

IN THE ALABAMA COURT OF CIVIL APPEALS

Rosanne L. Wiggins and)
Randy E. Wiggins,)
)
 Appellants,)
vs.)
)
The Frank V. & Penny)
S. Turner Investments LP,)
)
 Appellee.)

Appeal No: 2100037

ON APPEAL FROM THE CIRCUIT COURT
OF LOWNDES COUNTY, ALABAMA
CIVIL ACTION NO.: CV-2011-900065.00

APPELLANTS' INITIAL BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The issue raised on appeal is one of first impression in the courts of Alabama. Appellants therefore respectfully request oral argument in this case.

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STATEMENT OF THE JURISDICTION

This Court has jurisdiction pursuant to Rule 4 of the Alabama Rules of Appellate Procedure and Section 12-3-10, Alabama Code. The lower court entered the Final Judgment on September 14, 2012. (R. at 76). On October 14, 2012, the Appellants filed a Motion to Alter, Amend or Vacate the final judgment. (R. at 56). The court denied that motion on January 3, 2013. (R. at 69). On February 13, 2013, the Appellants timely filed a Notice of Appeal. (R. at 71).

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STATEMENT OF THE CASE

This appeal concerns the ownership of real property acquired through adverse possession against the State of Alabama. On October 31, 2011, the Appellee, The Frank V. & Penny S. Turner Investments LP ("Turner Investments"), sued the Appellants, Rosanne L. Wiggins and Randy E. Wiggins (collectively, the "Wiggins"), in the circuit court of Lowndes County. (R. at 11). Turner Investments alleged they own title in fee simple to real property located at the East Half of the North East Quarter of Section 16, Township 14 North, Range 13 East, in Lowndes County, Alabama (the "Land"). (R. at 11).

Turner Investments further alleged the Wiggins claimed an interest in the Land and interfered with Turner Investments' exclusive and peaceable use and occupancy of the Land. (R. at 11). Turner Investments asked the circuit court to quiet title, provide injunctive and declaratory relief, and award damages for trespass, civil conspiracy and slander of title. (R. at 11-13).

The Wiggins, in their Amended Answer, disputed Turner Investments' claim to the Land. (R. at 32). The Wiggins maintained that the State of Alabama owned the Land until

2005, when it issued a land patent to Francis Lyon and his siblings in accordance with Section 16-20-6, Alabama Code (1975). (R. at 32-33). At that point, according to the Wiggins, title passed from the State to Francis Lyon and his siblings, all of whom are deceased. (R. at 32). Ms. Wiggins, who descends from Francis Lyon, claimed she obtained title to the Land after this 2005 transfer. (R. at 34).

The parties stipulated to the facts and asked the lower tribunal to determine the rightful owner of the Land as a matter of law. (R. at 164, 170). On September 14, 2012, after conducting a hearing on the matter, the court issued a Final Judgment, finding that Turner Investments owned the Land in fee simple. (R. at 76). The court enjoined the Wiggins from further entry onto the Land and assessed nominal damages for trespass. (R. at 76).

On October 14, 2012, the Wiggins filed a Motion to Alter, Amend or Vacate the final judgment. (R. at 56). The court denied that motion on January 3, 2013. (R. at 69). On February 13, 2013, the Wiggins filed a Notice of Appeal. (R. at 71).

This appeal followed.

STATEMENT OF THE ISSUE

Does the issuance of a land patent operate to grant title or merely provide evidence of existing title?

STATEMENT OF THE FACTS

The State of Alabama obtained title to the Land for the benefit of the public schools when Alabama entered the Union in 1819. (R. at 74). Edward Lyon adversely possessed the Land under color of title beginning in 1824, when he purchased the land from the Gordon Family. (R. at 80). In 1889, Edward Lyon conveyed the property through probate to his children, Isaac N. Lyon, David G. Lyon, Rosa R. Lyon and Francis Lyon. (R. at 81-82). The Lyon children conveyed their respective interests in the property to Isaac N. Lyon in 1915. (R. at 85-86).

