

No. 08-0890

IN THE SUPREME COURT OF TEXAS

OFFSHORE SPECIALTY FABRICATORS, INC., *ET AL.*,

Petitioners,

v.

WELLINGTON UNDERWRITING AGENCIES, LTD., *ET AL.*,

Respondents.

*On Appeal from the
Court of Appeals for the Fourteenth Judicial District of Texas in Houston
Cause No. 14-07-00970-CV*

WELLINGTON UNDERWRITING AGENCIES, LTD., *ET AL.*'S
POST-SUBMISSION BRIEF

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents Wellington Underwriting Agencies, Ltd., *et al.* file this Post-Submission Brief. Wellington Underwriting Agencies, Ltd., *et al.* will be referred to as "Underwriters." The Houston Exploration Company will be referred to as "THEC." Offshore Specialty Fabricators, Inc. will be referred to as "OSFI."

SUMMARY OF THE ARGUMENT

During oral argument, Justice Hecht noted that if the London broker representing OSFI in the negotiations had testified unequivocally that he agreed to strike Paragraph 13, which provided coverage for weather stand by charges, such testimony would “cast this case in a different light.” The broker who represented OSFI in the negotiations provided such testimony. In fact, the record establishes as a matter of law that the London broker was OSFI’s agent, negotiated the policy coverage on OSFI’s behalf, and approved the striking of certain language in the Policy, including the provision extending coverage to weather stand by charges.

The London broker also sent a draft copy of the Policy showing all of the strike-outs to Greg Lary, the local agent representing the principal assured, prior to the date that the “jacket” of the platform’s leg free-fell into the seabed.¹ In the cover letter accompanying the draft policy, the Tysers broker stated that coverage would not extend to the level normally afforded by that particular policy form. Mr. Lary then hand-delivered a copy of the draft Policy to OSFI on July 22, 2002.

Underwriters submits this post-submission brief to provide record citations that show unequivocally that Tysers International Insurance & Reinsurance Brokers (“Tysers”), the London broker, represented the assured, approved the strike-outs during

¹ S.R. 752, 755, 770. Letter dated July 22, 2002, to Greg Lary stating that some coverages were removed from the WELCAR policy form and attaching a copy of the Policy showing the stricken provisions, including Section 13, which extended coverage to weather stand by charges. A copy of this letter and draft policy is attached to the appendix as Exhibit A.

negotiations, and forwarded the draft policy to the local broker, who then delivered the draft policy to OSFI.

The Policy does not cover weather stand by charges. The parties deleted the only provision allowing coverage for such charges. Further, even if the stricken language was considered extrinsic evidence, it would still be admissible because it does not contradict the remaining language of the Policy.

Finally, the evidence shows that the Assureds did not purchase or pay a premium for weather stand by charges. Thus, there is no coverage.

ARGUMENT

I. The Record Establishes as a Matter of Law that Tysers was OSFI's Agent and Approved the Strike-Outs.

A. Tysers represented the named assured, OSFI.

It is undisputed that: (1) OSFI hired Houston insurance broker, Lary Insurance Services, Inc. ("Lary"), to obtain coverage, and (2) Lary retained Tysers to negotiate on behalf of Lary and its principal, OSFI, in the overseas insurance markets and to secure insurance coverage.² As a matter of law, Tysers and Lary acted as OSFI's agent in procuring the Policy.

It is well-recognized that an insurance broker in the London market negotiates on behalf of the assured in procuring a policy. *Houston Cas. Co. v. Certain Underwriters at*

² S.R. 197-99 (Deposition of Greg Lary at page 380, line 12 to page 382, line 4 [380:12-382:4], 383:15-386:18, 387:23-390:22), 343-44 (Deposition of Guy Darell, of Tysers, 314:3-315:18, 317:1-14, 318:3-319:3). Copies of the deposition excerpts of Greg Lary and Guy Darell are attached to the Appendix as Exhibits B and C respectively.

