IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

THOMAS L. STROMEI and STROMEI REALTY, LLC, a New Mexico Limited Liability Company,

Plaintiffs-Appellees/Cross-Appellants,

vs. **No. 30,499**

RAYELLEN RESOURCES, INC., a New Mexico Corporation, LIONEL BURNS, an individual, JANE BURNS, a/k/a JANE MCVEY, an individual, KENYON BURNS, et al.,

Defendants-Appellants/Cross-Appellees.

Appeal from the District Court, Sandoval County
Before the Honorable George P. Eichwald, Thirteenth Judicial District

REPLY IN SUPPORT OF BRIEF IN CHIEF OF DEFENDANTS-APPELLANTS

Oral Argument Is Requested

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STATEMENT OF COMPLIANCE

This brief was prepared using a proportionally-spaced type style or typeface, Times New Roman, and the body of the brief contains 4,388 words, as indicated by Microsoft Office Word version 2007.

ARGUMENT

Defendants stand on their Brief in Chief as to any points raised by Plaintiffs which are not discussed herein.

POINT 1

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON THE LISTING CONTRACT BECAUSE STROMEI REALTY FAILED TO PRODUCE A READY, WILLING AND ABLE BUYER.

The Purchase and Sale Agreement ("PSA") required Triple Bar S ("TBS") to produce at the first and second closings, "[w]ritten confirmation *by Buyer*" (emphasis in original) that it was "a Colorado limited liability company duly organized, validly existing and in good standing with the State of Colorado and is qualified to do business in New Mexico" "as of the Effective Date" (December 16, 2005), among other dates. Ex. E7, §§ 6.2.1(b)(5), 6.2.2(b)(4), 8, 8.1. Since it is undisputed that TBS was not a limited liability company in good standing on

December 16, 2005, it was impossible from the inception for TBS to comply with that condition at the first or second closings or at any other time.

Plaintiffs respond: (1) TBS eventually became a valid LLC and thereafter ratified the PSA; (2) the "technical violation" of the PSA was waived by Rayellen or cured by TBS; and (3) other unknown parties in unrelated transactions have closed sales where the paperwork was not in order when the contract was signed so "no harm, no foul." Answer Brief at 10-16.

A. EVEN ASSUMING TBS RATIFIED THE PSA, NO CONTRACT AROSE BECAUSE THE PERFORMANCE OF A CONDITION PRECEDENT WAS IMPOSSIBLE *AB INITIO*.

Plaintiffs rely on the "promoter" rule under which a corporation or other entity will become bound by a contract entered into by a promoter if it ratifies the contract after it becomes legally organized. Answer Brief at 10-11. That principle does not apply here. That principle might apply if Rayellen were attempting to enforce the PSA against TBS and TBS was trying to avoid the contract on the ground that it did not legally exist when the contract was signed. But Rayellen is not trying to enforce the PSA against TBS. Rather, Rayellen contends that no contract was ever formed because TBS did not exist when the contract was signed – as required by the proposed contract itself. The issue is not whether TBS is bound by the contract; the issue is whether a contract ever arose where it is

undisputed that a condition precedent was impossible of performance *ab initio*.

Defendants cited *Sanders v. Freeland*, 64 N.M. 149, 325 P.2d 923 (1958), in which the Court held that because it was impossible to comply with the conditions of the contract, there was "no contract at all." *Id.*, 64 N.M. at 152. *Sanders* was followed by *Hoke v. Brown,* 79 N.M. 682, 448 P.2d 483 (1968), in which the performance of a lease agreement was held to be impossible.

> Since it was impossible to assign the loan payments as contemplated by the parties, this impossibility of performance resulted in no lease at all. *Sanders v. Freeland.*

Id., 79 N.M. at 684, 448 P.2d at 485. (Emphasis added).

The requirement that TBS be a legally valid and existing entity on the date the PSA was signed was essential. Otherwise, the power to make this a binding contract rests in the hands of one party (TBS) at the risk of the other (Rayellen). If this condition is excused, then after December 16, 2005, at least until TBS might ratify the contract at some unknown future date, TBS would have the unilateral power, at its sole discretion, (a) to create an enforceable contract, through organization and ratification, or (b) to avoid the creation of an enforceable contract by failing to become duly organized and failing to ratify the contract. Stromei is in no position to say that at some later date, TBS did become organized and did ratify the PSA. This contract expressly required that TBS be duly organized and existing

on December 16, 2005, and provide written confirmation that such was the case. Just as in *Sanders*, where the impossibility of performance resulted in "no contract at all," and in *Hoke,* where the impossibility of performance resulted in "no lease at all," so here, the impossibility of performance rendered the PSA no contract at all.