In 1934, Isaac Lyon and his wife, Inez Lyon, sold the property to B. H. Gardiner and his wife. (R. at 90-91). On December 17, 1959, B. H. Gardiner's widow, Pauline L. Gardiner, transferred the Land to her daughter, Bess G. Beck, by deed of gift. (R. at 93-94). Ms. Beck, in turn, appears to have sold the property to Thomas Marlin Rittenberry by way of warranty deed on November 20, 2001. (R. at 95). The validity of that deed was subsequently

called into question upon Ms. Beck's passing. (R. at 98 n. 1).

On February 17, 2005, the Circuit Court of Lowndes County granted a Petition to Sell Real Property and entered an Order Approving Sale of Realty. (R. at 97). The Order authorized the administrators of Ms. Beck's estate to sell certain tracts of real property to cover the debts owed by Ms. Beck. (R. at 97). The property to be sold pursuant to the Order included the Land at issue in this case. (R. at 98).

According to the Order, Mr. Rittenberry agreed to sell the Land to The Timberlands, L.L.C., pursuant to a contract attached to the petition. (R. at 99). Both Mr. Rittenberry and the estate of Ms. Beck executed deeds to convey the Land to The Timberlands, L.L.C. (R. at 107; R. at 110 (see description of parcel 4); R. at 113). Through these conveyances, the Timberlands, L.L.C., took possession of the property. Jerry L. Thornton and J. Milton Coxwell, Jr., represented the administrators of the estate of Ms. Beck in this proceeding. (R. at 97).

On September 16, 2005, legal counsel for the Department of Conservation and Natural Resources sent a letter to the Governor informing him that Jerry L. Thornton had applied for a patent to the Land. (R. at 40). Counsel certified in

the letter that (1) neither the State nor any department thereof holds any note, bond, obligation, or any contract of anyone for the purchase of the Land; and (2) proof of adverse possession under color of title was shown to the satisfaction of the Attorney General, as required for the issuance of a patent under Section 16-20-6, Alabama Code. (R. at 40). Based on this certification, counsel advised the Governor that a patent in the name of Isaac N., David G., Rosa R., and Francis Lyon should be sent to Mr. Thornton. (R. at 40).

The Governor signed a patent to the Land on September 29, 2005. (R. at 41). The patent states that Isaac N. Lyon, David G. Lyon, Rosa R. Lyon and Francis Lyon "have made proof that they have been in adverse possession, either personally or with their predecessors in possession of the described land." (R. at 41). The patent provides a legal description of the Land and memorializes certification of the Commissioner of the Department of Conservation and Natural Resources, the Director of Finance, and the Attorney General that the Lyons were entitled to the issuance of a patent pursuant to Section 16-20-6 and Section 35-4-386 of the Alabama Code. (R. at 41).

The patent grants title in the Lyons in no uncertain terms: "NOW THEREFORE, THE STATE OF ALABAMA grants the tract

of land above described with all the appurtenances thereto belonging unto the said Isaac N., David G., Rosa R., and Francis Lyon, their heirs, successors or assigns forever.” (R. at 41).

On March 15, 2007, Turner Investments took possession of the property by way of a warranty deed executed by The Timberlands, L.L.C. (R. at 116). Turner Investments argued below that they owned the property in fee simple based on this warranty deed.

Ms. Wiggins maintained that her interest in the Land flowed from the land patent, which was issued to, among others, Francis Lyon, her grandfather. After discovering the land patent in 2007, Ms. Wiggins conveyed her interest in the Land to her husband, Randy E. Wiggins, by quitclaim deed. (R. at 52). The Wiggins subsequently attempted to re-enter and peaceably retake possession of the Land. (R. at 121, 130-131). Turner Investments then filed suit in circuit court, where the parties submitted the matter for judicial determination of the rightful ownership of the Land. (R. at 11-13).

Relying on *Tennessee Coal, Iron and Railway Co. v. Brewer et al.*, 92 F.2d 804 (5th Cir. 1937), the court concluded that issuance of the land patent in 2005 did not operate to convey any present title, but instead confirmed

that title had already vested by virtue of adverse possession prior to 1908. It further found that Francis Lyon validly conveyed the Land to B. H. Gardiner in 1945. (R. at 52). Thus, based on the chain of title in its warranty deed, the court found Turner Investments owned the Land. (R. at 52.)

