No. 06-6252

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICREDIT FINANCIAL SERVICES, INC.

Creditor/Appellant,

v.

ROBERT HARRIS LONG AND GINGER DENISE LONG,

Debtors/Appellees

Brief of Amicus Curiae National Association of Consumer Bankruptcy Attorneys In Support of the Appellees.

Direct Appeal from the United States Bankruptcy Court for the
Eastern District of Tennessee

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March 10, 2007

CORPORATE DISCLOSURE STATEMENT

Americredit Financial Services, Inc. v. Robert Harris Long and Ginger Denise Long, No. 06-6252.

Pursuant to F.R.A.P. 26.1 and 6 Cir. R. 26.1, Amicus Curiae the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.
NONE.

3) If there is a publicy held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

Dated: March 10, 2006

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Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF NACBA AS AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2,600 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own motor vehicles. The 2005 amendments to section 1325(a) added an unenumerated, hanging paragraph at the end of the section that deals with certain claims secured by motor vehicles. The effect of this paragraph has been widely debated by creditors, debtors, counsel and commentators. This case affords the court an opportunity to address this debate as it pertains to the surrender of these vehicles.

SUMMARY OF ARGUMENT

Before considering whether property securing a claim covered by the hanging paragraph may be surrendered in full satisfaction of that claim, the Court should first consider whether section 1325(a)(5) has any applicability to such claim. The hanging paragraph added to the end of section 1325(a)(5) plainly makes section 506 inapplicable to certain claims. Without the application of section 506, Creditor's claim cannot be an "allowed secured claim" entitled to the protections provided under section 1325(a)(5). For those secured claims falling outside the scope of 1325(a)(5), debtors may modify those claims subject to section 1322(b)(2) and the dictates of good faith.

By contrast, most court decisions to date have either assumed that the hanging paragraph prevents bifurcation or have completely ignored the longstanding majority position under which, in chapter 13, the term "allowed secured claim" refers to a claim whose status has been determined pursuant to section 506(a). In limiting bifurcation of claims covered by the hanging paragraph, several courts have simply overreached in attempting to extend the very narrow and limited holding in *Dewsnup v. Timm*, 502 U.S. 410 (1992). The conclusion of these courts leads to the nonsensical result that the words "allowed secured claim" in section 1325(a)(5) carries two different definitions. One definition is determined with reference to section 506(a) and the other is not.

In the alternative, if Creditor is found to have an "allowed secured claim" in the full amount of the debt and entitled to treatment under section 1325(a)(5), it cannot also have an allowed unsecured claim. The 2005 amendments to section 1325(a) in no way altered the applicability of section 1325(a)(5)(C) to "allowed secured claims" provided for by the plan, nor did they limit application of the hanging paragraph to section 1325(a)(5)(B). Prior to the 2005 amendments, debtors were permitted to surrender collateral in full satisfaction of the Creditor's "allowed secured claim." Such a result has not been modified by the addition of the hanging paragraph.

ARGUMENT

I. The plain language of the "hanging paragraph" following section 1325(a)(9) renders section 506 inapplicable for the purposes of 1325(a)(5).

The starting point for the court's inquiry should be the statutory language itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). In interpreting the statutory language, the court must assume that Congress said in the statute what it meant and meant in the statute what it said. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, it has been well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwirters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000)(internal quotations omitted). A result will only be

deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999), *citing Public Citizen v. Dept of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989). A plain reading of the statutory language in results in an outcome that is neither absurd nor demonstrably at odds with the intentions of Congress.

The new paragraph added to the end of section 1325(a)(9) (hereinafter the "hanging paragraph") states in relevant part:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debtor that is the subject of the claim, …

This paragraph plainly and clearly makes section 506 inapplicable for purposes of section 1325(a)(5) to a claim based on a purchase money security interest in a motor vehicle obtained within 910 days of the filing of the petition. While most courts have agreed that the statute is unambiguous on this point,[1] courts have differed dramatically on what it means to say that section 506 does not apply. *See, e.g.*, *In re Carver*, 338 B.R. 521 (Bankr. S.D. Ga. 2006)(910 car claims not "allowed secured claims"); *In re Brooks*, 344 B.R. 417 (Bankr. E.D.N.C. 2006)(910 car claims are allowed secured claims in the full amount of the debt);

[1] *See, e.g., In re Turkowitch*, 2006 WL 3346156 (Bankr. E.D. Wis. Nov. 16, 2006); *In re Patricka*, 355 B.R. 616 (Bankr. E.D. Mich. 2006); *In re Payne*, 347 B.R. 278 (Bankr. S.D. Ohio)(finding the language of the hanging paragraph "unambiguous and clear").

