Nos. 08-1298, 08-1305, 08-1317

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BREAKTHROUGH MANAGEMENT GROUP, INC.,

Plaintiff/Appellee/Cross-Appellant,

v.

CHUKCHANSI GOLD CASINO AND RESORT; CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY; and RYAN STANLEY,

Defendants/Appellants/Cross-Appellees,

On Appeal from United States District Court for the District of Colorado,

The Honorable Judge Marcia S. Krieger

D.C. No. 06-CV-01596 MSK-KLM

REPLY BRIEF OF CROSS-APPELLANT BMG

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Oral Argument Is Requested

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ABBREVIATED TERMS

"Aplee. Supp. App. XX" refers to the BMG's Supplemental Appendix.

"Aplt. App. XX" refers to the Appellants' Appendix.

"Authority" means Appellant/Cross-Appellee Chukchansi Economic Development Authority.

"BMG" means Appellee/Cross-Appellant Breakthrough Management Group, Inc.

"DE XX" refers to the docket entry number assigned to the Record on Appeal.

"eLearning Agreement" means the eLearning Agreement set forth in Aplee. Supp. App. 29-33.

"Courseware Agreement" means the Online Courseware Software Agreement set forth in Aplee. Supp. App. 25-28.

"Evidentiary Hearing" means the evidentiary hearing held before the United States District Court for the District of Colorado on October 23, 2008.

"IGRA" means the Indian Gaming Revenue Act, 25 U.S.C. § 2701, *et. seq.*

"Resort" means Appellant/Cross-Appellee Chukchansi Gold Casino and Resort.

"Resort Parties" means the Appellants/Cross-Appellees Resort, the Authority and Stanley.

"Stanley" means Appellant/Cross-Appellee Ryan Stanley.

"Tribe" means Picayune Rancheria of the Chukchansi Indians.

SUMMARY OF THE ARGUMENT

The Resort Parties position is essentially that while a clause that calls for the parties to arbitrate constitutes a waiver of tribal immunity, a clause that calls for the parties to litigate in Colorado's courts does not. In what appears to be an issue of first impression with any court, there is simply no legitimate basis to differentiate between dispute resolution regimes that call for arbitration versus litigation. In *C & L Enterprises*, the Supreme Court held that an arbitration clause constituted an immunity waiver even in the absence of any express reference to "immunity" because the Court did not want a contract's dispute resolution regime to be completely devoid of meaning and practical consequences. Refusing to similarly interpret a contract's dispute resolution regime that calls for litigation in a designated court as a waiver of immunity creates the situation that the Supreme Court wanted to avoid: namely, a dispute resolution regime that has no practical impact.

The Resort Parties contention that this case should be distinguished from *C & L Enterprises* because none of the contracts in this case provided for a judgment enforcement process rings hollow. The court in *C & L Enterprises* looked outside of the four corners of the contract, such as the AAA Rules of Arbitration and

Oklahoma's Uniform Arbitration Act, when determining whether there were any provisions that allowed for an arbitration award to be enforceable. Here, there is a wealth of federal and state laws that provide that a judgment obtained in Colorado's District Court is enforceable in other states and judicial districts.

With respect to BMG's other issue on Cross-Appeal, the Resort Parties have not contested that the trial court abused its discretion when BMG was denied any right to conduct any discovery on the issues of the applicability and waiver of immunity, as well as to call subpoenaed witnesses at the Evidentiary Hearing.

ARGUMENT

I. THE AGREEMENTS' DISPUTE RESOLUTION PROVISIONS CONSTITUTED A WAIVER OF ANY APPLICABLE IMMUNITY.

A. There Is No Justifiable Basis To Differentiate Between A Contract's Dispute Resolution Regime That Calls For Arbitration, Which Constitutes A Waiver Of Immunity, And A Contract's Dispute Resolution Regime That Calls For Litigation In Court.