The Wiggins now respectfully ask that this Honorable Court reverse that determination and declare that Turner Investments has no interest in the Land.

STATEMENT OF THE STANDARD OF REVIEW

Where there is no material dispute of fact, appellate courts review the legal effect of conveyance of property *de novo*. *Philpot v. State*, 843 So. 2d 122 (Ala. 2002).

SUMMARY OF THE ARGUMENT

The lower court erred in concluding that Turner Investments owns the Land. Although Alabama courts have not directly reached this issue, the overwhelming weight of decisional and scholarly authority supports the view that a person cannot convey legal title to state land prior to issuance of a land patent. Any conveyance purporting to do so is a nullity.

Since Isaac Lyon had not yet obtained title to the property, no title passed when he attempted to convey the Land to B. H. Gardiner in 1934. But once the State issued the land patent in 2005, title vested in Isaac N. Lyon, David G. Lyon, Rosa R. Lyon and Francis Lyon and their heirs. Randy Wiggins established a valid interest in the land through the quitclaim deed executed by his wife, the granddaughter of Francis Lyon. Accordingly, this Court should reverse the circuit court and declare that Turner Investments holds no rightful claim to the Land in suit.

ARGUMENT

I. THE LOWER COURT ERRED IN HOLDING THAT A PARTY MAY CONVEY LEGAL TITLE TO LAND ADVERSELY POSSESSED AGAINST THE STATE WITHOUT THE PRIOR ISSUANCE OF A LAND PATENT.

Isaac Lyon had no title to convey in 1934; thus, the claim of Turner Investments, which depends upon the validity of the 1934 transfer, does not support its claim to the Land. This section will first recite the relevant law concerning land patents and Sixteenth Section lands, and then apply that law to the facts of this case.

A. Land Patents and Sixteenth Section Lands.

In March of 1819, upon the admission of the State of Alabama into the Union, the United States Congress granted

the sixteenth section in every township in Alabama "to the inhabitants of such township, for the use of schools." *State of Alabama v. Schmidt*, 232 U.S. 168, 172 (1914). Legal title to these "Sixteenth Section" lands rests "in the State, in trust for the inhabitants of the respective townships, in which the land is situated." *Long v. Brown*, 4 Ala. 622, 631 (1843); see also *State v. Schmidt*, 180 Ala. 374, 379, 61 So. 293, 294 (1913) *aff'd sub nom. State of Alabama v. Schmidt*, 232 U.S. 168 (1914).

Alabama adheres to the common law rule of *nullum tempus occurrit reipublicae*, which prohibits citizens from acquiring title to the State-owned lands by adverse possession or prescription. *Bd. of Sch. Comm'rs of Mobile Cnty. v. Architects Grp., Inc.*, 752 So. 2d 489, 491 (Ala. 1999); *Miller v. State*, 38 Ala. 600, 603-04 (1863). However, this general rule does not extend to townships and other political subdivisions of the State. *Id.* Thus, as early as 1863, Alabama courts recognized that Sixteenth Section lands could be obtained by adverse possession. *Miller*, 83 Ala. at 603.

In 1915, the Alabama Legislature "sought to clear up confusion in the public records touching the existing

status of sixteenth section school lands, and remove clouds on the title of citizens who have acquired unencumbered legal titles under the laws of Alabama." *State v. Michie*, 222 Ala. 682, 683, 133 So. 734, 735 (1931).

The resulting statute, now codified at Section 16-20-6, Alabama Code (1975), provides as follows:

When a person is in possession of any sixteenth section lands under color of title, and has been in such possession for more than 20 years prior to the first day of May, 1908, and neither the state, nor any department thereof, holds any note, bond, obligation or other contract of anyone for the purchase money of such land, and the Commissioner of the Department of Conservation and Natural Resources and the Director of Finance shall so certify, and the Attorney General shall certify that proof of adverse possession, by the person now in possession, or coupled with his predecessor in possession, for 20 years prior to May 1, 1908, under color of title, has been made, which proof is satisfactory to the Attorney General. The Governor must cause a patent to issue to said land under the seal of the state to the person entitled thereto. Notwithstanding the foregoing provisions of this section, if the Attorney General is satisfied with the proof of color of title for 20 years prior to 1908 by the person now in possession or coupled with his predecessors in said color of title, the Attorney General shall not require affidavits of adverse possession for the period prior to 1908, except in cases of boundary line disputes, to establish said adverse possession.

