No. 11-1507

In The Appellate Court of Illinois
First Judicial District

WEST BEND MUTUAL INSURANCE CO.,	)	
	)	
Plaintiff/Appellant,	)	On Appeal from the Circuit Court
	)	of Cook County, Chancery Division
v.	)	
	)	Case No. 10 CH 1688
NEW PACKING COMPANY, INC.,	)	
	)	Hon. Mary Ann Mason,
Defendant/Appellee.	)	Judge Presiding

BRIEF AND ARGUMENT OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/APPELLEE NEW PACKING COMPANY, INC.'S RESPONSE BRIEF

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The financial security that insurance policies provide is critical to individuals and businesses and embedded in the fabric of our economy and modern society. Any person or business that has experienced a catastrophic loss recognizes the importance and value of insurance as protection against financial ruin. That intangible aspect of insurance is a primary reason why the law has always placed heightened obligations on insurers. The contractual guarantees of insurance cannot be easily mended once broken; seeking coverage after a catastrophe has already occurred is simply impossible. United Policyholders is particularly interested in this case since the Defendant, New Packing Company, Inc., purchased an insurance policy that the Plaintiff, West Bend Mutual Insurance Company, now claims did not provide coverage that was intended and expected; yet, the Plaintiff accepted premiums and delivered a policy that clearly signaled coverage. This case has additional significance since a ruling adverse to Defendant, New Packing Company, Inc., would significantly impede the willingness of potential buyers of real estate from purchasing properties that require repair and rehabilitation if such properties are vacant at the time of sale. The availability of insurance coverage during the time necessary to repair such properties enables real estate investors and developers to buy and improve existing structures.

United Policyholders, ("UP") is a non-profit 501(c)(3) organization founded in 1991 that serves as an independent information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor support the organization's work. United Policyholders' work is divided into three program areas: *Roadmap to Recovery* (resources to help policyholders navigate and resolve large loss

claims), *Roadmap to Preparedness*, (promoting disaster preparedness and insurance literacy), and *Advocacy and Action* (advancing the interests of insurance consumers in courts of law, before regulators, legislators, and in the media). UP offers a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.uphelp.org.

United Policyholders participates in the proceedings of the National Association of Insurance Commissioners as an official consumer representative, and is part of the American Law Institute's Advisory Panel on the Principles of Liability Insurance. UP receives frequent invitations to speak to trade and civic associations and testify at public hearings on insurance rate and policy issues.

United Policyholders has appeared as *amicus curiae* in over three hundred cases throughout the United States in state, federal and the U.S. Supreme Court.[1] Arguments from United Policyholders *amicus curiae* brief have been cited with approval by several

[1] E.g. *L.A. Checker Cab Co-op., Inc. v. First Specialty Ins. Co.* (2010); *Villa Los Almos HOA v. State Farm General Ins. Co.* (2010); *Hyundai Motor America v. National Union Fire Insurance Co.* (2009); *Kwikset Corp. v. S.C. (Benson)* (2009); *Meyer v. Sprint Spectrum L.P.* (2009); *Everett v. State Farm General Ins. Co.* (2008); *Medina v. Safe-Guard Products International, Inc*. (2008); *Cold Creek Compost, Inc., et.al v. State Farm Fire & Cas.* (2006); *First Am. Title Ins. Co. v. Superior Court* (2007); *Griffin Dewatering* v. *Northern Ins. Co. of N.Y.* (2007); *Hailey v. California Physicians' Service dba Blue Shield of California* (2007); *Padilla Construction Company, Inc., v. Transportation Insurance Company* (2007); *Medill v. Westport Insurance Corporation,* (2006); *County of San Diego v. Ace Property & Cas. Ins. Co.* (2005); *Powerine Oil Co., Inc. v. Superior Court* (2005); *Johnson v. Ford Motor Co.* (2005) ; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005); *Julian v. Hartford Underwriters Ins. Co.* (2005); *Garamendi v. Golden Eagle Ins. Co.* (2005); *American Ins. Ass'n v. Garamendi* (2005); *Watts Industries, Inc. v. Zurich American Ins. Co.* (2004); *Cassim v. Allstate Ins. Co.* (2004); *Marselis v. Allstate Ins. Co.* (2004); *Hameid v. National Fire Ins. of Hartford* (2003); *Rosen v. State Farm General Ins. Co.* (2003); *County of San Diego v. Ace Property & Casualty Ins. Co.* (2002); *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002); *Bialo v. Western Mut. Ins. Co.* (2002); *Vu v. Prudential Property & Casualty Ins. Co.* (2001); *20th Century Ins. Co. v. Superior Court* (2001); and *AICCO, Inc. v. Insurance Co. of North America* (2001).