Lloyd's, London, 51 F. Supp. 2d 789, 799-800 (S.D. Tex. 1999); *see also Continental Cas. Co. v. Bock*, 340 S.W.2d 527, 532 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (an insurance broker acts for the insured in procuring the policy). *Houston Cas.*, which THEC cited in prior briefing, explained the process of procuring coverage in the London market as:

Typically, a broker will prepare the “slip,” a summary of the details of the risk the broker is seeking to insure (or reinsure). The broker and the active underwriter proceed to negotiate the terms and premium, indicating as much on the slip itself. The underwriter who structures the transaction with the broker is known as the “lead” underwriter; the lead underwriter's syndicate is known as the “market lead” or “leader of the market” for that particular risk. When the underwriter signs (or “scratches”) the slip, a binding contract between his syndicate and the insured is formed. Having obtained the signature of the lead underwriter, the broker retains the slip and approaches other syndicates or insurance companies to secure coverage for the remaining risk. Once the broker has succeeded in procuring full coverage, he retains the slip and provides subscribing underwriters with copies of the terms and conditions of the coverage.

Houston Cas. Co., 51 F. Supp. 2d at 791-92.

Greg Lary and Tysers's representative both repeatedly testified that they acted as OSFI's agent in procuring coverage.³ Tysers, on behalf of the prospective assured, OSFI, negotiated with Underwriters and ultimately agreed on the terms of the Policy.⁴

³ S.R. 197-99 (Lary Dep. 380:12-382:4, 383:15-386:18, 387:23-389:23), 206 (Lary Dep. 417:10-418:17), 228-29 (Lary Dep., 502:5-505:6, 508:24-509:16), 343-44 (Darell Dep., 314:3-315:18, 317:1-14, 318:3-319:3), 347-48 (Darell Dep., 330:9-332:16, 334:10-336:4), 349 (Darell Dep., 338:1-9, 339:20-341:15), 351 (Darell Dep., 347:7-348:3), 356 (Darell Dep., 367:14-369:6), 357 (Darell Dep., 370:7-23), 414-15 (Deposition of Michael Allan, 215:12-218:12), 715-17 (Deposition of Christopher Sydenham, of Tysers, 187:12-194:20), 729-30 (Sydenham Dep., 244:2-246:3). Excerpts from the depositions of Michael Allen and Christopher Sydenham are attached to the Appendix as Exhibits D and E respectively.

Although THEC now attempts to recast Tysers as Underwriters' agent, THEC has repeatedly admitted that the strike-outs occurred during negotiations with Tysers on one side and Underwriters on the other.⁵

Finally, the fact that Tysers received a commission on the Policy does not transform Tysers into the agent of Underwriters. *Critchfield v. Smith*, 151 S.W.3d 225, 234 (Tex. App.—Tyler 2004, pet. denied) (“where a policy is issued at the request of an insured, the broker receives consideration and is the agent for the insured, even though the agent is paid with commissions from the insurer.”).

B. Tysers and Lary approved the stricken language.

The undisputed record shows that Tysers sent Lary a copy of the policy wording, which showed the strike-outs, prior to the incident, as well as a cover letter expressly noting that OSFI's coverage would not extend to the level normally afforded by that particular policy form.⁶ Lary then hand-delivered the draft policy to OSFI several days later.⁷ Tysers and Lary reviewed the draft policy with the strike-outs and approved it.⁸

⁴ Specifically, Guy Darell of Tysers (OSFI's London broker) negotiated with Michael Allen, who represented Underwriters. S.R. 66-101, 206 (Lary Dep. 417:10-418:17), 343-44 (Darell Dep. 314:3-315:18, 317:1-14, 318:3-319:3), 356 (Darell Dep. 367:14-369:6), 414-15 (Allan Dep., 215:12-220:13).

⁵ THEC's Brief on the Merits at 1; Petition for Review at 1. Specifically, THEC stated:
During negotiations between the London broker (Tysers) and Underwriters, several provisions were stricken from the form policy, including paragraph 13.

⁶ S.R. 752, S.R. 123-24 (Lary Dep., 87:25-92:25).

⁷ S.R. 123-24 (Lary Dep., 87:25-92:25).