Ala. Code § 16-20-6 (1975). By its terms, the statute confers authority on the executive branch to determine

whether an adverse possessor can marshal sufficient evidence to satisfy the statutory prerequisites for the issuance of a land patent. If so, the Governor is required to issue the patent.

Alabama courts have not had the opportunity to determine legal effect of the issuance of a land patent under this statutory section. However, the general law governing land patents provides valuable guidance on this issue.

A patent is an instrument by which the sovereign conveys title to public lands. *McCarty v. Helbling*, 73 Or. 356, 370, 144 P. 499, 503 (1914); *Schell v. White*, 80 Ariz. 156, 159, 294 P.2d 385, 388 (1956). Until a land patent issues, the fee of the land remains in the State. *Masters v. Eastis*, 3 Port. 368, 371 (1836) (A certificate of sale does not declare that the "passes the fee of the land: this can be done only by the patent."); *Prestwood v. Watson*, 111 Ala. 604, 609, 20 So. 600, 601 (1896) superseded on other grounds by statute ("until the final payment of the purchase money, and the issue of a patent by the state, that title is not divested . . ."); *Brown v. Hitchcock*, 173 U.S. 473, 476 (1899) ("In this case the record discloses no

patent, and therefore no passing of the legal title.”).

Since title to land does not pass until the state has issued a patent, the rule in the majority of jurisdictions is that an antecedent sale of property cannot confer legal title on the purchaser prior to the issuance of the patent. See, e.g., *Harmon v. Steinman*, 9 Iowa 112, 113 (1859); *Ski Roundtop Inc. v. Wagerman*, 556 A.2d 1144, 1147 (Md. Ct. App. 1989); see also 2 PATTON AND PALOMAR ON LAND TITLES § 295 (“The legal title to land sold by the state does not pass till a patent is executed in a manner prescribed by the statute”); 73B C.J.S. PUBLIC LANDS § 139.

For example, in *Harmon*, the Iowa Supreme Court was called to determine whether a party who claimed title to property under a contract of sale executed by school commissioner in 1854 held superior title over the counterparty in suit, whose claim originated from a subsequent patent issued in 1856. *Id.* The court affirmed the lower court and held that the patentee held legal title to the land, even though the equitable title of the purchaser was accompanied by possession of the property. *Id.* Thus, the prior purchase of the property had no bearing in a court of law because the land patent had not

yet issued when that purchase occurred. *Id.*

Likewise, in *Ski Roundtop*, a litigant claimed an interest in disputed property through title conveyed by a predecessor in title. *Ski Roundtop*, 556 A.2d at 1147. That party admitted, however, that the State of Maryland had never actually issued a patent to the land. *Id.* The appellate court stated that "a requisite for valid title to real property is an original conveyance of public land by the State." (citing 3 AMERICAN LAW OF PROPERTY, § 12:16 (1952); 73B C.J.S., PUBLIC LANDS, § 188 (1983); 2 PATTON ON TITLES, § 281 (2d ed. 1957)). "Absent such a conveyance," it held, "one purporting to transfer an ownership interest in such property transfers nothing, and no quantity of successive transfers by deed nor the mere passage of time will metamorphose good title from void title." *Id.*

As is clear from the foregoing authorities and the ancient principle *nemo dat qui non habet*,¹ in the absence of a land patent, the sale of state lands is a nullity.

B. Application of the Law.

It follows ineluctably from these legal principles that

¹ "He who hath not cannot give." Black's Law Dictionary, 1037 (6th ed. 1990).

Turner Investments has no legal title to the Land. Because the land patent had not yet issued, the transfers from which Turner Investments traces its title had no legal effect. Therefore, the deed under which Turner Investments claims title is a nullity.

This conclusion is bolstered by the finding of the Executive Branch, which was required under Section 16-20-6 to determine the legal right of the "person now in possession" of the property. Ala. Code § 16-20-6 (1975). It is clear that the Executive Branch, which had access to the relevant records and deeds concerning the Land, found that the subsequent transfers of the property had no legal effect.

