct and should be affirmed.

CONCLUSION

For the reasons set forth above, the trial court's order denying Appellant's motion to compel arbitration should be affirmed as entered.

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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ARCpoint of Tallahassee, Inc., Greg Bowman d/b/a Bowman Lab solutions, Inc., d/b/a ARCpoint Labs of Nashville; Gary Patrone d/b/a On Trac holdings, Inc. d/b/a Arcpoint Labs of Tempe, ARCpoint Labs of Mesa, ARCpoint Labs of Phoenix - Black Canyon, Employer's Choice Testing, LLC, Michael Gammel d/b/a Blue Lizard, Inc., Florence Ods, Inc., Myrtle Bach Ods, Inc., 3 Sons Ventures, Inc.; Jumpr2, Incorporated, Neil Seltz and Lesly Datlow d/b/a Shamey, LLC ..... Respondents,

v.

ARCpoint Franchise group, LLC, f/k/a Accudiagnostics, LLC and ARCpoint Occupational Solutions, LLC, ... Appellants.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Appellants in the foregoing matter with a copy of the INITIAL BRIEF OF RESPONDENT by depositing a copy of same in the United States Mail with adequate postage affixed thereon to ensure delivery, address as follows:

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Re: ARCpoint of Tallahassee, Inc., et.al. *v.*
ARCpoint Franchise Group a/k/a Accudiagnostics
C.A. No.: 2017-CP-23-03986
Appellate Case No. 2017-00260

Dear Ms. Kitchings:

Attached please find the original and one copy of the Initial Brief of Respondent and Respondents' Designation of Matters to be Included in the Record on Appeal in the above-referenced matter. By copy of this letter we are providing a copy of same to all parties.

Best regards,

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