

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLES CRIHFIELD,

Appellant,

v.

No. 34593

**STEVEN BROWN, and
THE HOME SHOW, LLC,**

Appellees.

**BRIEF
ON BEHALF OF APPELLANT
CHARLES CRIHFIELD**

Date: December 12, 2008

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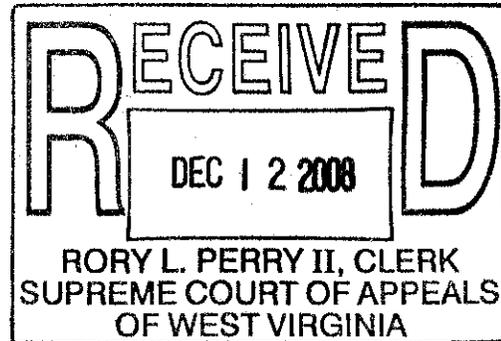


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- Wilkinson v. Duff, 212 W. Va. 725, 575 S.E. 2d 335 (2002)
- Marrowbone Development Co. v. United Mine Workers of America, 147 F. 3d 296 (4th Cir. 1998)
- Board of Education of Berkeley County v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E. 2d 439 (1977)
- Turner v. Stewart, 51 W. Va. 493, 41 S.E. 924 (1902)
- Brown v. Engstrom, 89 Cal. App. 3d 544, 152 Cal. Rptr. 628, 634 (2d Dist. 1979)
- Thorgaard Plumbing, 71 Wash. 2d at 134, 426 P. 2d at 828
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- "Agreements to Arbitration in West Virginia", 79 W. Va. L. Rev. 121 (1976)
- W. Va. Code § 55-10-1
- W. Va. Code § 55-10-2

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**BRIEF
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I. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL.

This Civil Action was instituted in the Circuit Court of Kanawha County, West Virginia by the Appellant, Charles Crihfield, as Plaintiff, against Defendants Steven Brown and The Home Show, LLC, seeking injunctive relief and a declaratory judgment that Defendants were not legally authorized to reinstitute an arbitration that had previously been commenced by Defendant Brown and unilaterally terminated by him the night before the final hearing, contrary to the Rules of the American Arbitration Association ("AAA"), the governing rules for such arbitration.

Crihfield filed a Summary Judgment Motion before the Circuit Court, seeking determination that such reinstated arbitration was improper. Having heard argument on the Motion on February 5, 2008, the Circuit Court ruled in favor of Defendants, by its Order dated April 14, 2008, attached as Exhibit A. Appellant now seeks an appeal from this Order.

II. STATEMENT OF FACTS

This matter originally arose out of alleged breach of contract claims asserted by Defendant Steven Brown ("Brown"), against Charles Crihfield ("Crihfield"), in connection with a stock purchase agreement entered into in 2001 between Brown as purchaser and Crihfield, among other shareholders, as sellers ("Purchase Agreement"), a copy of which Purchase Agreement is attached as Exhibit A to the Complaint.

Brown alleged violations by Crihfield of restrictive covenant provisions contained in Section 5.3 of the Purchase Agreement, and had initially instituted a civil action in the Circuit Court of Kanawha County in 2003. Following commencement of that action, Crihfield moved for dismissal on the grounds that the Purchase Agreement required binding arbitration of all disputes. The Purchase Agreement contained the following provision regarding binding arbitration:

11.4 Arbitration. Any disputes between Purchaser and Sellers that arise under or relate to this Agreement and that they cannot resolve between themselves shall be resolved exclusively and finally by binding arbitration. In the event of any such arbitration:

- (i) The procedural rules (including discovery rules) governing the arbitration shall be those of the American Arbitration Association ("AAA") as then in effect.
- (ii) The site of the arbitration shall be Charleston, West Virginia.
- (iii) Purchaser and Seller shall agree upon and choose the arbitrator.
- (iv) If Purchaser and Seller are unable to agree on the choice of the arbitrator, the arbitrator shall be assigned by the AAA, from its panel for Charleston, West Virginia.
- (v) The decision or award of any arbitration shall be final and binding on the parties, and the arbitrator may determine an allocation of attorneys' fees and costs between the parties.

