

2010

Westgate Resorts v. Shaun S. Adel and Consumer Protection Group, LLC : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WESTGATE RESORTS, LTD.,

Plaintiff/Appellee,

v.

SHAUN S. ADEL and CONSUMER
PROTECTION GROUP, LLC,

Defendants/Appellant.

Case No. 20101017-SC

APPEAL FROM FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH
HON. LYNN DAVIS, CIVIL NO. 020404068
DECISION DATED DECEMBER 13, 2010

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Only Possible Appeal from the Decision Below is a URAP Rule 5 Appeal.

In its response brief, Westgate argues that CPG had an appeal as of right (a URAP Rule 3 appeal) because the trial court's Ruling and Order resulted in CPG's motion to confirm the Arbitration Award being denied. Acknowledging that the Order "also vacated the same arbitration award and directed a rehearing" Westgate asserts that "those additional mandates in the order do not change the analysis." Response Brief at 13. Westgate complains that CPG's arguments ignore "that the district court's order denies confirmation of an award and focus only upon the fact that the order also vacates the award and directs a rehearing." *Id.* at 18. CPG unsurprisingly disagrees and asserts that the analysis is changed based upon the decision made by the trial court. It is the vacatur of the award which is the key to the district court's decision and the basis for this appeal.

The question of whether the district court's Order triggered the rights of appeal listed in Utah Code Ann. § 78B-11-129 should be decided by looking at the language of the Order and of the Ruling upon which the Order is based. The Order is titled as an order on

both CPG's combined motion for confirmation, for attorney fees and for certification under URCP Rule 54(b) and Westgate's motion to vacate, and reads:

Pursuant to this Court's Ruling dated September 30, 2010, attached hereto as Exhibit "A" and incorporated herein by reference, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Westgate Resorts, Ltd.'s Motion to Vacate Arbitration Award is GRANTED;
2. The Findings of Fact, Conclusions of Law and Arbitration Award dated February 2, 2010 issued in the arbitration proceedings styled: *Consumer Protection Group, LLC v. Westgate Resorts, Ltd.*, is VACATED, RENDERED NULL AND VOID and OF NO FORCE AND EFFECT; and
3. Consumer Protection Group, LLC's Combined Motion to Confirm Arbitration Award and for Attorney Fees and Expenses and for Rule 54(b) Certificate of Judgment as Final is DENIED.

By its very language the Order makes clear that granting the Motion to Vacate, and the vacating of the Arbitration Award, were the principal and primary purposes of the Order. Having vacated the award, the trial court had no other option than to deny the now moot motion to confirm the award. There was no award to confirm after the award was vacated. The trial court was extremely clear: the Arbitration Award was "VACATED, RENDERED NULL AND VOID and OF NO FORCE AND EFFECT." (All capitals in the original).

Two of the three sub-points of the Order addressed the vacating of the Arbitration Award. The trial court wanted no confusion: the Arbitration Award was vacated, and as a result, the other motion was, obviously, denied, because it was moot.

The Ruling upon which the Order is based, which the trial court incorporated into the Order by reference, also makes clear that the trial court granted Westgate's motion to vacate and, as a result, had to deny CPG's motion to confirm. Following the recitation of the parties' several arguments, the pages of the Ruling devoted to the trial court's analysis and conclusion address only one topic: Westgate's motion to vacate. See Ruling at 6-8. The only analysis the trial court engaged in concerns the motion to vacate. At the end of the analysis discussing the arbitrator's duty to disclose, the trial court concludes with "Westgate's Motion to vacate Arbitration Award is granted." *Id.* at 8. Only after that conclusion does the trial court even mention CPG's motion, and only to observe that CPG's Combined Motion "is denied." *Id.* Having granted Westgate's Motion to Vacate, the trial court had no need to, and did not, analyze CPG's Motion, because that motion was moot.

The language of the Ruling is clear. The trial court analyzed and granted the motion to vacate, and the denial of CPG's motions is a by-product, the result of the trial court's analysis on Westgate's Motion to Vacate. If Westgate's argument were correct, that this is an appeal from a denial of the motion to confirm, this Court should be able to review the trial court's analysis on the motion to confirm. This Court cannot do that because there is no analysis in the Ruling or the Order addressing the motion to confirm. Westgate is wrong in labeling this an appeal from the denial of the motion to confirm. This is an appeal from the only issue addressed by the trial court: the motion to vacate. That is the only issue which this Court can review. See *e.g. Allen v. Prudential Property & Casualty Insurance Co.*, 839 P.2d 798, 800 (Utah 1992) (applying the presumption that trial court decisions are correct "has little operative effect when members of this Court cannot divine the trial court's reasoning because of the cryptic nature of its ruling").

