IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE KENT AND JANE WHIPPLE TRUST, DATED MARCH 17, 1969, JANE WHIPPLE, CO-TRUSTEE (ERRONEOUSLY NAMED AS TRUSTEE), AND AMENDMENTS THERETO, JANE WHIPPLE.

WARNER WHIPPLE, CO-TRUSTEE OF THE KENT AND JANE WHIPPLE TRUST, DATED MARCH 17, 1969, AS AMENDED,

Appellant,

vs.

JANE WHIPPLE, CO-TRUSTEE OF THE KENT AND JANE WHIPPLE TRUST, DATED MARCH 17,1969, AS AMENDED, AND JANE WHIPPLE,

Respondents.

Supreme Court No. 69945
District Court Case No. CV930015
Appeal from the Seventh Judicial District Court, The Honorable Steve L. Dobrescu, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The arguments in Appellee Jane Whipple's ("Appellee") Answering Brief rest on several fundamental misunderstandings of both law and the language of the Kent and Jane Whipple Trust (the "Trust"). An arbitrator may be (and often is) empowered to put on the judge's robes, so to speak. When this occurs, every dispute—with very rare exception—between the parties must be resolved through arbitration. Nevada law and public policy strongly encourages parties to make these agreements and requires the courts to honor them.

In this case, the Trust explicitly puts the judge's robes on an arbitrator by requiring Appellant and Appellee to arbitrate any disagreement, whether about their authority, acts "under" or "beyond" the Trust, and anything else related to the Trust and Trust assets. The disagreement in this case revolves around the Trust's water rights (the "Water Rights"). No matter how Appellee dresses up her plan to sell the Water Rights, since those Water Rights are Trust assets and Appellant disagrees with the plan to sell, arbitration of their disagreement is mandatory.

LEGAL ARGUMENT

A. Appellant properly stated the burden borne by a party seeking to defeat arbitration, which Appellee has not satisfied.

Appellee's contention that Appellant has misstated the standard for avoiding arbitration is puzzling, to say the least. Appellee first objects in the most strenuous of terms to Appellant's assertion that a party seeking to defeat arbitration must do so beyond a reasonable doubt. Appellee then concedes that in the face of a valid arbitration agreement, all doubts regarding the arbitrability of a particular dispute must be resolved in favor of arbitration.[1] In any event, because the parties both acknowledge the validity of the Trust's arbitration clause and because Appellee failed to carry her burden of proof to show that this particular dispute is not arbitrable, the district court should be reversed and the parties referred to arbitration.

Both the *Phillips* and *Dryer* cases cited by Appellant stand for the proposition that, in the face of a valid arbitration clause (as is the case here) all doubts regarding which particular disputes must go to arbitration must always be resolved *in favor* of arbitration.[2] The *Phillips* court went so far as to state, "Evidentiary reliance upon an agreement containing an arbitration clause requires arbitration of the dispute." In other words, if an agreement containing an

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[1] *See* Answering Brief at p. 11.

[2] *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990); *Dryer v. Los Angeles Rams*, 709 P.2d 826, 831 (Cal. 1985) (*In Bank*).

arbitration clause is introduced in a case (or will need to be introduced) as evidence then the parties must arbitrate.[3] At issue in *Phillips* was the question of whether a party could sue over its alleged ownership of a business instead of arbitrating when the very evidence of ownership was a contract containing an arbitration clause.[4] This Court concluded that even though the party's lawsuit did not directly allege a breach of the contract,

> Parker may not rely on the agreement to prove ownership and simultaneously disavow the applicability of the arbitration clause. If Parker must rely on the agreement in order to prove his disputed right to stock ownership, he has placed himself squarely within the ambit of the arbitration provision covering controversies or claims arising out of or relating to the agreement.[5]

For its part, the *Dryer* court specifically held that once a valid arbitration clause is found to exist, arbitration should ordered, "...unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute and that all doubts are to be resolved in favor of coverage."[6] If anything, the cases cited by Appellant go beyond a reasonable doubt standard and require proof beyond *any* doubt that a matter is not arbitrable to overcome the presumption of arbitration.