courts including the United States Supreme Court and the California Supreme Court. *See, e.g., Humana, Inc. v. Forsyth,* 525 U.S. 299 (1999) (United Policyholders' brief cited in the published opinion at page 314); *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 145 P.3d 472 (Cal. 2006). United Policyholder briefs have also been received by the Supreme Court of Illinois in *Avery et al. v. State Farm*, 835 N.E.2d 801 (2005) and *Country Mutual Ins. Co. v. Livorsi Marine, Inc.*, 856 N.E.2d 338 (2006).

STATEMENT OF FACTS

The Defendant, New Packing Company, Inc. ("New Packing"), is a manufacturer of processed meats, with its principal place of business at 1249 West Lake Street in Chicago, Illinois. R. 232. New Packing purchased a policy of insurance (Policy No. 1011 852, hereafter "the Policy") from the Plaintiff, West Bend Mutual Insurance Co. ("West Bend"), covering commercial property damage, among other liabilities, for the period of August 17, 2008 to August 17, 2009. R. 230. The Policy contained a provision excluding coverage for losses due to theft or vandalism at a property vacant for more than 60 days prior to the date of the loss (the "Vacancy Provision"). R. 231-32. The Vacancy Provision read as follows:

> 6. Vacancy
>
> a. Description of Terms
>
> (1) As used in this Vacancy Condition, the term building and the term vacant have the meaning set forth in (1)(a) and (1)(b) below:
>
> (a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain

enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:

(i) Rented to a lessee or sublessee and used by the lessee or sub-lessee to conduct its customary operations; and/or

(ii) used by the building owner to conduct customary operations.

(2) Buildings under construction or renovation are not considered vacant

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism;
(b) Sprinkler leakage, unless you have protected the system against freezing;
(c) Building glass breakage;
(d) Water damage;
(e) Theft; or
(f) Attempted theft.

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

R. 231-32.

On April 21, 2009, New Packing entered into a contract to purchase a property located at 4151 West Lake Street in Chicago, Illinois (the "Property"). R. 232. On April 28, 2009, New Packing asked West Bend to add the Property as an insured property, effective on the date of closing; and West Bend underwrote coverage. R. 233. On April 30, 2009, New Packing closed on the purchase of the Lake Street Property. R. 233. On May 5, 2009 and May 17, 2009, the Property was vandalized, causing New Packing to sustain losses allegedly in excess of $1,000,000.00. R. 255. New Packing submitted a claim to West Bend for the damage, but West Bend denied the claim, citing the Vacancy Provision and stating that the Property had been vacant for over 60 days. R. 233.

On January 13, 2010, West Bend sued New Packing in the Circuit Court of Cook County, Chancery Division, seeking a declaration that the losses sustained by New Packing were excluded from coverage under the Policy's Vacancy Provision. R. 234. The parties submitted cross-motions for summary judgment. R. 207-668. New Packing argued the Vacancy Provision did not apply to periods of vacancy predating its ownership of the building, while West Bend argued that the Vacancy Provision was not so limited. R. 207-229, 346-56. On November 2, 2011, the Honorable Mary Ann Mason, Judge of the Circuit Court of Cook County, issued a Memorandum Opinion and Order granting in part New Packing's Motion for Summary Judgment and denying West Bend's Cross-Motion for Summary Judgment. R. 655-62. West Bend appealed that decision on May 26, 2011. R. 700.