A contract's dispute resolution regime that calls for litigation in Colorado's courts is the functional equivalent of a contract's dispute resolution regime that calls for arbitration. Since an arbitration clause serves to waive immunity so to should a clause calling for litigation in Colorado's courts. *C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

The Resort Parties primarily rely on an anemic rationale that the Supreme Court rejected; namely that BMG's dispute resolution regime "speaks to only where a suit may be brought, but it does not expressly or impliedly address whether a suit may be brought." (Resort Parties Answering Brief on Cross-Appeal, p. 23; Aplt. App. 10) (emphasis in original). But the tribe in *C & L Enterprises* raised a similar argument when the tribe claimed that "the arbitration clause waives simply and only the parties' rights to a court trial of contractual disputes" should it ever decide to waive immunity, but the tribe claimed that the arbitration clause did not address whether claims could be brought. *C & L*, 532 U.S. at 422. In holding that an arbitration clause constitutes a waiver of immunity, the Supreme Court recognized the importance of a "contract's dispute resolution regime" and how "[i]t has a real world objective; it is not designed for regulation of a game lacking practical consequences." *Id.*

The Resort Parties attempt to distinguish *C & L Enterprises* by arguing as follows:

> "As the opinion in *C & L Enterprises* shows, what was of critical importance to the Supreme Court was that the tribe there knowingly agreed to a specific process by which disputes would be adjudicated and that the agreement provided that enforcement of any awards would occur in state courts. Therefore, the Court found that because the tribe waived immunity to the

> adjudicatory process,[1] it also waived its immunity to enforcement actions. Otherwise, the Court noted, the agreement to participate in the arbitration process would have no practical consequences."

(Resort Parties Answering Brief on Cross-Appeal, p. 23) (internal citations omitted). However, the Resort Parties fail to recognize that similar processes pertaining to how disputes would be litigated and the enforcement of judgments are present in this case.

When determining whether immunity had been waived in *C & L Enterprises,* the Court looked outside the confines of the contract to determine whether a judgment obtained in the selected adjudicatory process, in that case arbitration, was enforceable under state law when it considered Oklahoma's Uniform Arbitration Act, which was applicable under conflict of laws principles. Specifically, in *C & L Enterprises*, the Court held that '[b]y selecting Oklahoma law…to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' Oklahoma's Uniform Arbitration Act," which in turn provides for "jurisdiction to enforce the agreement in 'any court of competent jurisdiction of

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[1] It appears from this quoted passage that the Resort Parties may take the position that BMG's forum selection clauses constituted a waiver of immunity to "the adjudicatory process" of litigation in Colorado's courts, but not necessarily a waiver of immunity for the enforcement of any judgment. This argument was not raised at the lower court by the Resort Parties.

this state.'"[2] *C & L*, 532 U.S. at 421-22 (emphasis added) (footnote and citation omitted).

Unlike arbitration, which requires a statute to ensure enforceability of an arbitration award, a judgment obtained in the "adjudicatory process" of litigation in Colorado's federal courts is unquestionably enforceable in the United States.[3] *See e.g.,* U.S. Const. art IV, § 1 (full faith and credit clause); 28 U.S.C. § 1963 (allowing for judgments obtained in one district court to be enforced in other judicial districts); 28 U.S.C. § 1961 (the enforceability of interest on judgments); 28 U.S.C. § 1738; Col. Rev. Stat. § 13-53-100, *et. seq.* (Colorado's Uniform Enforcement of Foreign Judgments Act); Cal. Code Civ. Proc., § 1710.10, *et. seq.* (California's Sister State Money Judgment Act); *c.f.* 17 U.S.C. § 504 (allowing for

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[2] In *C & L Enterprises*, a provision of the contract also allowed for the enforcement of arbitration awards "in any court having jurisdiction thereof," but the Tribe recognized that the clause "begs the question of what court has jurisdiction," which it claimed was no court. 532 U.S. at 421.