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[3] *Phillips*, 106 Nev. at 415.
[4] *Id*, at 418.
[5] *Id.*
[6] *Dryer*, 709 P.2d at 831.

This extremely high burden is followed by all courts of which Appellant is aware. The United States Supreme Court has articulated it as follows, "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."[7] The Third Circuit requires all reasonable doubts to be resolved in favor of arbitration.[8] The California courts also require that all doubts be resolved in favor of arbitration and that parties should arbitrate, "...[unless] it can be said with assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[9] In other words, Appellant, having shown a valid arbitration clause in the Trust, the burden shifted to Appellee to show beyond any reasonable doubt that this particular dispute between her and Appellant (Appellee's claim of exclusive authority over the Water Rights) was not subject to arbitration; she failed to carry that burden.

Appellee attempts to push her burden of proof onto Appellant by claiming that, in addition to proving the validity of the arbitration clause, Appellant must affirmatively show that this particular dispute is arbitrable before Appellee has to

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[7] *AT&T Tech. v. Communications Workers of America*, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419 (1986) (*quoting Quoting Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)).
[8] *In re Tyco*, 422 F.3d 41, 44 (1st 2005).
[9] *See Shanghai Freeman v. ABC-Omega*, 2010 WL 1612208 at *3 (Cal Ct. Appl. 2010) (unpublished).

make any showing whatsoever.[10] This claim turns the law and burden of proof on its head. Because the Trust includes a valid arbitration clause, the burden to exempt any co-trustee dispute from arbitration is squarely on the party seeking exemption: "When an arbitration clause is broad and there is a dispute as to whether a matter is arbitrable, all reasonable doubt should be resolved in favor of arbitration."[11] Because both sides acknowledge that the Trust's arbitration clause is valid and requires arbitration of disagreements between co-trustees, Appellant has met his burden to compel arbitration. In order to defeat arbitration, Appellee needed to show beyond any reasonable doubt that the current dispute regarding the Water Rights is not subject to the Trust's arbitration clause.[12]

Appellee's only effort to meet her burden of proof is her claim that—through some mechanism wholly unexplained to either the district court or this Court—the Water Rights fall into the unfunded the A Share.[13] Next, according to Appellee, the Water Rights must also somehow be exempt from the Trust's requirement that all Trust assets (including those transferred to the sub-trusts) be administered by co-trustees.[14]

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[10] *See* Answering Brief at p. 11-12.
[11] *BDO v. SSW Holding*, 386 S.W.3d 361, 368 (Ark. 2012).
[12] *Coast Plaza v. Blue Cross*, 99 Cal. Rptr.2d 809, 816 (Cal. Ct. App. 2000).
[13] *See* Answering Brief at p. 14.
[14] *See* Answering Brief at p. 14.

In support of her claim that A Share assets are subject to her exclusive control, Appellee claims that because the Trust contains a provision allowing Appellee (in her individual capacity) to demand that the Trust distribute A Share assets to her as her own personal property, she is entitled to sole trusteeship over A Share assets prior to either a demand or distribution.[15] This argument is completely contrary to well established law: a beneficiary who holds the right to demand a trust distribution (called a power of appointment) cannot exercise authority over trust property until the power of appointment is actually exercised. [16] Appellee, by her own admission has never exercised her power of appointment to demand a distribution of A Share assets and cannot treat Trust assets as her own personal property.