The jury was instructed that a broker is entitled to a commission if he produces a buyer who is ready, willing and able to purchase on terms acceptable to the seller pursuant to a "binding contract." RP 2941. Stromei never produced such a buyer, and, thus, was not entitled to a commission under the Listing Agreement.

B. THE FAILURE OF THE CONDITION PRECEDENT WAS NEITHER WAIVED NOR CURED.

Plaintiffs concede that "when TBS signed the PSA, it was technically in violation of the warranty that it be 'duly organized, validly existing, and in good standing with the State of Colorado ....'" Answer Brief at 12. But it contends that this "violation" was cured or waived.

First, as demonstrated, the impossibility of supplying the required warranty and written confirmation of it rendered the PSA no contract at all. So, there was nothing to waive and nothing to cure. There was simply no contract.

Second, and in the alternative, the required warranty and written confirmation of it were conditions precedent to Rayellen's performance that did not occur and could not ever occur.

> A contracting party may repudiate performance under the contract if a condition precedent to that performance cannot be satisfied.

Evatt v. Steele, 109 N.M. 183, 185, 783 P.2d 959, 961 (1989). *See also*, *Western Commerce Bank v. Gillespie,* 108 N.M. 535, 538, 775 P.2d 737, 740 (1989) ("Generally, a condition precedent is an event occurring subsequently to the formation of a valid contract, an event that must occur before there is a right to an immediate performance, before there is breach of a contractual duty, and before the usual judicial remedies are available.")

Third, as noted, the PSA required TBS to be a duly organized and existing entity on December 16, 2005, when the contract was signed. Contrary to Plaintiff's contention, that deficiency was not "effectively cured" by its becoming validly organized some five weeks later. The purported contract was signed by a nonexistent phantasm.

Fourth, the PSA provided that (1) "time shall be of the essence ... with respect to all matters contemplated by this Agreement" and that no waiver "shall be binding unless executed in writing by the party to be bound thereby." Ex. E7, §§ 14.3 & 14.10. Plaintiffs have still failed to cite any writing constituting a waiver of the warranty provision. Instead, they argue that "[b]y proceeding to attempt to close the transaction, Rayellen quite clearly waived the right to

terminate the agreement." Answer Brief at 12. Assuming the PSA had any force at all (which is denied), the non-waiver clause forecloses Plaintiffs' argument.

C. ANECDOTAL TESTIMONY ABOUT OTHER TRANSACTIONS CANNOT DISPEL THE CONCLUSION REQUIRED HERE BY THE LAW AND UNDISPUTED FACTS.

Finally, Plaintiffs' real estate expert generally testified that "in the real world of real estate transactions" it is common for the filing of organizational papers to occur after the signing of the purchase contract. Answer brief at 13. That testimony is unavailing.

First, neither Plaintiffs nor their expert made any attempt to produce the real estate purchase agreement in any of those transactions. Second, even if the provisions were comparable, the testimony does not override the plain consequences of the contractual provisions and undisputed facts of this case, which demonstrate that the contract did not exist and that conditions precedent have not occurred. Obviously, if a buyer and seller want to proceed with a transaction, even though not contractually bound to do so, who is to stop them? The bare fact that transactions occur despite the lack of organization papers at the time of signing an agreement proves nothing.

POINT 2

THE COURT ERRED IN DENYING DEFENDANTS' MOTION FOR DIRECTED VERDICT ON THE ORAL AGREEMENT BECAUSE PLAINTIFFS FAILED TO PROVE A MEETING OF THE MINDS AS TO A MATERIAL TERM.

Plaintiffs' response to Defendants' contention that there was no meeting of the minds on interest, which was a material term, appears to consist of two arguments: (1) there was evidence that the parties agreed that Stromei would be assessed "reasonable interest" and there was evidence to support the jury's determination that reasonable interest was prime rate compounded, or alternatively, (2) if the parties did not agree on interest, the jury could supply that missing term. The first argument fails because there is no evidence that the parties agreed to assess Stromei "reasonable interest." The second argument fails because the jury was properly instructed, without objection, that if the parties did not agree on a material term, there was no contract.