[3] It is important to note that conflict of laws principles, not a contract's choice of law clause, that direct which laws are applicable in litigation. If an agreement does not contain a choice of law clause, such as the unambiguous choice of Colorado law by the parties in the eLearning Agreement, then courts will look at the multi-factored approach that BMG set forth on page 47 of BMG's Opening Brief. Thus, even in the absence of a choice of law clause, an agreement with a dispute resolution regime of litigating in the United States automatically calls for the enforceability of any judgment by virtue of conflict of laws principals that mandate that Colorado law is applicable.

monetary damages for copyright infringement, which the Resort agreed by contract it would be subject to). Moreover, state and federal law provides a detailed process for litigating cases in Colorado's federal courts. The Resort Parties contention that "unlike *C & L Enterprises*, the Authority and the Resort did not agree to any process" completely ignores the fact that Colorado law is applicable in this case under conflict of laws principles (including the fact that of an express choice of law selection in an agreement) and the applicable law in this case calls for the parties to follow the detailed processes when litigating this case all the way to enforcing a judgment. (Resort Parties Answering Brief on Cross-Appeal, p. 23).

In challenging the applicability of *C & L Enterprises* to this case, the Resort Parties argue that "the District Court noted that this case is similar to *American Indian Agr. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), 'where the tribe agreed that District of Columbia law would apply to any dispute, **but did not necessarily agree to submit such dispute to litigation**.'" (Resort Parties Answering Brief on Cross-Appeal, p. 24; Aplt. App. 9.) (emphasis added). Contrary to the Resort Parties assertion, the facts of this case are not similar to *American Indian Agricultural* because in each of the two agreements in this case the Resort Parties agreed to submit disputes to litigation in Colorado's courts, and indeed, the eLearning Agreement even uses the language

that litigation in Colorado's courts is the "sole and exclusive" venue to resolve disputes. (Aplee. Supp. App. 33). In contrast. the agreement in *American Indian Agricultural* contained a choice of law clause without any forum selection clause, such as to litigate in certain designated courts. In short, the Resort Parties reliance on *American Indian Agricultural* is misplaced.[4]

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[4] Although it is not necessary for resolution of this appeal, BMG feels compelled to respond to some of the Resort Parties derogating comments that go to the issues raised on Cross-Appeal. The Resort Parties insist that the property where the Resort is situated is "Indian Lands" pursuant to 25 U.S.C. § 2703(4)(A) and for the first time claim it is because the relatively small parcel qualifies as a "reservation" under the IGRA. This parcel was at all relevant times located on fee simple land located within Madera County, California, which prompted two lawsuits between the Tribe and the County concerning (i) the County's claim that it was due sales tax for any business activities on the property and (ii) the County's claim that the renovation of the Resort was subject to the County's building codes. (Aplee. Supp. App. 86.) These lawsuits were settled in 2007 with the Tribe agreeing to pay monies to the County. Contrary to the Resort Parties assertion, the Tribe cannot simply purchase property in California and automatically cause that property to either qualify as "Indian Lands" under §2703(4)(A) or serve as a "reservation" for the purposes of possibly satisfying the definition of "Indian Lands." *See Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1267 (10th Cir. 2001) (holding that a tribe's cemetery that was reserved for a tribe by a treaty was not a "reservation" for the purposes of the IGRA). The definition of a "reservation" under the IGRA requires that the land actually be used as residence for the Tribe's members, and the IGRA's definition of a "reservation" is much more narrowly construed than a common dictionary definition. *Id.* Yet, the Resort Parties have failed to submit any evidence that the 48.53 acre parcel that was subsequently purchased to house the Resort is used as a residence for any Tribe members. Thus, despite the fervor of the Resort Parties arguments on this point, the record simply does not support their position that the Resort is located on "Indian Lands" or their new argument that this parcel qualifies under the IGRA as a "reservation."