⁸ S.R. 66-101, S.R. 123-24 (Lary Dep., 87:25-92:25), 197-99 (Lary Dep., 380:12-382:4), 206 (Lary Dep. 416:21-418:17), 229 (Lary Dep., 508:17-509:16), 343-44 (Darell Dep., 314:3-315:18, 317:1-14, 318:3-319:3), 356 (Darell Dep., 367:14-369:6), 414-15 (Allan Dep., 215:12-220:13), S.R. 752-87.

The only difference between that draft and the final Policy was that the strike-outs were done by hand in the former and by word processor in the latter.⁹

As agents for OSFI, Tysers and Lary had the authority to approve the stricken language. *See Houston Cas. Co.*, 51 F. Supp. 2d at 800. A principal may confer actual authority upon an agent, either expressly or by implication; the term “actual authority” denotes that authority that a principal intentionally confers upon an agent or intentionally allows the agent to believe himself to possess. *Polland & Cook v. Lehmann*, 832 S.W.2d 729, 738 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Implied authority means the authority to do all things proper, usual, and necessary to exercise any authority granted to the agent. *Houston Cas. Co.*, 51 F. Supp. 2d at 800. “An agent’s authority is presumed to be coextensive with the business entrusted to his care. He may perform such acts as are necessary and proper to accomplish the purpose for which the agency was created.” *Polland & Cook*, 832 S.W.2d at 738. Notice to an agent is deemed notice to the principal. *Id.*; *Malmgren v. Inverness Forest Residents Civic Club, Inc.*, 981 S.W.2d 875, 878 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

Guy Darell, the Tysers broker who represented OSFI in the negotiations, testified repeatedly that he was aware that Section 13 providing coverage for weather stand by charges was deleted during negotiations and that he agreed with the deletion. He testified, for example:

⁹ S.R. 753-87; S.R. 66-101.

Q. . . . [A]t the time when this policy wording was negotiated, there was no doubt in your mind that standby charges was deleted, correct?

MR. WINTON: Objection, leading.

A. Standby charges, when they were deleting them, I didn't immediately think, oh, we're deleting standby coverage here. It's just I assumed that we were, but it wasn't a specific point, because we also deleted the liability section, leak costs, quite a few bits and bobs within the policy.

Q. You deleted a bunch of terms and conditions of this policy because you wanted to keep the cost of this policy low, right?

MR. WINTON: Objection, leading, form.

A. Well, actually, I didn't do the deletion. The Underwriter did.

Q. Right. But you agreed to it by not asking them to reinsert those clauses, didn't you?

MR. WINTON: Objection, leading, form.

A. There were some clauses for removal of debris that Mike Allan wished to delete, as well, and I said that was unfair, bearing in mind that they definitely need that coverage.

But how this policy was set up, which was for short-term jobs, ten-day job, three million limits, I did not think that standby charges would be an issue for the particular jobs that were set up.

Q. So what you just told me is that there were other terms that you negotiated with Mr. Allan and, ultimately, were not deleted, correct?

MR. WINTON: Objection, leading.

A. Correct.

Q. Like the clause you talked about, debris and so forth, right?

A. Correct.

Q. But standby charges were deleted?

MR. WINTON: Objection, form, leading.

A. Standby charges buyback was deleted, yes.

Q. Which meant, to you, what at the time?

A. At the time it was being done, it meant we hadn't got coverage for standby charges.¹⁰

In negotiating and accepting the Policy, Tysers was acting within the scope of its authority. *See Houston Cas. Co.*, 51 F. Supp. 2d at 800 (representations made by broker to Underwriters during negotiation of reinsurance policy were binding on the insured). There is no question that Tysers and Lary had the authority to procure insurance on OSFI's behalf.¹¹ Tysers was hired specifically for the purpose of negotiating and obtaining coverage in the London market.¹² No evidence exists in the record that OSFI, THEC, or Lary ever objected to the Policy and its stricken terms. OSFI cannot simply disclaim the actions of Tysers and Lary long after the Policy was drafted and approved.