Because the trial court's ruling and order focused solely on the motion to vacate and did not discuss the motion to confirm, the decision below did not trigger Utah Code Ann. §78B-11-129 (1)(c) which provides that "[a]n appeal may be taken from an order

confirming or denying confirmation of an award.” Because the trial court’s decision vacating the award included a rehearing, the decision below also did not trigger Utah Code Ann. § 78B-11-129 (1)(e) which limits appeals to one “taken from an order vacating an award without directing a rehearing.” Therefore, no URAP Rule 3 appeal flowed from the decision of the court below, and a URAP Rule 5 appeal is the only logical and possible way to present the issue to this Court.

In *Powell v. Cannon*, this Court explained that there are exceptions to the final judgment rule, and that those exceptions are statutory appellate rights, URAP Rule 5 appeal from interlocutory orders, and certification of an order under URCP Rule 54(b). *Powell v. Cannon*, 2008 UT 19, ¶13; 179 P.3d 799. There is no URCP Rule 54(b) certification before the Court. As discussed above, none of the statutory bases contained in Utah Code Ann. § 78B-11-129 were triggered by the trial court decision. Therefore, only URAP Rule 5 can provide this Court the jurisdiction to decide the important issue presented on appeal, whether the motion to vacate was properly granted by the trial court.

The Hicks Decision is Inapposite

Westgate's argument for defeating jurisdiction rests in part on *Hicks v. UBS Financial Services*, 2010 UT App. 26, ¶¶ 15-17; 226 P.3d 762. In *Hicks*, the Court of Appeals found it had jurisdiction over an appeal brought under URAP Rule 3, concluding it was bound by its prior decision in *Amalgamated Transit Union, Local 382 v. UTA*, 2004 UT App 310, ¶¶ 11-13; 99 P.3d 379. *Amalgamated* had found jurisdiction to review an order granting a motion to compel arbitration.

The *Hicks* case is similar to this case only because the *Hicks* trial court decision also involved a motion to vacate and a motion to confirm an arbitration award, with that trial court vacating the award. The *Hicks* case, however, is unlike this case because of the posture of the case at the Court of Appeals; the *Hicks* appeal was brought under URAP Rule 3. Although, in *Hicks*, the Court of Appeals discussed issues raised by Utah Code Ann. § 78B-11-129, it ultimately decided it was bound to its earlier *Amalgamated* decision which had relied on the Utah Constitution's mandate that "there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause." *Amalgamated Transit Union, Local 382 v. UTA*, ¶8 (quoting Utah Constitution Article

VIII, §5). The *Hicks* decision held that the order from that trial court was as final an order as the order in *Amalgamated*. *Hicks v. UBS Financial Services*, ¶17.

Unlike in *Hicks*, in this case the Court is not faced with a URAP Rule 3 appeal from a final order. As this Court has explained, “For an order or judgment to be final, it must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case. In other words, it must end the controversy between the litigants.” *Powell v. Cannon*, ¶13. Here, the subject-matter of the litigation between the parties goes on, the dispute has not been finally concluded, and the controversy remains.

When the trial court granted Westgate’s motion to arbitrate, the trial court severed the UPUAA claims from the common law and the breach of contract claims. Those claims were retained by the trial court. (R. 4718.) Although the UPUAA claims were arbitrated, the other claims have not been resolved. After the arbitration panel issued its Findings of Facts, Conclusions of Law and Award, the parties returned to the trial court which had ordered the arbitration. CPG moved for confirmation of the award, attorney fees and certification as final under URCP Rule 54(b). (R. 5797.) Westgate

opposed CPG's motion and moved to vacate the award. (R. 5909.) When the trial court granted Westgate's motion to vacate, both parties and the trial court understood that an arbitration rehearing was ordered. It is not to be doubted that if this Court were to hold it lacks jurisdiction to hear this URAP Rule 5 appeal and the arbitration rehearing is held, the parties will return to the trial court seeking confirmation or vacatur of the rehearing results. Thus the trial court's decision vacating the award is not a final order as defined by this Court. It does not end the controversy between CPG and Westgate.

The Utah Uniform Arbitration Act Did Not Vitate URAP Rule 5

The decision appealed here combines granting a motion to vacate with a rehearing and a denial of a motion to confirm. The Utah Uniform Arbitration Act does not address the appealability of an order which combines various decisions. Made on its own merits, the decision to deny confirmation might be appealable under Utah Code Ann. § 78B-11-129(1)(c). But the decision to deny confirmation was not taken on its own merit. It came about only because of the decision which the trial court made, to vacate the award. A decision to vacate an award may, under Utah Code Ann. § 78B-11-129(1)(e), grant appellate rights if the award is vacated without a rehearing.