B. The Agreements Containing Immunity Waiver Are Valid And Enforceable.

With respect to the issue of actual authority to enter the agreements in question, BMG has submitted uncontroverted evidence that Ryan Stanley was a Director of the Casino and "Key Employee" of the Resort pursuant to Cal. Bus. & Prof. Code §§ 19801(h), 19805(t), & 19854 and that D'Mello was a manager of the Resort.[5] The only evidence that the Resort Parties submitted to the issue of actual authority was Exhibit D to the Resort's Motion to Dismiss (DE 29), the pertinent part being the Authority's charter (Aplt. App. 119-120). However, the Authority's charter

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[5] While the Resort Parties acknowledge Stanley status a Director of the Resort, incredibly, they now assert, without any factual support or reference, that Stanley was "not a statutory 'Key Employee' of the Resort." (Resort Parties Answering Brief on Cross-Appeal, p. 6). This is shocking given that California Gambling Control Commission's website indicates that just a few weeks before BMG filed its Complaint that the license application that the Resort had filed for Director Stanley as a "Key Employee" had been approved. .(*See* http://www.cgcc.ca.gov/agendas/2006/Agen080306.pdf produced as Exhibit H to Docket Entry ("DE") 44, p. 4, ¶ 19(s)). They also challenge for the first time D'Mello's status of manager, again without factual support, even though a former direct report to him has provided an affidavit to the contrary. (Aplee. Supp. App. 1, ¶ 4). In their Reply to the Motion to Dismiss, the Resort Parties did not challenge the assertion that Stanley was a "Key Employee" or that D'Mello was a manager and, instead, tried to minimize the legal import of their "key employee" designation of Stanley. (DE 52, pp. 2-3.)

does not address immunity waivers by the Resort and does not provide that waivers that fail to comply with any formalities are void.

The Resort Parties have not produced a single document or proffered any testimony that there was any limitation on the Resort employees waiving the Resort's immunity, and instead, they have tried to assert that there was such a limitation by referring to evidence that deals with either the Authority or the Tribe – not the Resort. Also, the Resort Parties have simply failed to present evidence that either D'Mello or Stanley lacked authority to enter the Agreements. (*See* The Resort and the Authority's Motion to Dismiss, DE 29; The Resort and Authority's Reply In Support of their Motion to Dismiss, DE 52*).*

While the documents improperly utilized by the Resort Parties in their Answering Brief on Cross-Appeal do not controvert the issue of actual authority, it is important to note that the Resort Parties stipulated that any documents that were introduced at the October 23, 2007 Evidentiary Hearing on the *Johnson* analysis would not be used in connection with any other issues such whether the agreements served to waive immunity because BMG no witness was present to authenticate all of the documents and BMG had had no opportunity to conduct any discovery on the documents. (Transcript of Hearing, Aplee. Supp. App. 99). Despite the stipulation from Resort Parties counsel on the record that the

documents at the Evidentiary Hearing would not be used on issues related to any whether the agreements waived any applicable immunity and the Evidentiary Hearing was limited to the *Johnson* analysis, the Resort Parties in their Answering Brief on Cross-Appeal improperly cited to evidence from that hearing. (Resort Parties Answering Brief on Cross-Appeal, p. 29). This evidence should not be considered.

Even if the Resort Parties had presented evidence that called Director Stanley and D'Mello's actual authority into question, which they did not, the Resort Parties ratified the Agreements that contained the immunity waivers. *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1984); Restatement (Second) of Agency § 82 (1958); Restatement (Second) of Contracts §§ 7, 85 & 380(1) (1981). The Resort Parties contest the ratification issue solely on the legal basis of this Court's holding in *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260 (10th Cir. 1998). However, in *Ute Distribution*, this Court did not address the issue of whether ratification of contract is applicable when the agreement serves to waive immunity, and instead, the Court held that it would not imply a waiver of immunity to avoid inequity.