C. Lary delivered to OSFI a copy of the draft Policy language showing the stricken language.

After receiving a copy of the draft policy language with the weather stand by provision stricken by hand, Mr. Lary hand-delivered the draft policy to OSFI.¹³ Mr. Lary testified that he received the fax of the draft policy showing the hand-written strike-outs on July 22, 2002.¹⁴ He then received the original copy of the draft policy showing the

¹⁰ S.R. 348 (Darell Dep., 334:12-336:4) set forth in Exhibit C; *see also* S.R. 347 (Darell Dep., 330:9-331:9).

¹¹ *Supra* page 2, note 2.

¹² *Id.*

¹³ S.R. 123-24 (Lary Dep., 87:25-92:25).

¹⁴ S.R. 123-24 (Lary Dep., 87:25-92:25).

provisions had been stricken by hand.¹⁵ He testified that he hand-delivered the draft policy to OSFI on or about July 27 or 29, 2010.¹⁶

D. Tysers and Lary attempted to advocate for the assureds when they made their claim for coverage.

Sworn testimony shows that, after the claim was made, Lary and Tysers attempted to advocate for coverage for the weather stand by charges on behalf of their clients, the assureds. As part of that advocacy, they claimed in letters that Paragraph 13 was a sublimit, an argument they later admitted under oath was incorrect and made solely in an attempt to obtain coverage for their clients.¹⁷

II. The Weather Stand By Charges do Not Fall Within the Policy's Coverage.

A. The charges do not fall within the "all risk" language in the insuring clause.

In arguing that the free-fall of the platform's jacket triggered coverage for the weather stand by charges, THEC and OSFI rely heavily on *Lanasa Fruit Steamship & Imp. Co. v. Univ. Ins. Co.*, 302 U.S. 556 (1938). This case does not support the argument of THEC and OSFI for two reasons.

First, the Supreme Court in *Lanasa* evaluated whether damage to a vessel's cargo of bananas, which spoiled when the ship became stranded, could be covered under a marine cargo policy's clause insuring losses caused by "perils of the sea." *Id.* at 560.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ S.R. 228-29 (Lary Dep., 502:5-505:6, 508:24-509:16), 234-35 (Lary Dep., 529:21-531:13), 349-51 (Darell Dep., 339:20-347:3), 357 (Darell Dep., 370:7-372:19), 715-17 (Sydenham Dep., 187:12-194:20).

Here, by contrast, the issue is whether an optional cost the Assureds chose to incur during a delay in repairs fell within the terms of the Policy's coverage of property damage.

Second, the Court in *Lanasa* rejected the insurer's argument that the loss, *i.e.* the spoiled bananas, was due to "inherent vice" and instead held that the stranding of the vessel was the "real efficient cause" of the cargo damage. *Id.* at 572. Here, THEC describes the weather stand by loss as follows:

Rather than release the vessels, THEC put them on "stand by" so that they would be available when the hurricane passed.¹⁸

Essentially, THEC and OSFI paid OSFI's vessels to remain idle and refrain from working with other companies so that they would be available immediately after the storms passed. Thus, the "real efficient causes" of the weather stand by charges were the hurricane and subsequent decision to pay the vessels to remain on stand by, as opposed to the free fall of the jacket.

B. THEC's attempt to lower the causation threshold for coverage lacks merit.

During oral argument, counsel for THEC incorrectly stated that the Policy insures all risks of property damage "arising out of the occurrence" and raised the argument that THEC need not show proximate causation to obtain coverage, pursuant to *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198 (Tex. 2004). Four problems exist with THEC's argument.

¹⁸ Petition for Review at 1; Brief on the Merits at 1.

First, THEC incorrectly quotes the Policy, which actually states that it covers “risks of physical loss of and/or physical damage to the property covered hereunder, provided such loss or damages *arises from* an Occurrence”¹⁹ Second, as the Court of Appeals noted, the stand by charges were not themselves “physical loss of and/or physical damage” to covered property; they were a cost related to a delay in repairs. *See Wellington Underwriting Agencies, Ltd. v. Houston Exploration Co.*, 267 S.W.3d 277, 284 (Tex. App.—Houston [14th Dist.] 2008, pet. granted). Third, the language is subject to the Policy’s Terms and Conditions in which stand by coverage was stricken.²⁰