ARGUMENT

This Court should affirm the decision of the Circuit Court that West Bend is liable for the losses New Packing sustained at the Property on May 5, 2009 and May 17, 2009.

R. 662. In *Kolivera v. Hartford Fire Insurance Company*, 8 Ill. App. 3d 356, 360 (1st Dist. 1972), this Court held that a vacancy provision in an insurance policy is measured from the time of the issuance of the policy, not from the time of the loss, unless the policy contains specific language providing otherwise. While the Vacancy Provision at issue in this case excludes coverage for damage or loss "[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs," the Vacancy Provision defines "building" by reference to the date of the issuance of the Policy and "vacancy" by reference to the building owner's use of the property. R. 231-32. Thus, the Vacancy Provision lacks "specific language" indicating that the exclusion applies to periods of vacancy preceding the issuance of the Policy. Indeed, the policy contains language indicating precisely the opposite. R. 231. Therefore, this Court should affirm the judgment of the Circuit Court that the Vacancy Provision does not apply to the losses sustained by New Packing at the Property on May 5, 2009 and May 17, 2009. In the alternative, this Court should rule that the Vacancy Provision is ambiguous and, therefore, must be interpreted against the drafter. *See Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 119 (1992) ("Ambiguous terms [in an insurance contract] are construed strictly against the drafter of the policy and in favor of coverage.").

I. THE COURT SHOULD AFFIRM THE JUDGMENT OF THE CIRCUIT COURT BECAUSE THE VACANCY PROVISION PLAINLY APPLIES ONLY TO VACANCIES OCCURING AFTER THE POLICY'S ISSUANCE

A. This Court Has Consistently Held that a Vacancy Provision in an Insurance Policy Is Measured from the Time the Policy Was Issued, Unless the Policy Contains Specific Language Stating Otherwise

An insurance policy is a contract, and ordinary rules of contract interpretation apply. *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). The primary objective of the court in interpreting a contract is to ascertain and give effect to the intention of the parties, as expressed in the policy language. *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). "An insurance policy, like any contract, is to be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose." *Cent. Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004). "If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning." *Id.* "Plain, ordinary, and popular meaning" has been interpreted variously to be "that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business[person], or to a lay[person]." *Outboard Marine Corp.*, 154 Ill. 2d at 115 (quoting 2 COUCH ON INSURANCE 2d § 15:18 (rev. ed. 1984)).

In *Kolivera v. Hartford Fire Insurance Company*, 8 Ill. App. 3d 356 (1st Dist. 1972), this Court confronted the issue of when a vacancy provision in an insurance policy begins to run. The plaintiff in *Kolivera* brought suit to recover on multiple insurance policies for losses resulting from two fires in a vacant industrial building on Chicago's West Side in October 1963. *Id.* at 357-58. The owner carried nine insurance policies on the property, three of which had been purchased within 60 days of the fires and two of which had been renewed during that same time period. *Id.* at 358. The policies all contained provisions suspending coverage "while a described building, whether intended

for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days." *Id.* The trial court granted judgment for the defendants but this Court reversed as to the three insurance companies that had issued policies within 60 days of the fires. *Id.* at 361. The court relied on *Old Colony Insurance Company v. Garvey*, 253 F.2d 299 (4th Cir. 1958), a Fourth Circuit federal court opinion, for the rule that "absent specific language including such, a previous condition of vacancy or unoccupancy of premises is to be disregarded upon the issuance of a policy of insurance containing a vacancy clause, and that such clause is to be measured from the time of the issuance of the policy." *Id.* at 360. The court declined to consider whether the vacancy provisions contained in the policies renewed within 60 days of the fires were enforceable because the plaintiff failed to raise the issue during the trial court proceedings. *Kolivera*, 8 Ill. App. 3d at 358, 361. *Kolivera* remains the law in this District today.