Here, BMG is not asking for any waiver of immunity to be implied for the agreements in question contain an express waiver of immunity under *C & L Enterprises*. Rather, BMG merely seeking to prevent the Resort Parties from

raising a defense to the contracts' validity that they ratified through the uncontroverted facts that they: (i) mailed three checks to BMG drawn on accounts in the Resort's name, (ii) had a number of its employees access the 12 hour-long eChampion application over 98 times for over 103 hours, (iii) had its employees access the eBlack Belt application for over 67 hours, and (iii) used BMG's works to train Resort employees. (Aplee. Supp. App. 1-7 (¶¶ 10-12 & 40), 13-14 (¶¶ 14 & 19), 43 (¶¶ 7, 9, 10)). The Resort Parties do not challenge any of the factual basis for the existence of ratification of the contracts. No known case has ever held that the doctrine of ratification of a contract is inapplicable when the agreement contains an immunity waiver, and no legitimate policy concern would support such a holding.

Finally, the Resort Parties contend, without citing to any authority on point, that the doctrine of apparent authority should not be applicable if the agreement contains an immunity waiver. (Resort Parties Answering Brief on Cross-Appeal, p. 29); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo. Ct. App. 2004). However, no known case stands for such a position, and the Resort Parties are essentially espousing a rule that would create incentives for tribes and tribal corporations to misrepresent that someone has authority to enter an agreement, when in fact the person may lack such authority.

The Resort Parties also mistakenly claim that because of the very nature of the end user agreements in question that it was impossible for BMG to rely on any evidence of apparent authority. However, in this case, BMG had telephonic communications with both Stanley and D'Mello before they purchased licenses to the works that were licensed under the Courseware Agreement and the eLearning Agreement. With respect to Stanley, two BMG employees had telephone conversations with Stanley beginning in November 2005 and he entered the Courseware Agreement in February 2006. (Aplee. Supp. App. 11 (¶4), 12 (¶ 10), 17 (¶3). Likewise, BMG had telephonic communication with D'Mello months before he entered into the eLearning Agreement. (*Id.* 18 (¶15), 13 (¶15). Further, affidavits in the record support BMG's claim that BMG reasonably relied to its detriment that the persons that entered into the eLearning Agreement and Courseware Agreement had authority to enter into those agreements, and the Resort Parties have not presented any evidence to challenge this assertion. (*Id.* 15, ¶¶ 25-26).

C. The Resort Parties Newly Found Argument That The Immunity Waivers Only Apply To Contract Claims Is Unavailing.

The Resort Parties also argue, without citing to any authority on point that the immunity waivers in the agreements only serve to waive immunity for contract claims and not for non-contractual claims, such as BMG's copyright infringement claims. (Resort Parties Answering Brief on Cross-Appeal, p. 31). However, the Resort Parties never raised the issue to the lower court, and thus the issue was waived by them. *See Wilburn v. Mid-South Health Dev., Inc.,* 343 F.3d 1274, 1280 (10th Cir. 2003) (holding "[a]n issue is waived if it was raised below in the district court."); *Ellis v. State Farm Fire and Cas. Co*. No. 08-7072, 2009 WL 1014793, at *3 (10th Cir. April 16, 2009) (same); (The Resort and the Authority's Motion to Dismiss, DE 29; The Resort and Authority's Reply In Support of their Motion to Dismiss, DE 52*)*.

Even if the Resort Parties had not waived this issue, there is no legal authority that supports their position that the immunity waiver prevents BMG from bringing copyright claims. Nothing in either Courseware Agreement or the eLearning Agreement limited the scope of the immunity waiver to contract claims, and BMG's claims arise out of entering the contracts in question. Further, the Courseware Agreement expressly provided that "You understand that you are

subject to the Copyright laws of the United States of America," which expressly allows for monetary recovery, and the agreement also provided that "You understand that you will be held liable for any wrongful actions you undertake," without any language limiting the claims to those founded in contract.

In making this argument, the Resort Parties incorrectly assert that "the District Dismissed [SIC] all of BMG's contract claims and BMG did not appeal that decision." (Resort Parties Answering Brief on Cross-Appeal, p. 31). However, the District Court has not dismissed BMG's contract claims (Counts Ten and Eleven), and BMG has not appealed the dismissal of any claims or parties at this juncture since there has been no final judgment.[6]

II. THE RESORT PARTIES DO NOT CHALLENGE THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING BMG THE ABILITY TO CONDUCT DISCOVERY AND CALL NECESSARY WITNESSES.