Judge Zakaib of the Circuit Court of Kanawha County, granted Crihfield's Motion to Dismiss, by Order dated October 3, 2003.

Thereafter, Brown immediately instituted arbitration to pursue claims of alleged solicitation of employees by Crihfield. This arbitration commenced in October, 2003 ("2003 Arbitration"), and proceeded all the way through discovery, and preliminary hearing before Judge James O. Holliday, as arbitrator. The final hearing on the arbitration was scheduled for December 23, 2003.

Following the completion of depositions from the relevant employees, it was clear that there was no direct evidence from any witness that would support Brown's allegations of alleged solicitation. In fact, the employees in question all clearly testified in their depositions that there had been no solicitation. Thus, as of the hearing date it was presumably apparent to Brown that he had no proof to support his claims. Moreover, in the course of the preliminary conference between the arbitrator and counsel for both parties, the arbitrator indicated informally that from the intended evidence he saw little merit to the alleged solicitation claims.

As a result, on the evening before this final arbitration hearing, Brown, through his counsel, sent a facsimile letter to the arbitrator dated December 22, 2003, a copy of which is attached as Exhibit B to the Complaint, stating that Brown was "withdrawing" this arbitration. Specifically, that letter stated:

"Late Sunday evening Mr. Steve Brown left a message on my answering service here in the office indicating his desire to withdraw this matter from arbitration. I have been instructed by Mr. Brown to file a petition for appeal on Judge Zakib's October 3, 2003, Order."

Brown instead elected to pursue an appeal to the West Virginia Supreme Court of Appeals, appealing the dismissal order issued by the Circuit Court of Kanawha County. A petition for appeal was filed

on February 3, 2004, and by Order dated May 6, 2004, the Supreme Court of Appeals denied the petition for appeal.

At that time, this dispute should have been fully resolved, in that Brown had instituted both a civil action in the Circuit Court of Kanawha County, as well as arbitration to pursue his asserted claims of alleged solicitation, and also had the opportunity for appeal to the West Virginia Supreme Court of Appeals. However, after a year delay, Brown attempted to re-institute his arbitration claims, through the vehicle of a new arbitration demand. This is in the form of a letter asking for reinstatement of the previously terminated arbitration, dated November 16, 2004 ("Second Arbitration"). Subsequently, Defendants filed a demand request through AAA, seeking demand for arbitration in the name of "The Home Show LLC", rather than Brown's name, even though The Home Show LLC was never party to any agreement with Crihfield, which was dated July 13, 2005, and in fact was created by Brown after the transaction under the Purchase Agreement. Subsequently, a third, undated arbitration demand was issued, as an amended demand ("Third Arbitration") in the name of Steven Brown, rather than The Home Show LLC, a copy of which is attached as Exhibit E to the Complaint. The AAA thereafter appointed an arbitrator, and proceeded toward the re-arbitration of this same claim.

In response to the Third Arbitration, Appellant instituted this action in the Circuit Court of Kanawha County, seeking an injunction against such renewed arbitration and declaratory judgment that Defendants were now barred from pursuing this new arbitration, having fully litigated and arbitrated the claims in 2003. Appellant initially filed a Motion for Summary Judgment with the Court, and a hearing was scheduled for September 13, 2006. At that hearing, the Court reported that it had contacted the Honorable James O. Holliday, the retired Circuit Judge who had acted as the

initial arbitrator in the 2003 Arbitration. Based upon the Court's statement that Judge Holliday would agree to recommence the arbitration at the point it had been previously withdrawn in 2003, and thus not subject Appellant to an entirely new arbitration with a new arbitrator, Appellant consented to an Agreed Order, dated November 27, 2006, specifically remanding the matter to Judge Holliday as arbitrator.