West Bend argues that *Kolivera* is not "controlling authority" because the policy language at issue in *Kolivera* is distinct from the language in the Policy at issue here. Appellant Br. at 8-9. Specifically, West Bend argues that the policy in *Kolivera* contained prospective language ("*beyond* a period of sixty consecutive days") whereas the Policy at issue here contains retrospective language ("the building where loss or damage occurs has been vacant for more than 60 consecutive days *before that loss or damage occurs*"). Appellant Br. at 14. (Emphasis added). However, while the specific facts of *Kolivera* may differ from the facts of this case, the rule announced in *Kolivera* – that, absent specific language providing otherwise, a vacancy provision in an insurance policy is measured from the time of the issuance of the policy – is nevertheless controlling unless overturned by this Court. 8 Ill. App. 3d at 360. And there are sound

policy reasons for *Kolivera's* continued viability. West Bend is undoubtedly a sophisticated insurance company that would not have issued coverage without employing careful underwriting practices that would have included an inspection of the property. West Bend therefore would have undoubtedly known the property was vacant when it bound coverage. It is common knowledge that vacant properties "can become havens for trash, stray animals, squatters, and criminals. Vacant properties are also more likely to be vandalized or burned to the ground." "Reducing Urban Blight as a Crime Prevention Strategy," Michigan Youth Violence Prevention Center, November 11, 2011 (available at http://yvpc.sph.umich.edu/2011/11/10/reducing-urban-blight-crime-prevention-strategy/). Therefore, for an insurer to issue a policy on a property known to be vacant and then evade coverage if a loss occurs under these circumstances has to be viewed as an unfair and deceptive practice. Illinois courts have consistently held:

> No rule in the interpretation of an insurance policy is more firmly established, or more imperative or controlling, than that which declares that in all cases it must be liberally construed in favor of the insured to the end that he will not be deprived of the benefit of the insurance for which he has paid, except where the terms of the policy clearly, definitively, and explicitly require it.

Schmidt v. The Equitable Life Assur.Soc. of U.S., 376 Ill.183, 190-91 (1941). Thus, after charging New Packing a premium for insurance coverage, the Vacancy Provision could not be applicable until 60 days after the inception of coverage. If it were otherwise, no purchaser seeking to develop or rehabilitate vacant property would ever purchase such real estate. Otherwise, the risk of a ruinous financial loss not covered by insurance would override the potential profits from real estate development. Given the current state of the real estate market, a ruling against New Packing would severely impede the development

of existing real estate that was vacated in the wake of the financial downturn in the real estate market that started in 2008 since no one would be willing to assume such risks without insurance. Consequently, West Bend's efforts to convince the court that the Vacancy Provision precluded indemnity for the loss at issue here should fail.

B. The Policy at Issue in this Case Does not Contain Specific Language Indicating that the Vacancy Provision Applies Before the Issuance of the Policy and, in Fact, Contains Language Directly to the Contrary

Applying the *Kolivera* rule to the present facts, it is clear that the Policy at issue in this case does not contain "specific language" indicating that the Vacancy Provision is measured from the time of loss rather than the time the Policy was issued. *See id.*; R. 231-32. Indeed, the Vacancy Provision contains language indicating precisely the opposite. Although subpart B of the Vacancy Provision excludes from coverage certain losses "[i]f the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs," subpart A defines "building" and "vacant" as follows:

> *When this policy is issued to the owner or general lessee of a building*, building means the entire building. Such building is vacant unless at least 31% of its total square footage is . . . used by the *building owner* to conduct customary operations.