It is important to remember that this appeal stems from motions to dismiss, and all of BMG's requests to conduct any discovery on any issues surrounding the applicability and/or waiver of immunity were denied. The Resort Parties do not

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[6] This is but one of many examples of misstatements of fact that the Resort Parties have made, some of which BMG cannot comment on because they do not touch on the Cross-Appeal.

challenge BMG's claim that the denial of discovery prejudiced BMG in responding to the motions to dismiss on immunity grounds. The Resort Parties also do not challenge BMG's claim that BMG was prejudiced by not being allowed to call witnesses it had subpoenaed at the Evidentiary Hearing.

CONCLUSION

In *C & L Enterprises*, the Supreme Court endeavored to interpret a contract's dispute resolution regime so that it was not rendered meaningless, so it had "a real world objective," and so it would not create "regulation of a game lacking practical consequences." To interpret a contract's dispute resolution regime that calls for litigation in Colorado's courts so that the contract "speaks to only where a suit may be brought, but it does not expressly or impliedly address whether a suit may be brought" completely invalidates that contract's dispute resolution regime. For immunity waiver purposes, there is simply no proper basis for differentiating between a contract's dispute resolution regime that calls for arbitration and one that calls for litigation in Colorado's courts.

While BMG's contracts did not contain an express reference to enforcement of judgments, conflict of laws principles mandate the applicability of an extensive judgment enforcement process in Colorado litigation matters, as well as a litigation process. Indeed, the Court in *C & L Enterprises* considered applicable laws that

were not expressly referenced in the contract in question in order to confirm that an arbitration award was enforceable.

With respect to the validity of the agreements that contain the immunity waivers, the Resort Parties have failed to submit any evidence that controverts the fact that D'Mello and Stanley's had actual authority to enter those agreements. Unsupported allegations of counsel do not suffice. While an extremely limited number documents that the Resort Parties voluntarily produced refer to immunity waivers by the Tribe or the Authority (most of which were subject to a stipulation that they would not be used on issues outside of the *Johnson* analysis), none of the documents address the ability of employees of the Resort from waiving immunity – as opposed to the Tribe or the Authority. Assuming arguendo that either Stanley or D'Mello did not have actual authority to enter the agreements, the agreements are valid because (i) they were ratified by the Resort and (ii) Stanley and D'Mello had apparent authority to enter them. The Resort Parties have failed to controvert BMG evidence on the issues of ratification of the contract and apparent authority.

With respect to the BMG's claim that it was prejudiced by being denied all discovery and the ability to conduct any discovery, the Resort Parties do not challenge BMG's claim.

Dated: July 20, 2009

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 28.1(e)(2)(A)(i) because it contains contains 4,103 words (excluding parts of the brief exempted by FRAP 32(a)(7)(B)(iii)), relying on my word processor, Microsoft Word 2007 for the word count.

This brief complies with the typeface requirements of FRAP 32(a)(5) and Tenth Circuit Rule 32 and the type style requirements of FRAP 32(a)(6) because the brief has been prepared in a proportionately spaced type and has a typeface of 13 points or more.

Dated this 20th day of July 2009.

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CERTIFICATE OF DIGITAL SUBMISSION

I, Marc Pappalardo, hereby certify on this 20th day of July, 2009, that:

A. All required privacy redactions have been made and with the exception of those redactions, every document submitted in Digital Form or Scanned PDF format is an exact copy of the written document filed with the Clerk, and

B. The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec AntiVirus Corporate Edition, version 10.1.4.4000 and according to the program, is free of viruses.

Dated this 20th day of July 2009.

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CERTIFICATE OF SERVICE

I, Marc F. Pappalardo hereby certify that I filed via the Court's Electronic Case filing and sent via the United States Mail a copy of the foregoing within the two business day time limit:

CROSS-APPELANT'S REPLY BRIEF TO:

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July 20, 2009
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