Fourth, in *Utica* the Court held that the phrase “arising out of” must be interpreted by reference to the language used in other sections in the policy. 141 S.W.3d at 203 (comparing “arising out of” to the phrase “due to,” which was also contained in the policy, and finding that the terms had different meanings with regard to causation in the policy at issue). Here, the Policy uses several different causative phrases, including “arising out of,”²¹ “arising from,”²² “arising from or in connection with,”²³ and “caused by or contributed to by or arising from.”²⁴ Reviewing the specific language of the Policy, as this Court has directed, it is apparent that “arising from” has a different meaning than the phrase “arising out of,” as both are used in the Policy. *See* 141 S.W.3d at 203. More importantly, the phrase “arising from” must require more direct causation

¹⁹ S.R. 75 (emphasis added).

²⁰ S.R. 75.

²¹ S.R. 75, 85, 96.

²² S.R. 76, 80.

²³ S.R. 86, 99.

²⁴ S.R. 86.

than “in connection with” or “caused by or contributed to by;” otherwise those phrases would be rendered meaningless in the provisions requiring that a loss be “arising from or in connection with” or “caused by or contributed to by or arising from.” *See Utica*, 141 S.W.3d at 203. The assured cannot establish coverage by merely alleging that stand by charges “arise out of” damage to the insured property; the Policy’s terms and conditions do not provide coverage for damages that only remotely relate to an occurrence.

C. The charges do not fall within the coverage extended in Section 1(a).

Part of the oral argument focused on whether charges fell within Section 1(a) of the Terms and Conditions, which provides coverage for items “necessarily incurred and duly justified in repair.” The weather stand by charges were not costs necessary to repair the jacket. These charges are paid to a vessel owner to keep its vessels idle and refrain from taking on other work. The vessels are not repairing anything when they incur such charges.²⁵

D. The Court of Appeals correctly held that Paragraph 13 “confirmed” the finding that the remaining Policy terms did not extend coverage to weather stand by charges.

The Court of Appeals did not read the stricken language in a vacuum. The Court of Appeals spent the first ten pages of its opinion focusing on the “Covered Perils” clause

²⁵ Thus, this situation is distinguishable from the hypothetical posed by Justice Jefferson during oral argument. Justice Jefferson asked whether these types of charges would be similar to those incurred by a delivery truck that was delayed in a traffic accident on the highway. The present situation, however, is more analogous to a hypothetical where a truck hired by an assured cancelled a delivery due to a condition on a roadway and the assured paid the truck to refrain from doing any other work for third parties and to instead remain idle until that roadway improved.

and Terms and Conditions cited by THEC and OSFI and finding those terms did not provide coverage for weather stand by charges. *Wellington Underwriting Agencies, Ltd.*, 267 S.W.3d at 277-86. During that part of the opinion, the Court did not consider the effect of the stricken terms. It was only after the Court had found a lack of coverage in those terms that the Court, in the final two pages of the opinion, considered the stricken terms and found that they confirmed the Court's holding of noncoverage. *Id.* at 287-88. Importantly, the Court did not allow the stricken wording to vary or contradict the language in the Policy. *See id.* Instead, the Court noted that the stricken term complements the remaining coverage terms. *Id.* at 288.

III. There was No Coverage for Weather Stand By Charges Under the Policy Because OSFI, the Only Named Principal Assured Under the Policy, Did Not Purchase Such Coverage.

In determining coverage in an unambiguous policy, Texas courts consider whether the insured agreed to pay a premium for a certain grant of coverage. *Gibson v. Turner*, 294 S.W.2d 781, 785 (Tex. 1956) (in determining coverage, a court can appropriately consider policy terms that are not effective because no premiums have been paid for those particular risks); *Utica Nat'l Ins. Co. of Tex. v. Fidelity & Cas. Co. of N.Y.*, 812 S.W.2d 656, 661-62 (Tex. App.—Dallas 1991, writ denied) (intent of the policy may be evidenced by its stated coverage, the premiums paid for it, and its wording concerning excess insurance). Courts also consider whether the insurer agreed to provide a certain type of coverage. *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 552 (Tex. 2003) (explaining that in interpreting form policy terms the court looks to “the ordinary

lay meaning of the words to the general public” and based on that meaning makes “an examination of the choice the purchaser had and the choice he made”).