It appears that Defendants failed to contact Judge Holliday within the sixty (60) day period specified in the Agreed Order, to set a status conference for the final arbitration hearing. Subsequently, on or about September 5, 2007, Appellant received a letter from counsel for Defendants stating that Judge Holliday now reported that he was unable to continue with the arbitration, as set forth in the terms of the Agreed Order, for unspecified reasons. Copies of this September 5, 2007 letter, and Judge Holliday's letter of August 31, 2007, are attached as Exhibits A and B to Defendant's Response to the renewed Summary Judgment Motion ("Response") filed January 25, 2008. Thereafter, Defendants unilaterally selected an entirely new arbitrator, and set an arbitration hearing for January 21 and 22, 2008, as set forth in letter from Defendant's counsel dated December 6, 2007, attached as Exhibit C to the Response.

The sole basis on which Appellant consented to the Agreed Order was that the 2003 hearing would recommence with the same arbitrator at the same point, and thus Appellant would not be subjected to a second, new arbitration with a new arbitrator. This fundamental foundation to the Agreed Order therefore no longer existed, and the arbitration which was next attempted to be imposed by Defendants was completely inconsistent with the terms of the Agreed Order.

Appellant thereupon renewed his Motion for Summary Judgment, asking that the Court enter an order decreeing that the 2003 Arbitration cannot be reopened or renewed following its unilateral termination contrary to the provisions of the AAA. Specifically, Rule 28 of the Commercial Arbitration Rules of the AAA (attached to Plaintiff's Summary Judgment Motion as Exhibit F) applicable to this case reads as follows:

Postponements. The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

Because Brown unilaterally withdrew the original 2003 Arbitration, any subsequent arbitrator lacks jurisdiction to proceed in order to re-arbitrate the same claims.

The hearing on Appellant's renewed Motion for Summary Judgment was held before the Circuit Court of Kanawha County, West Virginia on February 5, 2008. Upon consideration of the filings by the parties and their respective arguments, the Court ruled from the bench that the Summary Judgment Motion was denied and instead ordered that the matter proceed to arbitration within thirty (30) days. Upon the request of Appellant, the Court stayed enforcement of the Order pending filing of an appeal to the Supreme Court of Appeals. Appellant now files this Brief in support of its appeal of the Order issued by the Circuit Court of Kanawha County, as entered by Order dated April 14, 2008.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL.

A. The Circuit Court erred in denying Appellant's Motion for Summary Judgment, and should have ruled, as a matter of law, that arbitration terminated by Appellees was final and that claims could not be pursued in subsequent arbitrations.

B. The Circuit Court erred in ruling that Appellees were entitled to reinstitute arbitration following an improper termination and withdrawal.

C. The Circuit Court erred in ordering that the matter proceed to arbitration, in effect granting summary judgment to Appellees and disposing of the matter in their favor, without basis in law or evidence.

D. The Circuit Court's Order failed to include required Findings of Fact and Conclusions of Law.

IV. POINTS AND AUTHORITIES RELIED UPON

Larew v. Monongahela Power Company, 199 W. Va. 690, 487 S.E. 2d 348 (1997)

Dawson v. Norfolk and Western Ry. Co., 197 W. Va. 10, 475 S.E. 2d 10 (1996)

Guthrie v. Northwestern Mutual Life Insurance Co., 158 W. Va. 1, 208 S.E. 2d 60 (1974)

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Stout v. Ravenswood Aluminum Corp., 207 W. Va. 427, 533 S.E. 2d 359 (2000)

Hawkins v. U.S. Sports Association, Inc., 219 W. Va. 275, 633 S.E. 2d 31 (2006)

Wilkinson v. Duff, 212 W. Va. 725, 575 S.E. 2d 335 (2002)

Marrowbone Development Co. v. United Mine Workers of America, 147 F. 3d 296 (4th Cir. 1998)

Board of Education of Berkeley County v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E. 2d 439 (1977)

Turner v. Stewart, 51 W. Va. 493, 41 S.E. 924 (1902)

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Thorgaard Plumbing, 71 Wash. 2d at 134, 426 P. 2d at 828

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"Agreements to Arbitration in West Virginia", 79 W. Va. L. Rev. 121 (1976)