Land patents are construed using contract principles, *City of Las Vegas v. Cliff Shadows Professional Plaza*, 293 P.3d 860, 864 (Nev. 2013), and by its express terms, the patent in this case vests title in Francis Lyon and his siblings. The face of the patent states: "NOW THEREFORE, THE STATE OF ALABAMA grants the tract of land above described with all the appurtenances thereto belonging unto the said Isaac N., David G., Rosa R., and Francis Lyon, their heirs, successors or assigns forever." (R. at 41).

A "patent possesses the highest verity," *Crommelin v. Minter*, 9 Ala. 594, 601 (1846), and unless a patent has been fraudulently obtained or otherwise improvidently granted, the grant of land is "conclusive" and "not open to relitigation in the court." *Johnson v. Drew*, 171 U.S. 93, 100 (1898). The holding in *Johnson v. Drew* follows from the "firmly embedded" principle that "contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts." *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891).

Here, the Executive Branch, in construing Section 16-20-6, necessarily found the pre-patent transfers of real property were void. Otherwise, it would have transferred the property to The Timberlands, L.L.C., the party "in possession" of the property at the time of its issuance. Ala. Code § 16-20-6 (1975). The trial court failed to give any weight whatsoever to the determination of the Executive Branch regarding the rightful ownership of the property. This is error, particularly since Turner Investment failed to sue the State, which is "generally a necessary party to

an action to set aside such a deed or patent." 73B C.J.S. § 139.

To be fair, there are recorded cases where courts have found, as did the trial court here, that the terms of a statute effectuate a "grant in præsentia." See *Stonum v. Davis*, 152 S.W.2d 1067, 1069 (Mo. 1941). In *Stonum*, the Missouri Supreme Court construed the terms of an 1850 act of the United States Congress, which granted swamplands to the state. *Id.* at 1069. That act stated that such lands "shall be, and the same are hereby, granted" to the state. *Id.* With respect to the patents, the act stated that the United States shall, "at the request of said governor, cause a patent to be issued to the State therefor, and on that patent, the fee simple to said lands shall vest in the said State." *Id.*

The Missouri Supreme Court held that the words "shall be, and the same are hereby granted" operated as a "grant in præsentia" to the states of a full and beneficial title to the swamp and overflowed lands within their respective boundaries, lacking only an identification and a patent to perfect the fee simple title of the state." *Id.* This is because the issuance of the patent was a ministerial duty,

which duty the government officials had no choice but to perform upon request. *Id.*

This appears to be the rationale underlying *Tennessee Coal, Iron and Railway Co. v. Brewer et al.*, 92 F.2d 804 (5th Cir. 1937), the only case cited by the circuit court in support of its decision below. In *Tennessee Coal*, the Fifth Circuit Court of Appeals considered the legal effect of a land patent issued under the statute now codified at Section 16-20-6. *Id.* at 805. The defendants claimed to hold title to the land in dispute under a patent. *Id.* The plaintiff claimed it held superior right to the subsurface minerals because it purchased such rights from the successor to the adverse possessor. *Id.*

The Fifth Circuit found for the plaintiff. *Id.* at 804-06. Citing to *State v. Michie*, 133 So. 734 (Ala. 1931), it held that the "patents were not intended to convey title but to acknowledge that the state had already lost title and to furnish record evidence of that fact." Thus, the Fifth Circuit held that the statute acted as a grant in præsenti to all adverse possessors at the time of enactment.

Tennessee Coal is unpersuasive for three reasons.

First, the reasoning of *Tennessee Coal* clashes with established precedent regarding the legal effect of a land patent. Specifically, Alabama courts recognized as early as 1836 that the fee of the land remains in the State until the issuance of a patent, and that only the issuance of land patent can divest the State of fee. *Masters v. Eastis*, 3 Port. 368, 371 (1836) (A certificate of sale does not declare that the "passes the fee of the land: this can be done only by the patent.").