The uncontroverted testimony before the trial court is that OSFI’s agent agreed to delete the portion of the Policy referencing stand by charges as a cost-cutting measure.²⁶ OSFI had the opportunity to obtain coverage for weather stand by charges but decided not to pay the necessary premium.²⁷ As a result, OSFI received a 10 percent reduction in the cost of the standard policy.²⁸ The supplemental premium for weather stand by coverage was not paid, and therefore such charges were not covered.

IV. Even if the Court Finds the Stricken Language to be Extrinsic Evidence, it is Still Admissible.

A. Courts consider evidence of the circumstances surrounding the execution of an insurance policy.

Even if one considers the stricken language as extrinsic evidence, it is still admissible to support a review of the plain language of the Policy. Language in insurance policies, like all contracts, must be interpreted with reference to both the wording of the agreement and the facts within the contemplation of the parties at the signing of the policies. *See Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). “Generally, as with any contract, extrinsic evidence may be admissible to give the words of an insurance policy a meaning consistent with that to which they are reasonably

²⁶ S.R. 347 (Darell Dep., 330:9-332:16), 402 (Allan Dep., 165:22-168:6), 412 (Allan Dep., 205:10-206:25).

²⁷ S.R. 402 (Allan Dep., 165:22-168:6), 412 (Allan Dep., 205:10-206:25).

²⁸ S.R. 347 (Darell Dep., 330:9-332:16), 402 (Allan Dep., 165:22-168:6).

susceptible, *i.e.*, to interpret *contractual terms.*” *Gen. Star Indemn. Co. v. Gulf Coast Marine Assocs.*, 252 S.W.3d 450, 457 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (emphasis in original) (citing *Nat’l Union Fire Ins. Co. of Pittsburgh, PA, v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995)). Extrinsic evidence is only inadmissible to contradict or vary the meaning of an unambiguous contract. 907 S.W.2d at 521; *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 32 (Tex. 1958).

Here, the Court may consider the stricken language in support of the plain meaning of the Policy, which is that the stand by charges were not covered. *See Gen. Star Indem. Co.*, 252 S.W.3d at 457.

B. If the Court finds the Policy to be ambiguous, it will not be construed in favor of the assureds.

During oral argument, Justice Green noted that the Court could find the Policy ambiguous, which would allow extrinsic evidence. THEC has argued that if the Policy is ambiguous, it will be construed against Underwriters. The majority of courts hold that this doctrine does not apply to policies involving sophisticated insureds who negotiate policy terms, such as in manuscript policies. *Vought Aircraft Indus., Inc. v. Falvey Cargo Underwriting, Ltd.*, 2010 WL 2573214, *5-7 (N.D. Tex., June 25, 2010) (not yet published); *Eagle Leasing Corp. v. Harford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976) (applying Missouri law) (when dealing with a manuscript form policy, *contra proferentem* rule has “no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts”); *Stryker Corp. v. XL Ins. Am., Inc.*, 2006 WL 1997142, *11-12 (W.D.

Mich. July 14, 2006) (rule “has no application where the contract at issue resulted from the parties’ negotiations”); LEE R. RUSS, 2 COUCH ON INS. 3d § 22:24 (2010 Supp.).


Here, the Policy was a manuscript policy negotiated by local and London brokers hired by OSFI, a corporation and sophisticated assured. Therefore, in the event this Court finds the Policy to be ambiguous, the rule mandating that the Court interpret the Policy in favor of coverage will not apply. *See Vought Aircraft Indus.*, 2010 WL 2573214 at *5-7.

PRAYER

For these reasons, Respondents ask that the Court affirm the decision of the Court of Appeals. Respondents further ask that the Court grant them such other and further relief to which they are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Wellington Underwriting Agencies Ltd., et al.'s Post-Submission Brief* was served via Federal Express on the 30th day of November, 2010, upon the following counsel of record:

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