An additional basis for concluding that Appellee has failed to carry her burden of proof is that she relies on the very Trust documents containing the arbitration clause to make her petition to the district court seeking sole authority over the Water Rights. Indeed, a copy of the Trust documents was attached to

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[15] *Id.*

[16] *Id.*, at p. 14 (claiming that because Appellee *may* demand a distribution, she can control A Share assets); *see In re CRS Stream*, 217 B.R. 365, 372 (D. Mass. Bankr. 1998) (until a power of appointment is exercised, beneficiaries creditors cannot reach trust assets); *see also In re Balay*, 113 B.R. 429, 438 (N.D. Ill. Bankr. 1990) (the right to control trust assets does not arise until trust assets are received by beneficiary in accordance with trust provisions); *see also University National Bank v. Rhoadarmer*, 827 P.2d 561, 562-63 (Col. Ct. App. 1991) (a power of appointment held by a trust beneficiary, unless exercised, is not a property right, it is merely a privilege or authority).

Appellee's petition in the district court.[17] Consistent with the *Phillips* Court's holding, since the very document (e.g. the Trust documents) Appellee relies on to make her claims of authority also contains the arbitration clause, the Court must reject her argument and refer the parties to arbitration.[18]

Even if Appellee's argument against arbitration did not fail out of the gate under *Phillips* based on her reliance on the Trust document itself, its premises and legal foundations are seriously flawed and cannot overcome the burden imposed on her. First, Appellee's argument relies on a legal impossibility: the Water Rights cannot fall into the unfunded, and thus non-existent A Share; as one court has explained: "...technically there *is* no trustee of an unfunded trust, only a *potential* trustee of a *potential* trust contemplated by a trust document."[19] Appellee admits at the very beginning of her petition in the district court that the A Share has never been funded.[20] A non-existent A Share cannot own anything, much less the Water Rights.[21]

Next, Appellee's argument disregards the express language of the Trust: the co-trustees are to jointly administer all Trust assets, including those in the A and B

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[17] Appx., p. 11-34.
[18] *Phillips*, 106 Nev. at 415.
[19] *Fox v. Hughes*, 2008 WL 2174348 at *3 (Cal. Ct. App. 2008) (unpublished) (emphasis in original); *see also Johnson v. Whipple*, 94 Nev. 259, 260, 578 P.2d 1189, 1190 (1978).
[20] Appx., p. 2 ("That the 'A' and 'B' trusts of the Kent and Jane Whipple Trust dated March 17, 1969, were never partitioned and funded...").
[21] *Fox*, 2008 WL 2174348 at *3.

Shares.[22] Finally, Appellee's argument rests on a fundamental misunderstanding of trust law: the holder of a power of appointment does not have control over trust property until the power of appointment is exercised and trust property distributed.[23] Appellee has not shown without a doubt that the present disagreement between her and Appellant is not subject to the Trust's arbitration clause. Accordingly, the district court should be reversed and this matter referred to arbitration.

B. This case is about an arbitrable disagreement between co-trustees regarding management of the trust's water rights.

NRS 38.219 empowers arbitrators to hear and decide any controversy. This Court has repeatedly held that the liberal construction of arbitration agreements and Nevada's policy of encouraging arbitration means that an arbitrator can resolve anything a court can decide.[24] For example, in *Exber*, the Court said, "...arbitration agreements are to be liberally construed in favor of arbitration of disputes and that the arbitrators have full power to decide all the 'questions or controversies' arising out of the contract..."[25] A controversy is, "a disagreement or a dispute, a justicable dispute."[26] This definition covers the entire universe of possible matters for judicial

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[22] Appx., p. 91-92.
[23] *In re Balay*, 113 B.R. at 438.
[24] *Exber v. Sletten Const.*, 92 Nev. 721, 729, 558 P.2d 517, 521-22 (1976).
[25] *Id.*, at 729 (internal citations omitted).
[26] *Black's Law Dictionary*, 331 (7th ed. 1999).

resolution, reaching the full boundaries of the courts' jurisdiction. Thus, as the California Supreme Court explained,

> ...consistent with our arbitration statutes...it is within the 'powers' of the arbitrator to resolve the entire 'merits' of the 'controversy submitted' by the parties. Obviously, the 'merits' include *all the contested issues of law and fact* submitted to the arbitrator for decision. The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.[27]