A. THERE WAS NO AGREEMENT ON "REASONABLE INTEREST."

The only evidence Plaintiffs cite to support their contention that the parties agreed on "reasonable interest" is Stromei's written proposal to Rayellen on September 2, 2003, in which Stromei proposed that the parties use "reasonable interest" to determine Stromei's net profit share. Answer Brief at 20; Ex. R1. But

Tom Stromei himself testified that Rayellen rejected this proposal. Tr. 10:82. So this is not evidence of an agreement between the parties that "reasonable interest" be used. Jimmy Waechter testified that the phrase, "costs of all kinds," in the Bond Agreement could be interpreted to include interest, but he did not testify that the parties agreed on "reasonable interest." In fact, he testified that he was not told of any agreement on what rate to use. Tr. 12:75-76, 98-99. The jury foreman advised the court that "we came to an agreement as to Mr. Waechter's testimony that there was no agreed upon interest." Tr. 15:12. Mr. Waechter was asked the bare question about what a reasonable interest would be (assuming the parties had agreed that was the measure) and he answered it. But that testimony assumes that which was not proven – namely, that the parties had agreed on "reasonable interest."

B. THE JURY HAD NO AUTHORITY TO IMPOSE "REASONABLE INTEREST" IN THE ABSENCE OF AN AGREEMENT BY THE PARTIES.

There being no evidence of an agreement for "reasonable interest," Plaintiffs argue in the alternative that the jury had the authority to supply the missing material term. First, this argument is contrary to, and inconsistent with, the jury instructions, including the following:

- "In order for a set of promises to be legally enforceable, there must

be ... mutual assent." RP 2925

- "For there to be mutual assent, the parties must have had the same understanding of the material terms of the agreement." RP 2932.

- "A material term is any term without which one of the parties would not have entered into the contract." RP 2926.

- "[T]he material terms ... must have been definite." RP 2928.

Being given without objection, these instructions are the law of the case. *McMinn v. MBF Operating Acquisition Corp.*, 2007-NMSC-040, ¶ 53, 142 N.M. 10, 164 P.3d 41. The instructions do not say, "if the parties did not agree on a material term you may nonetheless find that they entered into a binding contract and you may supply the missing term."

Second, the case law cited by Plaintiffs is not only inconsistent with the law of the case, but it does not support their argument in any event. *Beaver v. Brumlow*, 2010-NMCA-033, 148 N.M. 172, 231 P.3d 628, was an action for specific performance. The Court held that the district court had the power, sitting in equity, to determine the price where the parties had not expressly agreed upon it. *Id.* at ¶¶ 28-29. The case at bar is not within the power of a court sitting in equity. Plaintiffs' only other case, *Castle v. McKnight,* 116 N.M. 595, 866 P.2d 323 (1993) is even more remote. It holds that a consent clause in a boundary line agreement contained an implied covenant that the consent not be unreasonably withheld.

Neither of these cases holds that where parties have not agreed on a material term, such as the interest rate, a jury may nonetheless find a binding contract and supply the missing term. Where there is no agreement on interest, and the term, as here, is material, there is no enforceable contract. *Willmott v. Giarraputo,* 5 N.Y.2d 250, 157 N.E.2d 282, 184 N.Y.S.2d 97 (1959).

POINT 3

THE COURT ERRED IN GRANTING JUDGMENT AS A MATTER OF LAW ON THE DEFENSE OF STATUTE OF FRAUDS BECAUSE PLAINTIFFS TESTIFIED THAT THE ORAL CONTRACT GAVE THEM AN INTEREST IN LAND.

Plaintiffs cite *Kestenbaum v. Pennzoil Co.,* 108 N.M. 20, 24, 766 P.2d 280, 284 (1988), for the proposition that "as a general rule," determination of the applicability of the defense of the statute of frauds is a question of law for the court, not the jury. Answer Brief at 22. After that statement, the *Kestenbaum* Court noted, "[h]owever, a factual question concerning the particulars of a contract may prevent a ruling on the statute's applicability as a matter of law." *Id.* 108 N.M. at 24, 766 P.2d at 284. *See also, Nashan v. Nashan,* 119 N.M. 625, 629-634, 894 P.2d 402, 406-411 (Ct. App. 1995) (factual issues precluded summary judgment on statute of frauds). Here, there were factual questions concerning the particulars of the oral net profit agreement preventing a ruling on the applicability

of the defense as a matter of law.