In re Wampler, 345 B.R. 730 (Bankr. D. Kan. 2006)(910-car creditor does not have an "allowed secured claim" but has an allowed claim for the entire prepetition debt without post-petition interest).

Before considering whether property securing a claim covered by the hanging paragraph may be surrendered in full satisfaction, the Court should first consider whether section 1325(a)(5) has any applicability to such claim. Based on the plain language of the statute *amicus curiae* believe that it does not.

II. If section 506 does not apply to Creditor's claim, then Creditor cannot have an "allowed secured claim" subject to treatment in accordance with 1325(a)(5).

A. A claim becomes an allowed secured claim only after it has been "allowed" under § 502 and its secured status determined under § 506.

The "allowance," "status" and "treatment" of claims require three distinct inquiries under the Bankruptcy Code. Holders of "allowed secured claims" provided for in a chapter 13 plan are accorded special "treatment" of their claims under 11 U.S.C. § 1325(a)(5). Specifically, section 1325(a)(5) states that the court shall confirm a proposed chapter 13 plan if, "with respect to each allowed secured claim provided for by the plan" the creditor accepts the plan, the debtor affords the creditor's claim the treatment specified under section 1325(a)(5)(B), or the debtor surrenders the property. To achieve the status of a holder of an "allowed secured claim" and obtain the benefits of section 1325(a)(5) requires the operation of state law and sections 502 and 506 of the Bankruptcy Code. *See In re Green*, 348 B.R.

601 (Bankr. M.D. Ga. 2006); *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006); *In re Taranto*, 344 B.R. 857 (Bankr. N.D. Ohio 2006).

State Law. Whether or not the amount owed to a creditor is secured by a lien on property is determined in accordance with the applicable law of the state in which the debtor resides or where the contract was formed. Similarly, the classification of such a lien as a "purchase money security interest" is also determined by state law. *See, e.g*., *In re Horn*, 338 B.R. 110 (Bankr. M.D. Ala. 2006).

Bankruptcy Code. The "allowance", "status" and "treatment" of that creditor's claim in the context of a federal bankruptcy proceeding are determined not under state law, but by the provisions of the Bankruptcy Code. Only after the claim has been "allowed" under section 502(a) and its secured "status" determined under section 506, can the claim be afforded the "treatment" specified in section 1325(a)(5). *See Unites States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 238-39 (1989)(explaining that section 506 "governs the definition and treatment of secured claims."); *In re Fareed*, 262 B.R. 761 (Bankr. N.D. Ill. 2001)(explaining that the "'secured claim', arising from collateral valuation under § 506, if allowed under § 502, authorizes a secured creditor to demand the plan treatment specified in § 1325(a)(5)").

"Claim allowance" is determined by section 502, which establishes the amount of the creditor's allowed claim. Section 502 does not address the status or

treatment of a secured claim in a case, but merely creates a threshold for determining whether an asserted claim or interest is eligible for distribution from the estate, and if so, in what amount.

Once a claim is allowed, its "secured status" is determined in accordance with section 506. *See In re Bailey*, 153 F.3d 718 (4th Cir. 1998)(table, unpublished)("[t]he determination of an allowed claim's **secured status is an independent inquiry governed by 11 U.S.C. § 506**")(emphasis added). Absent the operation of section 506, the creditor does not obtain the status of a holder of an "allowed secured claim" under the federal bankruptcy law. *See In re Green*, 348 B.R. 601 (Bankr. M.D. Ga. 2006); *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006); *In re Taranto*, 344 B.R. 857 (Bankr. N.D. Ohio 2006). However, the hanging paragraph only makes section 506 inapplicable with respect to section 1325(a)(5). As a result, the creditor with a purchase money security interest securing a debt described in the hanging paragraph has an allowed secured claim for purposes of chapter 13 with one exception. Under that exception the creditor is simply not entitled to the special treatment specified in section 1325(a)(5). *See* 8 Collier on Bankruptcy ¶ 1325.06 (A. Resnick and H. Sommer, eds., 15th ed. Rev. 2005); *see also In re Zehrung*, 351 B.R. 675, 677 (W.D. Wis. 2006)("claims could not be 'allowed secured claims' under a literal reading). To hold otherwise, would be to completely disregard the plain language of the statute.