W. Va. Code § 55-10-1

W. Va. Code § 55-10-2

V. DISCUSSION OF THE LAW

It is well established that summary judgment is appropriate when there are no issues of material fact and the matter can be decided by the Court as a matter of law. Larew v. Monongahela Power Company, 199 W. Va. 690, 487 S.E. 2d 348 (1997); Dawson v. Norfolk and Western Ry. Co., 197 W. Va. 10, 475 S.E. 2d 10 (1996). In the present case, the dispute relates to the proceedings following the institution of initial arbitration, i.e., the 2003 Arbitration, and the unilateral withdrawal of that arbitration and subsequent attempts to revive and rearbitrate those claims by Brown. There are no disputes as to the relevant facts, and the correspondence and related matters referred to in the Statement of Facts show the undisputed events that occurred.

This case, as presented to the Court below, is simply a matter of applying the law to these undisputed facts. While there may certainly be disputes between the parties as to the underlying claims in the 2003 Arbitration, that is not relevant to this action, which instead deals solely with the procedural steps following Brown's abandonment of the 2003 Arbitration. This is precisely the type of dispute that is appropriate for summary judgment by the lower court, in its role to promote traditional efficiency. As the Court stated in Guthrie v. Northwestern Mutual Life Insurance Co., 158 W. Va. 1, 208 S.E. 2d 60 (1974) "the purpose of summary judgment is not to notify nor frame

the issue; the rule is designed to provide a method of promptly and speedily disposing of the controversy if there is not triable issue of fact."

Once the party moving for summary judgment makes a showing that there are no genuine issues of material fact, the burden shifts to the opposing party to produce some evidence as to the existence of such issue of fact. See Harbaugh v. Coffinbarger, 209 W. Va. 57, 543 S.E. 2d 338 (2000); Painter v. Peavy, 192 W. Va. 189, 451 S.E. 2d 755 (1994). In fact, Defendants have never asserted, in their pleadings or briefs in the lower court, that there does exist any genuine issues of material fact, that would operate to deny summary judgment to Plaintiff, or that facts would support judgment in Defendant's favor.

Moreover, it is equally well established by this Court's precedent that a Circuit Court order relating to granting or denial of summary judgment should be supported by findings of facts and conclusion of law. By denying Appellant's Motion for Summary Judgment, the Court, in its April 14, 2008 Order, entered in essence a final order in the case by requiring the third arbitration to proceed, thus resolving all matters in dispute raised in the underlying Civil Action. Thus, although the Order was a denial of the Appellant's motion, it resulted in the equivalent of entry of judgment in favor of Appellees. The Order therefore required findings of fact and conclusions of law. Toth v. Board of Parks and Recreation Commissioners, 215 W. Va. 51, 593 S.E. 2d 576 (2003); Stout v. Ravenswood Aluminum Corp., 207 W. Va. 427, 533 S.E. 2d 359 (2000).

The matter now presented to this Court essentially is a determination that the legal conclusion implicitly reached by the Circuit Court of Kanawha County, West Virginia was erroneous and improper and should be reversed. In its review of the lower court's order, this Court would now act by de novo review, and therefore such requested relief is appropriate. Hawkins v. U.S. Sports

Association, Inc., 219 W. Va. 275, 633 S.E. 2d 31 (2006); Wilkinson v. Duff, 212 W. Va. 725, 575 S.E. 2d 335 (2002). The Appellant requests that this Court remand the case to the Circuit Court of Kanawha County, West Virginia with directions to enter an order granting Appellant's Motion for Summary Judgment on the grounds that the 2003 Arbitration, having been voluntarily and unilaterally withdrawn and terminated by Brown, cannot now be re-arbitrated - - whether one time or ten times.

As a preliminary matter, it is well established under West Virginia law that issues of jurisdiction for arbitration are matters for the courts, and not for the arbitrator, who does not have sufficient authority to determine his or her own jurisdiction. Thus, this Court is the proper forum to determine whether jurisdiction exists for the efforts of Brown to re-arbitrate his claims pursuant to his "third arbitration demand." Marrowbone Development Co. v. United Mine Workers of America, 147 F. 3d 296 (4th Cir. 1998).