Plaintiffs cannot dispute that in their verified complaint, which was admitted into evidence (Ex. 185, p. 2, 18), they contended that the oral agreement was for "a 25% equity interest in the L Bar Ranch inclusive of the real estate." *See also*, Exs. 186, 187 & 188; NMSA 1978, §38-1-4. To avoid the effect of this evidence, they contend that they no longer sought a property interest "at trial" and that the pretrial order governs what claims were made at trial. Answer Brief at 24. They miss the point.

The applicability of the statute of frauds is governed not by what claims are made or what relief is sought but, rather, by the nature of the contract at issue. If it is a contract coming with the type of contract described in the statute of frauds, then it is governed by that statute. *See, e.g., Cox v. Hanlen,* 1998-NMCA-015, ¶ 26, 124 N.M. 529, 953 P.2d 294 ("the grant or reservation of an easement, a real property interest, is unenforceable unless one of the exceptions to the statute of frauds applies"); *Mercury Oil & Gas Corp. v. Rincon Oil & Gas Corp.,* 79 N.M. 537, 539, 445 P.2d 958, 960 (1968) ("[c]ontracts involving the purchase and sale of oil and gas properties are governed by the Statute of Frauds and must be in writing").

So whether the statute of frauds applies depends on the nature of this net

profit agreement, not what relief Plaintiffs were seeking at trial or what they claimed it was at trial. Does it confer on Plaintiffs an interest in land? If so, it comes within the statute of frauds.

The verified complaint is sworn and competent evidence that, at some point at least, Plaintiffs contended that the net profit agreement conferred on them an interest in land – namely, the L Bar Ranch. This was evidence the fact-finder could have considered to determine whether this contract came within the statute of frauds. Of course, Plaintiffs later changed their tune, but that simply presents a conflict in the evidence. The court erred in granting Plaintiffs judgment as a matter of law on this issue.

POINT 4

PLAINTIFFS CANNOT RECOVER UNDER THE ORAL CONTRACT FOR A SHARE OF NET PROFITS BECAUSE SALE OF THE RANCH WAS A CONDITION PRECEDENT WHICH NEVER OCCURRED.

Plaintiffs offer two responses to Defendants' contention that they could not recover under the oral contract because the sale of the Ranch was a condition precedent which never occurred. They contend that (1) the occurrence of the condition precedent (the sale of the Ranch) was excused because Defendants prevented its fulfillment, or (2) Rayellen committed an anticipatory breach of the oral contract thus excusing the performance of the condition precedent.

The first argument highlights the difference between the oral contract for net profits and the written listing agreement. Under the latter contract, Plaintiffs were entitled to the commission set forth in the agreement if they produced a buyer who was ready, willing and able to purchase the Ranch pursuant to a binding contract on the terms stated in the listing agreement. Under its terms, if that condition were met, the commission was earned regardless of whether the sale of the ranch occurred.

The oral contract was completely different in nature. It was an agreement to share the net profit from the sale of the Ranch if and when that sale occurred. Unlike the listing agreement, the share of net profit was not earned if Plaintiffs produced a buyer at a certain price. The share was earned only upon consummation of the sale. Whether to conclude a particular transaction was in the sole and absolute discretion of Rayellen, the owner. Exs. 37, 62; Tr. 11: 53-54. By the terms of this oral contract, Plaintiffs were in no position to say that if Rayellen failed to close on a potential transaction, then Rayellen was "preventing the fulfillment of a condition precedent" by failing to close. Whether to go through with any proposed transaction was in the sole discretion of Rayellen but, if and when the Ranch was sold, Plaintiffs were entitled to a share in the net profits.