Most importantly, such claims may still be modified under section 1322(b)(2), which expressly permits the modification of secured claims. AmeriCredit conveniently ignores section 1322(b)(2) and suggests that since section 506 is inapplicable its secured claim cannot be modified and remains fully secured. Such a position is contrary to the plain language of 1322(b)(2) which only protects certain claims secured by residential real property from modification.

B. Courts applying *Dewsnup* in chapter 13 have failed to recognize the absurd result in which the same words "allowed secured claim" in section 1325(a)(5) would have two different meanings.

Relying heavily on the Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), some recent court decisions[2] hold that a claim allowed under section 502 and for which the creditor has a valid lien pursuant to state law is sufficient to create a "allowed secured claim." *See, e.g*., *In re Patricka*, 355 B.R. 616 (Bankr. E.D. Mich. 2006);); *In re Brooks*, 344 B.R. 417 (Bankr. E.D.N.C. 2006); *In re Brown*, 339 B.R. 818 (Bankr. S.D. Ga. 2006). These courts conclude that the special treatment afforded "allowed secured claims" is available even when section 506 does not apply. In essence, these courts seek to extend the very

[2] Many early case decisions on the effect of the hanging paragraph assumed that covered claims were fully secured without offering much analysis to support the assumption. *See, e.g*., *In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala.)("Simply put, the claims of these creditors must be treated as fully secured under the plan'); *In re Horn*, 338 B.R. 110 (Bankr. M.D. Ala. 2006); *In re Robinson*, 338 B.R. 70 (Bankr. W.D. Mo. 2006).

narrow and limited holding in *Dewsnup*,[3] which held that a chapter 7 debtor could not use section 506(d) to strip down an undersecured lien bifurcated by section 506(a). *See In re Wampler*, 345 B.R. at 737-38 (criticizing cases that rely on *Dewsnup*). In the process, they overreach in their attempts to apply the *Dewsnup* opinion to chapter 13 where it has long been held that the term "allowed secured claim" in section 1325(a) does have the section 506(a) meaning—a meaning the *Dewsnup* court rejected for purposes of section 506(d) in chapter 7 cases. *See, e.g., Bank One, Chicago, NA v. Flowers*, 183 B.R. 509 (N.D. Ill. 1995)("had the Supreme Court intended *Dewsnup* to apply specifically to chapter 13 proceedings, it most likely would have stated such in *Nobelman*"); *In re Gray*, 285 B.R. 379 (Bankr. N.D. Tex. 2002)(stating that a majority of courts have taken the position that *Dewsnup* is not controlling in chapter 13 cases); *see also In re Zimmer*, 313 F.3d 1220 (9th Cir. 2003)(applying section 506 and determining mortgagee not "holder of secured claim" within the ambit of § 1322(b)(2)); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000). A thorough review of *Dewsnup*, *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993), and the relevant legislative history show that sections 506, 1322(b)(2), and 1325(a)(5), when viewed as a whole,

[3] The *Dewsnup* majority opinion is explicitly limited to the facts of that particular case. *See Dewsnup*, 502 U.S. at 417 n. 3 ("Accordingly, we express no opinion as to whether the word 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code.")

demonstrate that the words "allowed secured claim" are defined by section 506(a) in chapter 13 proceeding. *See Flowers*, 183 B.R. at 517.

The conclusion of the *Particka*, *Brooks*, and *Brown* courts leads to the nonsensical result that the term "allowed secured claim" contained within section 1325(a)(5) now carries two different meanings. One meaning applies when dealing with claims covered by the hanging paragraph and merely refers to a claim that is allowed under section 502 and for which the creditor has a valid lien pursuant to state law. For claims not covered by the hanging paragraph, the term "allowed secured claim" refers to the amount of the creditors claim entitled to special treatment under section 1325(a)(5) **after** applying section 506. The latter meaning is, of course, dependent on the application of section 506.