There is no factual issue in dispute with regard to the relevant facts or the jurisdictional history of this dispute. It is undisputed that, following the dismissal of the initial civil action by the Circuit Court of Kanawha County, Brown chose to arbitrate his claims of alleged solicitation, which matter was initiated, discovery done and arbitration set before Judge Holliday in December 2003. Similarly, it is undisputed that, as set forth in the facsimile letter of December 22, 2003 (Exhibit B to the Complaint), Brown unilaterally terminated the 2003 Arbitration. There are thus no issues of material fact with regard to the procedural history related to this matter, and it is solely and entirely a legal issue concerning application of law and the jurisdiction for this arbitration, which jurisdiction lies solely within the purview of the Circuit Court of Kanawha County, and now this Court.

It appears that the question raised in this Appeal is a matter of first impression in West Virginia. In West Virginia that the statutory arbitration provisions of W. Va. Code § 55-10-1 have largely supplanted the common law rules, and reflect the preference in favor of arbitration. It is equally well established that a contractual agreement for arbitration creates a condition precedent to any right of action arising under the contract, making the arbitration agreement mandatory and specifically enforceable. Board of Education of Berkeley County v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E. 2d 439 (1977). Thus, this extended the common law rule of irrevocability beyond existing controversies to future controversies. See Turner v. Stewart, 51 W. Va. 493, 41 S.E. 924 (1902), stating the proposition that submission to arbitration of an existing controversy, either entered in Court or by agreement, is irrevocable.

This principle of irrevocability is reaffirmed in W. Va. Code § 55-10-2, which states that "No such submission, entered or agreed to be entered of record, in any court, shall be irrevocable by any party to such submission without the leave of the court." Therefore, it is well established in West Virginia statute and common law that an agreement to arbitrate cannot be revoked and that the submission, once made, is irrevocable except by leave of the court. The same concept should apply to a termination or withdrawal of arbitration and any subsequent attempt to reinstitute those claims in a subsequent arbitration.

When a matter has been submitted to arbitration and has proceeded to final hearing, and is then unilaterally terminated by the party instituting such arbitration, it should have the same effect as a dismissal with prejudice. As one court has held, "once a stipulation for judicial arbitration has been executed and filed, a party may not withdraw from the arbitration proceedings." Brown v. Engstrom, 89 Cal. App. 3d 544, 152 Cal. Rptr. 628, 634 (2d Dist. 1979). Under W. Va. Code § 55-

10-2 a submission to arbitration is irrevocable and neither party should have the ability to suspend or terminate the arbitration without court's approval. W. Va. Code § 55-10-2. In this context, the Washington Supreme Court has held:

The submission of issues to the arbitrators was irrevocable in the absence of one of the statutory grounds for revocation in RCW 7.04.010; a party cannot unilaterally withdraw and issue from arbitration. Thorgaard Plumbing, 71 Wash. 2d at 134, 426 P. 2d at 828.

Godfrey v. Hartford Casualty Ins. Co., 142 Wash, 2d 885, 897, 19 P. 3d 617, 623 (2001). See "Agreements to Arbitration in West Virginia", 79 W. Va. L. Rev. 121 (1976).

Under the mandates of the Purchase Agreement between Crihfield and Brown, the arbitration was to be conducted subject to the rules of the AAA. As previously noted, Rule 28 of the AAA Rules of Commercial Arbitration sets forth the specific requirements for a "postponement" of an arbitration hearing. Had Brown wanted to simply stop the proceedings pending a subsequent appeal to the Supreme Court of Appeals, he could have requested a postponement consistent with the Rules. However he did not do that, but instead "withdrew" from the arbitration, thereby terminating the arbitration process he had started and ending the 2003 Arbitration.