In light of the public policy of strongly encouraging arbitration whenever possible, it is unsurprising that—contrary to Appellee's claims—courts can and do refer disputes about "authority" and "acts" to arbitration (or, as Appellee is now framing them, disputes "under" and disputes "beyond" the Trust). In *Hart v. McChristian* a court was asked to determine whether a dispute regarding the scope of some partners' authority to remove co-partners from their partnership was arbitrable pursuant to the arbitration clause in the partnership agreement.[28] The arbitration clause was extremely broad (as in this case) but did not specifically refer to disagreements about the scope of authority (also the case here).[29]

The court acknowledged that while the arbitration agreement did not specifically mandate arbitration of questions regarding scope of authority, its

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[27] *Moncharsh v. Heily & Blasé*, 832 P.2d 899, 916 (Cal. 1992) (*In Bank*) (internal citations omitted).
[28] *Hart v. McChristian*, 36 S.W.3d 357, 361-62 (Ark. Ct. App. 2000) (*reversed on other grounds*, 42 S.W.3d 552 (Ark. 2001)).
[29] *Id.*

unlimited nature meant disputes over partner "authority" had to be arbitrated to the same extent as partner "acts". In so holding, the Court stated:

> The contract in this case does not, as appellants suggest, distinguish between the undisputedly arbitrable issue of whether the partner's conduct merits removal and the allegedly nonarbitrable issue of whether those seeking removal have the authority to do so...If we resolve all doubts in favor of arbitration, the "appropriateness" of a partner's removal encompasses the threshold question of whether removal was appropriately sought in the first place.[30]

Other courts addressing similar issues have come to the same conclusion as *Hart*.[31]

One reason why courts decline to separate authority to act from the actual act when ordering arbitration is they recognize that such 'slicing and dicing' of a dispute is a form of artful pleading and is a way parties may try to avoid mandatory arbitration.[32] To overcome artful pleading, courts look past legal labels attached to pleadings and, instead, examine facts to determine whether arbitration should be ordered.[33] A dispute about whether a party has authority do an act is really no different than the act itself; the two cannot be separated to avoid arbitration.[34]

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[30] *Id.*

[31] *See Bregman v. Lashins*, 57 A.D.2d 529, 529 (N.Y. App. Div. 1977) (partnership was entitled to arbitration, pursuant to partnership agreement, of partner's authority to act on behalf of the partnership).

[32] *See Combined Energy v. CCI,* 514 F.3d 168, 172 (1st Cir. 2008).

[33] *See Phillips*, 106 Nev. at 415, *see also Keifer Specialty Flooring v. Tarkett*, 174 F.3d 907, 910 (7th Cir. 1999) (noting that where claims all arise out of a single act, if a dispute over that act is arbitrable, then all claims arising from the act are arbitrable, whether pled in tort or contract).

[34] *Hart*, 36 S.W.3d at 361-62.

The Trust includes an unlimited arbitration clause, which requires the co-trustees to arbitrate any disagreement.[35] Appellee has tried to keep her deal to sell the Water Rights from the Court's attention and claims that only her "authority" to engage in transactions with the Water Rights is at issue in this case. However, the real issue is Appellee's sale of the Trust's Water Rights without Appellant's consent. Appellee's artful pleading cannot change the fact that what she intends to do, i.e. sell the Trust's Water Rights, is an act subject to arbitration.

Appellant is entitled to arbitration of all issues raised in Appellee's petition for declaratory relief with the district court as well as the propriety of her filing the petition itself (addressed below). Appellant also intends to arbitrate the propriety of Appellee's already arranged sale of the Water Rights.[36]

Because the express purpose of Appellee's petition in the district court is to enable her to consummate a sale of the Water Rights without Appellant's consent, both Appellee's authority to sell the Water Rights and the actual agreement reached by Appellee to sell the Water Rights should be arbitrated.[37] As the court in

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[35] Appx,, p. 91-92.