That the *Dewsnup* majority disregarded the normal rules of statutory construction by giving identical words used in different parts of the same subsection distinct meanings is well known. *See Dewsnup*, 502 U.S. at 421 (Scalia, J., dissenting); *Sullivan v. Stroop*, 496 U.S. 478 (1990)(internal quotations omitted). However, neither the *Dewsnup* opinion nor any other authority can support the decisions such as *Patricka*, *Brooks*, and *Brown*, in which the same words "allowed secured claim" in the ***same*** paragraph of the same subsection—1325(a)(5) —have two different meanings.

C. Limiting the applicability of section 1325(a)(5) for certain claims is not demonstrably at odds with what is at best ambiguous legislative history regarding the new hanging paragraph.

The plain language of the statute should be conclusive, "except in 'rare cases [in which] the literal application will produce a result demonstrably at odds with the intentions of the drafters.'" *United States* v. *Ron Pair Enters., Inc.,* 489 U.S. 235, 242, 109 S.Ct. 2197 (1991); *see also Lamie*, 540 U.S. at 534-36. Here, the sparse legislative history with respect to the hanging paragraph simply does not prove that Congress could not have intended the result reached by application of the plain language.[4] *See Demarest v. Manspeaker*, 498 U.S. 184 (1991), *citing Griffin v. Oceanic Contract., Inc.,* 458 U.S. 564, 571 (1982).

Earlier versions of the 2005 bankruptcy legislation contained language that would have eliminated the bifurcation of certain claims pursuant to section 506(a), but would not have eliminated their status as allowed secured claims. *See, e.g*., H.R. 833, 106th Cong. 1st Sess. § 122 (1999). For example, section 122 of the Bankruptcy Reform Act of 1999 provided that "**subsection (a)** [of § 506] shall not apply to an ***allowed secured claim*** to the extent attributable in whole or in part to

[4] Creditor supports its argument based on the "likely intent of the Hanging Paragraph". Cr. Brief at 25. Similarly, the court in *In re Zehrung*, 351 B.R. at 678, relies on what is considers the "unlikely" Congressional intent in enacting the hanging paragraph. *Amicus curiae* is aware of no rule of statutory construction that direct courts to rely on their best guess as to Congressional intent. Without clear Congressional intent to the contrary, the plain language of the statute is controlling.

the purchase price of personal property acquired by the debtor within 5 years of filing of the petition."(emphasis supplied). *See also* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 128 (1998). Similarly, the 1997 version of the bill provided that "**Subsection (a)** [of § 506] shall not apply to an **allowed secured claim** to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor during the 90-day period preceding the date of filing of the petition."(emphasis supplied). Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 302(c) (1997). Surely, had Congress intended only to prevent the bifurcation of claims under 506(a) while retaining the protections of section 1325(a)(5), it could have easily done so.

Indeed, Congress is fully aware of the language necessary to create an explicit exception to section 506. For example, under section 1111(b), the holder of a claim secured by a lien on property may elect that, notwithstanding section 506(a), such claim is a secured claim to the extent such claim is allowed. The fact that Congress considered but ultimately rejected similar language that would have eliminated bifurcation of certain claims supports the conclusion that it did not intend such an effect. *See Till v. SCS Credit Corp*., 541 U.S. 465, 480 n.8 (2004).

III. Alternatively, under amended section 1325(a), debtors may fully satisfy an "allowed secured claim" by surrendering the property securing the claim.

Section 1325(a)(5) sets forth the criteria for the treatment of allowed secured claims provided for by the plan. Assuming *arguendo* that Creditor's claim is an

allowed secured claim in the full amount of the debt because section 506 is inapplicable, the Creditor cannot also be the holder of an allowed unsecured claim in the same chapter 13 case. Creditors cannot have their cake and eat it too.