R. 231. (Emphasis added). The average person reading this language would interpret it to mean that the Vacancy Provision is effective only upon the issuance of the Policy. *See Outboard Marine Corp.*, 154 Ill. 2d at 115 (noting that contracts are to be interpreted according to "that meaning which the particular language conveys to . . . the average, ordinary, normal [person]"). First, the definition of "building" is prefaced with the words, "When this policy is issued to the owner or general lessee of a building . . .," signaling that the Vacancy Provision, which uses the term "building," is only effective

upon the issuance of the Policy. Furthermore, "vacancy" is defined by reference to the building owner's *use* of the property. It is axiomatic that a building owner cannot "conduct customary operations" prior to assuming ownership of the building. West Bend could easily have drafted the definitions of "building" and "vacancy" in general terms, but chose instead to define them by reference to the issuance of the policy and the building owner's use of the property. Therefore, it is evident that West Bend intended the Vacancy Provision to take effect only upon the issuance of the Policy.

Moreover, as the Circuit Court noted, the Vacancy Provision lacks "specific language" indicating that it applies to periods of Vacancy preceding the issuance of the Policy. West Bend could have drafted the Policy as follows:

> We will not pay for any loss or damage if the building where loss or damage occurs has been 'vacant' or 'unoccupied' for more than . . . 60 consecutive days before the loss or damage if cause by any other Covered Cause of Loss; whether or not such vacancy begins before the inception of this policy.

R. at 661 (quoting Miller's Standard Ins. Policies Annot. Vol. 1, at 463, Form POVOV, F8B (1995). West Bend failed to incorporate such specific language in the Policy. Therefore, under the default rule announced in *Kolivera*, the Vacancy Provision is measured from the time the Policy was issued. *See* 8 Ill. App. 3d at 360.

West Bend's reliance on *Gas Kwick, Inc. v. United Pacific Ins. Co.,* 58 F.3d 1536 (11th Cir. 1995) at pages 13-16 of its brief is misplaced. Although the vacancy provision at issue in *Gas Kwick* is similar to the Vacancy Provision at issue here, in that both policies excluded coverage "if the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs," the *Gas Kwick* policy made no reference to the date of the issuance of the policy – a factor the *Gas*

Kwick court considered significant. *See Gas Kwick*, 58 F.3d at 1539 ("There is no reference to the date of the issuance of the policy, . . . The only relevant question is whether the building was vacant for 60 days prior to the loss."). Moreover, it does not appear that the *Gas Kwick* policy defined "vacant" by reference to the building owner's use of the property, if it defined the term at all. *See id.* Therefore, the two policies are hardly "identical," as West Bend asserts. *See* Appellate Br. at 14.

West Bend's reliance on *Babandi v. Allstate Indemnity Ins. Co.*, No. 07 CV 329, 2008 U.S. Dist. LEXIS 27222 (N.D. Oh. March 31, 2008) misses the mark for the same reason. Appellant Br. at 16. The policy at issue in *Babandi* excluded coverage for vandalism "if [the] dwelling is vacant or unoccupied for more than 90 consecutive days immediately prior to the vandalism." 2008 U.S. Dist. LEXIS 27222, at *6. However, it does not appear that the *Babandi* policy referenced the date of the issuance of the policy or defined "vacant" by reference to the owner's use of the property. *See id.* Thus, *Babandi*, like *Gas Kwick*, is entirely distinguishable from this case.

Furthermore, *Gas Kwick* and *Babandi* are merely persuasive, not precedential authorities. It remains for this Court, consistent with its guiding precedent, to decide whether the language contained in the policy issued here is sufficient to put the "average person" on notice that the losses attributable to periods of vacancy preceding the issuance of the policies may not be covered. *See Outboard Marine Corp.*, 154 Ill. 2d at 115.

West Bend's assertion that the Circuit Court inappropriately applied the "reasonable expectations" doctrine is also without merit. Appellant Br. at 20-27; R. 661. The "reasonable expectations" doctrine has been articulated as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored

> even though painstaking study of the policy provisions *would have negated* those expectations.

Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co., 145 Ill. App. 3d 175, 191-192 (1st Dist. 1986) (Emphasis added). Because the Circuit Court did not interpret the Vacancy Provision in a manner contrary to the plain language of the Policy, the "reasonable expectations" doctrine is inapplicable, and any reference to the doctrine was harmless error.

Equally unfounded is West Bend's assertion that the Circuit Court "chose not to apply the [Vacancy Provision] as written and looked elsewhere in the Policy to create an ambiguity that did not exist." Appellant Br. 30. The Circuit Court did not look "elsewhere" in the Policy to find an ambiguity; it looked to the Vacancy Provision itself, which defines "building" and "vacancy" in a manner that directly contradicts the interpretation advanced by West Bend. R. 660. In so doing, the Circuit Court merely followed the general rule of contract interpretation that an insurance policy "must be construed as a whole, giving effect to every provision." *Cent. Ill. Light Co.*, 213 Ill. 2d at 153. West Bend further argues that the Circuit Court's interpretation renders the phrase "before that loss or damage occurs" superfluous. Appellate Br. at 32. However, the same can be said of West Bend's interpretation, which renders the phrases "[w]hen this policy is issued to the owner or general lessee of a building" and "used by the building owner to conduct customary operations" superfluous. R. 231. Thus, Appellant's argument is unpersuasive. Accordingly, this Court should affirm the judgment of the Circuit Court that the Vacancy Provision applies only from the time the Policy was issued and does not apply to New Packing's losses.

II. THE COURT SHOULD AFFIRM THE JUDGMENT OF THE CIRCUIT COURT ON THE ALTERNATIVE GROUNDS THAT THE POLICY IS AMBIGUOUS AND MUST BE INTERPRETED AGAINST THE DRAFTER

Even if this Court disagrees that the Policy language plainly supports New Packing's position, it should nonetheless affirm the judgment of the Circuit Court on the alternative grounds that the Policy is ambiguous and, therefore, must be interpreted against West Bend. "Ambiguous terms [in an insurance contract] are construed strictly against the drafter of the policy and in favor of coverage." *Outboard Marine Corp.*, 154 Ill. 2d at 119. "This is especially true with respect to exclusionary clauses . . . because there is little or no bargaining involved in the insurance contracting process (citation omitted), the insurer has control in the drafting process, and the policy's overall purpose is to provide coverage to the insured." *Id.* An insurance policy is ambiguous if it is subject to two or more reasonable interpretations, not simply if the parties can suggest creative possibilities for their meaning. *Valley Forge Ins. Co. v. Swiderski*, 223 Ill. 2d 352, 363 (2006). Courts will not search for ambiguity where there is none. *Id.*

Here, if the Policy is read in the manner suggested by West Bent, the Vacancy Provision is ambiguous. Read on its own, subpart B of the Vacancy Provision, which excludes coverage for damage or loss if the building has been vacant "for more than 60 consecutive days before that loss or damage occurs," seems to apply to all periods of vacancy, regardless of whether they occurred before or after the issuance of the Policy. Appellate Br. at 8-9; R. 232. However, subpart A of the Vacancy Provision, which contains the "Description of Terms," seems to indicate that the Vacancy Provision is effective only upon the issuance of the Policy, as noted above. Thus, the Vacancy Provision is arguably subject to two reasonable interpretations and, therefore, is

ambiguous. *See Outboard Marine Corp.*, 154 Ill. 2d at 119. Accordingly, the Policy must be strictly construed against West Bend.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court and hold West Bend liable for the losses sustained by New Packing at the Property on May 5, 2009 and May 17, 2009.

February 16, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 341(a) AND (b)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.

Dated on: February 16, 2012

Mark D. DeBofsky

CERTIFICATE OF SERVICE

I, Mark D. DeBofsky, an attorney, certify that on February 16, 2012, I caused a copy of this brief to be served by United States mail to:

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