Second, the *Tennessee Coal* Court cited *State v. Michie*, for a proposition that *State v. Michie* does not, in fact, support. In *State v. Michie*, the State sought to cancel a patent it had already issued, claiming that the patent had been obtained by fraud because the patentee did not have color of title. *State v. Michie*, 133 So. at 735. The Alabama Supreme Court found that the State failed to carry its burden of proof and that the color of title was not essential to the perfection of legal title because adverse possession carried sufficient notice of actual, open, and hostile possession. *Id.*

Contrary to the statement in *Tennessee Coal*, the Alabama Supreme Court did *not* declare that "patents were

not intended to convey title but to acknowledge that the state had already lost title." *Tennessee Coal*, 92 F.2d at 806. Therefore, on this point, the *Tennessee Coal* decision lacks any persuasive value.

Finally, the holding of *Tennessee Coal* is at odds with the terms of Section 16-20-6. The holding of *Tennessee Coal* suggests that predecessor to Section 16-20-6 operated as a grant in praesenti to adverse possessors, such that the State-owned land vested in the adverse possessors upon enactment, irrespective of whether a patent has issued. This reading of the statute is flawed.

In order for this construction of the statute to hold, the statutory language would have to include (1) an express intent to grant the land to adverse possessors at the time of enactment; such that (2) the issuance of a land patent by the Executive Branch is nothing more than a ministerial act that must be performed upon request. See *Stonum v. Davis*, 152 S.W.2d 1067 at 1069. These elements are absent from Section 16-20-6.

Unlike *Stonum*, there is no statutory language that evinces a legislative intent to effectuate a grant in praesenti. Nor can the statute be read to compel the

Executive Branch to issue a land patent upon request as a ministerial duty. Instead, the statute requires the Executive Branch to exercise discretion in reviewing the quantum of evidence offered in support of a patent. If, and only if, the applicant has provided sufficient evidence to satisfy the statutory prerequisites, then the Governor will issue the patent.

Suppose, for instance, the Governor in this case *denied* the application for a land patent. In such a scenario, Turner Investments certainly could not argue that title had vested at the time of enactment. Such argument would be defeated by the denial of the patent application. It follows, then, that the issuance of the patent serves a greater purpose than mere acknowledgement that title already vested. And that purpose is to formally transfer title to the patentee.

For these reasons, this Court should decline to follow *Tennessee Coal* and adhere to well-established principles governing land patents, which require the issuance of a land patent before legal title can pass. Hence, Turner Investments cannot not to claim legal title to Land in derogation of the express terms of the subsequently issued

patent.

It is worth noting, by way of conclusion, that Turner Investments had, at the very least, constructive notice of the potential defect in its title when it purchased the property. Turner Investments bought the property in 2007, two years after the issuance of the patent. In fact, Jerry L. Thornton, the attorney for the administrators of the estate of Ms. Beck appears to have recognized the potential defect himself *because he is the same attorney who applied for the land patent in 2005.* (R. at 97).

Mr. Thornton² must have sensed that obtaining a land patent would be prudent way to insulate the transaction from collateral attack. His plan appears to have backfired, however, because, instead of issuing the patent to The Timberlands, L.L.C., the party in possession of the property, the Executive Branch rightly construed the pre-patent conveyances as null and void. Thus, the Governor transferred the property to Francis Lyon and his siblings.

To the extent that Turner Investments claims any equitable interest in the property, this Court should

² Interestingly, his co-counsel in that matter was J. Milton Coxwell, the attorney who represents Turner Investments in this case.

consider the countervailing point: Turner Investments had at least constructive notice of that the land patent had already issued. Nevertheless, Turner Investments still bought the property.

This is not to say that Turner Investments may not recover. Turner Investments might well have a claim against the vendor, especially since an attorney working on the transaction through which The Timberlands, L.L.C., obtained title had actual notice of the lack of a patent.

However, as the Executive Branch correctly found, the conveyances that occurred prior to the patent did not operate to transfer title. Thus, Turner Investments does not have any legal claim to title of the Land.

This Court should reverse.

CONCLUSION

Based upon the foregoing arguments and legal authority, Appellants, Rosanne L. and Randy E Wiggins, respectfully requests that this Honorable Court reverse the lower court's ruling.

DATED this 24th day of May, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of forgoing has been filed through the Alafile system, this the 24th day of May, 2013, which will automatically provide service upon the following counsel of record. However, if the Alafile system indicates that service needs to be perfected by other means, service will be provided by first-class mail as follows:

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