[36] Appx,, p. 184-85.

[37] Although Appellee claims to this Court that such is not the case, her own affidavit filed with the district court states that she already has a deal in place to sell the Water Rights. The affidavit states, "[I] believe that this action [the motion to compel arbitration] has been taken to stall the transfer the transfer of water rights in a deal that is already in place..." Appx,, p. 184-85. Appellee's claim to this Court that she is just seeking to clear up ownership of the water rights without any other purpose in mind is simply untrue.

Hart held, questions regarding the propriety of a proposed action and the question of authority to take the proposed action are one and the same and thus, both are subject to arbitration.[38]

Since the Trust requires arbitration of any co-trustee disagreement, it is only sensible that arbitration of disagreements regarding co-trustee authority be arbitrable to the same extent as a disagreement regarding co-trustee acts. Otherwise, the arbitration requirement in the Trust could always be avoided by a co-trustee going to court with a petition for court guidance as to the co-trustee's "authority" to take some unilateral act that the other co-trustee disagreed with. Only if the co-trustee lost at the district court level would the co-trustees have to then go to arbitration for an act they disagreed with.

This is precisely what Appellee has requested from the Court; let the district court decide whether Appellee has authority to sell the Water Rights on her own. Only if the district court decides she cannot act alone (which it must), then send the parties to arbitration. This wasteful, inefficient process is completely contrary to the plain language of the Trust and common sense. To be sure, Appellee is free to raise her "exclusive authority" argument to the arbitrator as a basis for allowing her sale of the Water Rights against Appellant's wishes, but she is not entitled to separate litigation in the courts on that issue prior to arbitration.

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[38] *Hart*, 36 S.W.3d at 361-62.

The Trust calls for arbitration of any disagreement at any time between the co-trustees. Nevada law mandates that the arbitration agreed to by Appellee and her deceased spouse when they created the Trust occur. Accordingly, the district court should be reversed and the parties ordered to participate in arbitration.

C. The district court inappropriately made findings of fact going to the merits of the case.

Contrary to Appellee's Answering Brief, the district court's order includes improper findings of fact. The district court's order denying arbitration states that certain water rights permits were acquired by the Trust and subsequently conveyed by the Trust.[39] The district court then based its decision to deny arbitration on an additional unsupported factual finding that the Water Rights had been conveyed out of joint co-trustee control prior to Appellant's becoming a co-trustee, stating, "**On the record before the Court**, it appears that all of [Appellant's] disagreements or concerns relate to actions taken prior to the resignation of Warner's predecessor Co-Trustee. **Nothing in the record** suggests that Warner's predecessor was not "fully informed"..."[40] The problem, of course, with this conclusion from the district court is that there is no "record" from which the district court could conclude anything, much less essentially agree with Appellee's version of the facts. How the district court made these findings and the conclusions

[39] Appx,, p. 187.
[40] Appx., p. 191 (emphasis added).

it drew is completely unknown but, in any event, since no actual evidence was presented to the district court, it should not have made any factual findings beyond the existence of an agreement to arbitrate in the Trust.[41]

Additional unsupported findings include the district court's finding, in its "Factual Summary" that Appellee, as a Trustee, had authority under Nevada trust law to file her petition on behalf of the Trust.[42] The district court in effect made a factual determination that Appellee acted properly in filing the petition even though she never obtained Appellant's agreement as a co-trustee to do so as required by the terms of the Trust.[43] Each of these factual findings is based solely on the allegations in Appellee's unanswered petition.