As discussed in the Brief in Chief (at 31-32), in order for the non-occurrence

of a condition to be legally excused by the promisor's conduct, such conduct must amount to a clear and unequivocal breach of the contract. *See also, Gilmore v. Duderstadt,* 1998-NMCA-086, ¶ 15, 125 N.M. 330, 961 P.2d 175 (to establish repudiation, ("plaintiff must be able to show that the defendant's words or acts evinced a distinct, unequivocal, and absolute refusal to perform ..."). *See also* RP 2938. The evidence Plaintiffs cite is equivocal and insufficient to support the argument that the verdict on the oral agreement can be sustained on the theory of anticipatory breach. Ex. H3; Tr. 6:153-154. *See also* Tr. 6:138.

The oral contract was conditioned on a sale which never occurred. Plaintiffs cannot recover under that contract because of the failure of the condition precedent. *Enerdyne Corp. v. W. M. Lyon Development Co,* 488 F.2d 1237, 1239 (10th Cir. 1973) (where broker's commission was specified to come from "the sale price of the land, right to commission was contingent upon consummation of a sale and, in the absence of a sale, the broker was not entitled to a commission, applying New Mexico law).

POINT 5

THE COURT'S ADMISSION OF EVIDENCE OF BURNS' ALLEGED EXTRA-MARITAL AFFAIRS WAS ERRONEOUS, HIGHLY PREJUDICIAL AND AN ABUSE OF DISCRETION.

Plaintiffs' attempt to establish that any relevance of the evidence of Burns'

alleged extra-marital affairs was not outweighed by the high degree of unfair prejudice it aroused is unconvincing.

They argue , essentially, that the divorce between Burns and McVey and the struggle for control of Rayellen were relevant and material to the issues at trial. Answer Brief at 28-29. Defendants do not deny that, but Plaintiffs miss the point. Plaintiffs could have put on evidence of the divorce and the struggle for control of Rayellen without getting into the evidence of Burns' alleged extra-marital affairs; they clearly wanted to get that disturbing evidence before the jury for other reasons. Plaintiffs have offered no justification for going beyond the fact of the divorce into the underlying reasons for the divorce. The reasons were irrelevant, and this highly charged evidence was extremely prejudicial.

This case is like *Bourgeous v. Horizon Healthcare Corp.*, 117 N.M. 434, 872 P.2d 852 (1994), where the Court held that "the additional information of the alleged romantic character of the relationship would not have increased the probative value of the evidence and was far outweighed by its prejudicial effect." *Id.*, 117 N.M. at 440, 872 P.2d at 858. (Emphasis added).

POINT 6

THE JUDGMENT CANNOT BE SUPPORTED BY CLAIMS ON WHICH THE JURY AWARDED NO DAMAGES.

Plaintiffs contend that the verdict for damages against the individual defendants for "breach of the oral contract" and "breach of the listing agreement" (RP 2965) support the judgment (notwithstanding that they were not, and could not be, liable on contracts to which they were not parties) for this reason:

> The measure of damages for Plaintiffs' breach of contract claims was the same as for Plaintiffs' claims gains the individual defendants for tortious interference with contract, i.e., benefit of the bargain damages.

Answer Brief at 35.

Plaintiffs cite nothing to support this statement. *Id.* Plaintiffs similarly argue that "it must be assumed" that the jury's award, which was expressly for breach of contract" was an award for breach by Rayellen of the implied covenant of good faith and fair dealing. Answer Brief at 37. The jury instructions do not support this assertion.

In fact, the jury was given no instruction whatsoever on the measure of damages for tortious interference with contractual relations or for breach of implied covenant of good faith and fair dealing. The only instructions given to the jury on the measure of damages were on the claims for "breach of the verbal

contract" (RP 2940) and "breach of the Listing Contract." RP 2942. The jury verdict awarding damages on those two claims – and only those two claims (RP 2965) – is consistent with the only two instructions given to the jury on the measure of damages. Therefore, it cannot be assumed that the jury, which was given no instruction on the measure of damages for tortious interference with contractual relations or for breach of the implied covenant, intended its verdict on the breach of contract claims to constitute an award of damages those other claims. Plaintiffs simply failed to ask the jury to award damages on the claims of tortious interference or breach of the implied covenant of good faith and fair dealing, and the jury made no award on those claims. The findings on liability on those claims cannot support the judgment for damages. *See* cases cited in Brief in Chief at 40.