In that the AAA rules do not contain restrictions on termination or withdrawal of an arbitration, Brown, following the institution of such arbitration and in the absence of any counterclaims, could withdraw and end the matter. However, that election must be final and with prejudice, otherwise a party would be free to start and stop the entire process unilaterally, to suit his own tactics or ends, to avoid the finality of a weak case, to harass his opponent or for no reason other than delay. Such party would be able to continually forum shop through multiple arbitrations without any finality or end. The rules of AAA make it abundantly clear that a party may not

postpone or delay a pending arbitration without the consent of the other parties or the agreement of the arbitrator. See AAA Rule R-28. In this case no such action was taken. Certainly, *if a delay* cannot be effected without such consent, then a termination and later re-institution nearly a year after the fact, would be even more inappropriate. By terminating the arbitration, and subsequently attempting to reinstitute it, Brown is essentially attempting to obtain the equivalent of a twelve-month prolonged "postponement", in the guise of a "withdrawal" and without satisfying the specific AAA rules required for such a postponement.

Based on the clear and undisputed records surrounding the prior arbitration, it is clear that Brown was attempting to "game the system" by starting, then withdrawing from, arbitration when the outcome looked unpromising, attempting to seek another alternative. Had Brown wanted to appeal the original ruling of the Kanawha County Circuit Court, he should have made his appeal prior to instituting arbitration. Once he has instituted arbitration, he cannot then pick and choose between proceedings, but must follow through with the proceeding he started. He failed to do so.

Thus, while Brown may have been free to withdraw his arbitration, that action should be with prejudice and with the consequence that he has fully availed himself of his chance to arbitrate that claim. He cannot later attempt to re-arbitrate the matter repeatedly in the hopes of getting a more favorable outcome from each succeeding arbitrator, thereby serially withdrawing until he finds an arbitrator to his liking. This attempted Third Arbitration lacks jurisdiction, and the Circuit Court should have granted the declaratory relief requested by Appellant in his renewed Summary Judgment Motion and issued an order that Brown cannot further pursue arbitration and that this matter would finally be closed.

The Circuit Court of Kanawha County, West Virginia erred in ruling against Appellant on his Summary Judgment Motion and instead ruling in favor of Appellees on the merits and requiring arbitration to proceed. Brown has had full and ample avenues to seek redress on his alleged claims since 2003 - - he has proceeded in both Circuit Court and arbitration, and further by appeal to the Supreme Court of Appeals. Having pursued remedies in each such forum, and having walked away from his final arbitration hearing contrary to the rules of the American Arbitration Association and without consent of the opposing party or approval of the arbitrator, he has been fully afforded his opportunity to pursue his claims.

To hold otherwise, as the Circuit Court of Kanawha County did, would allow a litigant to continually rearbitrate the same matter, and there would then be no reason he or she could walk away from a final hearing one time or ten times. There must to be finality to disputes such as this, given that this claim now arises out of a sale transaction that occurred seven years ago. Both fairness to Petitioner and the requirements of judicial economy and finality mandate a ruling that this matter can not be unilaterally reopened and rearbitrated by one party.

VI. RELIEF PRAYED FOR

Based on the foregoing, and for other reasons apparent from the record in these proceedings, Appellant Charles Crihfield prays that the appeal be granted and that the April 14, 2008 Order of the Circuit Court of Kanawha County, West Virginia, be set aside and that the case be remanded to the Circuit Court with directions to vacate the Order of April 14, 2008, and to grant Appellant's Motion for Summary Judgment and enter an order precluding any further arbitration or adjudication of the claims initially made by Defendants in the 2003 Arbitration.

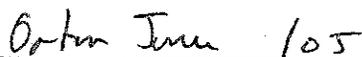
Respectfully submitted this 12th day of December, 2008.

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CERTIFICATE OF SERVICE

I, Mark A. Ferguson, counsel for Appellant do hereby certify that the foregoing **BRIEF ON BEHALF OF APPELLANT CHARLES CRIHFIELD** has been served upon counsel of record as indicated below, by facsimile and by mailing a true and exact copy thereof to:

Frederick F. Holroyd, Esquire
Holroyd & Yost
209 West Washington Street
Charleston, West Virginia 25302

in a properly stamped and addressed envelope, postage prepaid, and depositing the same in the regular course of the United States mail this 12th day of December 2008.



Mark A. Ferguson