Appellee essentially concedes the nature of the district court's findings in her Opposition where she states that the district court's "findings" were "uncontested" and that Appellant "does not appear to dispute" them.[44] Appellant has not yet had the opportunity to "dispute" Appellee's claims in the petition because he has not even had the opportunity to file an answer or other responsive pleading to the petition. What is more, he does not have to dispute them in court to get to arbitration; once the parties are in front of an arbitrator Appellant will dispute and vigorously contest each and every inaccurate and incorrect

[41] *Id.*
[42] Appx., p. 187:19-25.
[43] *Id.*
[44] Answering Brief at 16.

claim/allegation in Appellee's petition. The proper place, however, to have these factual issues decided is in arbitration, not the district court's review of an unanswered petition—without an evidentiary hearing, or even oral argument—in the context of a motion to compel arbitration.

NRS 38.221 mandates a summary decision in the face of a valid agreement to arbitrate. The Trust's arbitration clause includes an unlimited requirement to arbitrate all co-trustee disagreements. The district court's decision to go beyond this threshold inquiry was reversible error.

D. Appellee's decision to initiate legal proceedings itself was an act that required appellant's consent.

Appellee filed the petition in the district court on behalf of the Trust as a Trustee of the Trust. Appellee claims that her petition addresses only the construction of the language of the Trust and not any disagreement between the co-trustees on how the Trust should act. Appellee's assertion, even if true, completely ignores the fact that by filing the petition without Appellant's consent, Appellee violated the express provisions of the Trust. The Trust provides that only the co-trustees collectively, not any co-trustee individually, have the power to institute legal proceedings.[45] Thus, Jane's decision to file the petition itself was an act requiring co-trustee agreement, which she did not obtain.

[45] Appx., p. 86.

Appellee's decision, on her own, to file the petition on behalf of the Trust clearly involves a dispute between the co-trustees over actions of the Trust. On October 8, 2015, Appellant—acting through his attorney—sent notice to Appellee that he disputed and disagreed with both the filing of the petition and its contents, including Appellee's request for unilateral authority to dispose of the Water Rights.[46] Appellant disagrees with and has disputed Appellee's "act" of causing the Trust to litigate regarding the Water Rights. Appellant disagrees with Appellee's "act" of causing the Trust to litigate over the issue of whether Appellee has sole authority to dispose of the Trust's water rights (if for no other reason than that Appellee's positions are so patently untenable under Nevada law).

Appellee's claim that her petition is exempt from arbitration because she is just trying to get some help from the court figuring out what to do with the Trust's Water Rights, in addition to being false (what Appellee is actually trying to do is an end run around arbitration so she can sell the Water Rights) is also unavailing. Appellee is required to get the help she claims she wants from an arbitrator, who in addition to being less expensive than traditional litigation, will likely be more expert in the highly specialized field of trust law that will no doubt be important in this case. Moreover, if Appellee believes she should have the ability to file a lawsuit for the Trust on her own without Appellant's consent following arbitration,

[46] Appx., p. 105-06.

she can get a determination from the arbitrator on that issue as well. Accordingly, the district court should be reversed and the parties referred to arbitration.

CONCLUSION

For the reasons set forth herein, the district court should be reversed and the parties referred to arbitration forthwith.

Respectfully submitted this 15TH day of December, 2016,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Reply Brief has been prepared in a proportionately spaced typeface using MS Word 2010 in Times New Roman 14.

I further certify that this brief complies with the page or type/volume limitations of NRAP 32(a)(7)(ii) because it contains 4,023 words, as counted by MS Word 2007.

I further certify that I have read Appellant's Reply Brief and, to the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or cause unnecessary delay or needles increase in the costs of litigation.

Respectfully submitted this 15th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on December 15, 2016.

The following individuals have been served by electronic mail and U.S. Mail, First Class pre-paid as follows:

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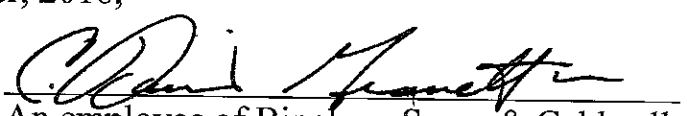

An employee of Bingham Snow & Caldwell