The hanging paragraph does not affect the debtor's ability to fully satisfy an allowed secured claim by surrendering the property securing that claim pursuant to 1325(a)(5)(C). *See, e.g., In re Osborn,* 2007 WL 542435 (B.A.P. 8th Cir. Feb. 23, 2007*); In re Quick*, 2007 WL 269808 (Bankr. N.D. Okla. Jan. 26, 2007); *In re Gentry,* 2006 WL 3392947 (Bankr. E.D. Tenn. Nov. 22, 2006); *In re Turkowitch,* 2006 WL 3346156 (Bankr. E.D. Wis. Nov. 16, 2006); *In re Evans*, 349 B.R. 498 (Bankr. E.D. Mich. 2006).

There is no question that prior to the enactment of BAPCPA and based on the plain language of the statute, a chapter 13 debtor could surrender property securing a claim in full satisfaction of the creditor's allowed secured claim. *See, e.g., In re Eubanks*, 219 B.R. 468, 473 (B.A.P. 6th Cir. 1998)("Section 1325(a)(5)(C) permits a Chapter 13 debtor to satisfy an 'allowed secured claim' by surrendering the property securing the claim."); *In re Day*, 247 B.R. 898, 901 (Bankr. M.D. Ga. 2000)(same).[5] No amendments were made to the provisions of

[5] *Amici* Wells Fargo, et al. twists the holding in *In re Eubanks* by stating that the case did not permit surrender "in full satisfaction of the debt" under section 1325(a)(5)(C). Wells Brief at 9. *Eubanks* clearly permits debtor to surrender in full satisfaction of the creditor's "allowed secured claim." 219 B.R. at 473. If the creditor has an "allowed secured claim" in the full amount of the debt for purposes

section 1325(a)(5)(C) as part of BAPCPA and nothing has changed the application of section 1325(a)(5)(C) to allowed secured claims provided for by the plan. If Congress had not wanted the hanging paragraph to apply to section 1325(a)(5)(C), it would have limited its applicability to section 1325(a)(5)(B), which it did not do. *See Johnson v. First Nat. Bank of Montevideo, Minn.,* 719 F.2d 270 (8th Cir. 1983)(and cases cited)("[A]bsent a clear manifestation of contrary intent, a newly enacted or revised statute is presumed to be harmonious with existing law and its judicial construction."). Accordingly, if the Creditor is found to have an allowed secured claim in the full amount of the debt owed to the creditor, then the Debtor may surrender the collateral in full satisfaction of that claim.[6]

If the effect of the hanging paragraph is to give creditors of covered claims "allowed secured claims" in the full amount of the debt, then surrender in full satisfaction of the debt is permitted. Such creditors are not entitled to a bifurcated claim and are prevented from filing a deficiency claim after the surrender of the collateral. "This rule complies with the meaning of the statue, constitutes the fair

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of 1325(a)(5), the debtor may surrender the collateral in full satisfaction of that claim.

[6] The minority of courts concluding otherwise state that § 506 is irrelevant where the debtor surrenders property in accordance with section 1325(a)(5)(C) because § 506 only has application when the estate retains an interest in the property. *See, e.g., In re Particka* 355 B.R. at 624. These courts erroneously assume that the estate's interest in the collateral "disappears with surrender." Nothing is the Code indicates that the estate's interest in property terminates immediately upon surrender of the property to the creditor. *See In re Quick*, 2007 WL 269808 at *5.

treatment of secured creditors as envisioned by Congress (because it will encourage debtors to either pay the claim in full or promptly surrender the collateral) and is in harmony with the majority of the bankruptcy courts that have analyzed this issue." *In re Turkowitch*, 2006 WL 3346156, at *8; *see also In re Quick,* 2007 WL 269808 (Bankr. N.D. Okla. Jan. 26, 2007).

CONCLUSION

In amending section 1325(a), "if Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, 540 U.S. at 1034. Until that time the plain language of the statute should apply: the inapplicability of section 506 to Creditor's claim means that the Creditor cannot have an "allowed secured claim" subject to treatment in accordance with 1325(a)(5). In the alternative, if Creditor does have "allowed secured claim" in the full amount of the debt, then the debtor may surrender the collateral in full satisfaction of that allowed secured claim, and the decision of the Bankruptcy Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 3822 words in Times New Roman (14 Point) proportional types. The word processing software used to prepare this brief was Microsoft Word for Mac.

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Tara Twomey

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2007, two copies of the foregoing brief have been mailed, first class mail, postage prepaid, to counsel listed below:

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