POINT 7

THERE WAS NO BASIS FOR AN AWARD OF PRE-JUDGMENT INTEREST

Defendants' offer to settle the matter before Plaintiffs filed this litigation was a reasonable, timely offer of settlement precluding an award of prejudgment interest under NMSA 1978, § 56-8-4. Plaintiffs concede this point by failing to challenge the timing or the reasonableness of this offer. Instead, they base their entire argument on the mistaken assertion that because the court found this

settlement offer was reasonable in a different context, it cannot apply to the issue of prejudgment interest. That argument fails to consider that the court's specific factual finding is the law of the case. The court made no factual finding to the contrary, as Plaintiffs did not request and the district court did not enter any factual findings on the issue of prejudgment interest. Therefore, the court's sole factual finding on the reasonableness of Defendants' pre-litigation offer of settlement was that it was reasonable. (RP 4001-4002, ¶6). Further, the district court concluded, in a specific factual finding, that Defendants participated in good faith mediation. (RP 4001-4002, 4010, 4015). These two findings preclude an award of prejudgment interest under the express terms of § 56-8-4.

With regard to the oral and listing agreements, the court could not award prejudgment interest because there was no evidence as to when such interest should begin to run as to either agreement. Significantly, Plaintiffs failed to cite to any testimony reflecting the precise dates on which the agreements were "breached." Plaintiffs did not request a jury instruction on this point, which was contested, and did not ask the district court to determine the date on which agreement was allegedly breached. As one court noted in a similar circumstance:

> .... The plaintiffs argue that the judge erred in failing to award prejudgment interest on the back of the oral contract from the date of the breach. There was no error. The special questions to the jury

> neglected to include a question as to the date of the breach, if a breach were found. The plaintiffs did not object to the omission, and they may not now complain that the date ... was not established by the jury.

Graves v. R.M. Packer Co., 45 Mass. App. Ct. 760, 771, 72 N.E.2d 21, 28 (1998).

Where prejudgment interest is awarded as of right, the court should nonetheless "examine any countervailing equities to determine whether the award was properly made." *State ex rel. Bob Davis Masonry v. Safeco Ins. Co. of America*, 118 N.M. 558, 561, 883 P.2d 144, 147 (1994). Here, the court did not give proper consideration to those countervailing equities. Despite 17 years of negotiation over contract terms, the parties never reached an agreement as to the basic monetary terms of the contract, and instead, left those basic terms to the jury to decide. That the jury was charged with filling in basic contract terms demonstrates the lack of a liquidated sum upon which interest can be based as to the oral agreement related to the sale of the L Bar Ranch. (RP 2901). Where there is a reasonable controversy, as here, as to the amounts due under a contract, the claims are necessarily unliquidated and not subject to prejudgment interest. *See, e.g., Folgers Architects Ltd. v. Kerns*, 262 Neb. 530, 550 (Neb. 2001).

Thus, even if prejudgment interest were otherwise proper, it cannot be awarded because Plaintiffs failed to have the jury ascertain the date of the breaches of either agreement. Therefore, the award of prejudgment interest was improper.

POINT 8

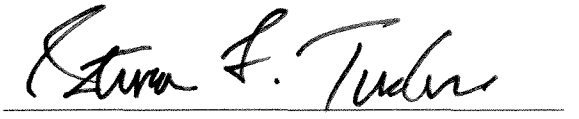
THE AWARD OF POST-JUDGMENT INTEREST AT THE RATE OF 15% MUST BE REVERSED.

Plaintiffs ask this Court to ignore the actual verbiage in their Special Verdict form, which awarded damages solely for breach of contract. They instead ask the Court to infer that the jury would have awarded damages for Plaintiffs' tort claims, had they simply asked. The point is that Plaintiffs did not ask, and the Special Verdict form must be applied as Plaintiffs wrote it and as the jury completed it. No damages having been awarded for anything other than contract claims, post-judgment interest can be allowed only at the rate of 8.75%.

STATEMENT REGARDING ORAL ARGUMENT

Defendants request oral argument for the reasons set forth in their Brief in Chief.

Respectfully submitted,

By: 

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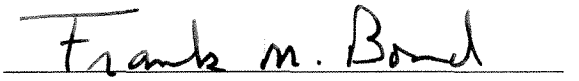
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2011, a true and correct copy of the foregoing pleading was sent via U.S. mail, postage prepaid, to Luis G. Stelzner, Robert P. Warburton, Jamie Dawes, Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A., P.O. Box 528, Albuquerque, NM 87103