But, as noted by the Court of Appeals, “subsection (e) of section 129 appears to deny us jurisdiction because the district court vacated the award and directed a rehearing, the opposite of an allowed appeal.” *Hicks v. UBS*, ¶12. Because, in this case, both parties and the trial court understood the decision to vacate to include a rehearing, there is no right of appeal under subsection (e).

Yet, it is precisely the decision to vacate which CPG is seeking to appeal pursuant to URAP Rule 5. It is the decision to vacate which is the crux of the issue. Indeed, the Utah Uniform Arbitration Act makes this clear in Utah Code Ann. § 78B-11-123 when it provides that when a party moves for confirmation of an award, “the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 78B-11-121 or 78B-11-125 or is vacated pursuant to Section 78B-11-124.” In other words, the act of confirming the award is secondary to a modification, a correction or an order to vacate the award. Although this is common sense, an award cannot be confirmed if it has been vacated, thus Section 129 becomes confusing when read in light of URAP Rule 5’s discretionary appeals from interlocutory orders.

URAP Rule 5 permits appeals from interlocutory orders when an analysis by this Court of a statute or rule may be determinative of an issue. In this matter, if the Court decides the first cousin issue by confirming CPG's position, there will be no need for a rehearing of the arbitration and the Court will have materially advanced the termination of the litigation. Westgate has argued that the Court lacks jurisdiction under URAP Rule 5 because only an appeal as of right is justified by the decision of the trial court and CPG did not bring a URAP Rule 3 appeal. But a URAP Rule 3 appeal could not be brought from the order to vacate because that order included a rehearing, and such an appeal is precluded by Utah Code Ann. § 78B-11-129(e). Under Westgate's analysis, CPG should have appealed from the denial of the mooted motion to confirm. But if a motion is moot, it cannot form the basis for an appeal under URAP Rule 3. This Court will not address moot claims on appeal. *Baker v. Stevens*, 2005 UT 32, ¶ 9; 114 P.3d 580 (citing *Black v. Allstate Ins. Co.*, 2004 UT 66, ¶ 29; 100 P.3d 1163).

Utah Code Ann. § 78B-11-129 creates a statutory right of appeal in certain circumstances, but it does not take away other bases for appeal such as URAP Rule 5 appeals from interlocutory

orders and URCP Rule 54(c) certification. Any argument which seeks to limit the applicability of URAP Rule 5 by barring motions to vacate from being appealed under URAP Rule 5 if the motion to vacate resulted in a denial of a motion to confirm should be rejected. This Court should make clear that Utah Code Ann. § 78B-11-129 does not destroy interlocutory appeals under URAP Rule 5.

The Majority of States Have Correctly Rejected Appeals in this Situation

Westgate urges this Court to adopt the minority position from other states by finding an appeal as of right from trial court decisions combining motions to vacate and motions to confirm. The majority of courts from other states which have addressed the jurisdictional issue presented by a trial court decision simultaneously vacating an award and denying a motion to confirm have correctly concluded that such orders are not appealable. Courts in California¹, Hawaii², Kentucky³, Missouri⁴, Nebraska⁵, Nevada⁶, North Carolina⁷, South Dakota⁸, and

¹ *Long Beach Iron Works, Inc. v. Int'l Molders & Allied Workers Union of North America*, 103 Cal. Rptr. 200 (Cal. Ct. App. 1972).

² *Hawaii Org. Police Officers v. County of Kauai*, 230 P. 3d 428 (Haw. Ct. App. 2010).

³ *Paul Miller Ford v. Craycraft*, 2005 WL 1593418 (Ky. Ct. App. July 8, 2005).

⁴ *Department of Transportation. State Employee Association*, 581 A. 2d 813 (Me. 1990).

the District of Columbia⁹ have dismissed appeals for lack of jurisdiction. Some of those courts have held that allowing such orders to be appealed would be contrary to the public policy of encouraging arbitration by allowing appeals as of right before “a sufficient degree of finality to the arbitration proceeding.” *Karcher Firestopping v. Meadow Valley Contractors*, 204 P.3d 1262, 1264 (Nev. 2009). Others have held that “allowing such orders to be appealed simply because a portion of the order denies confirmation of an award renders the ‘without directing a rehearing’ language of these states’ version of [Utah Code Ann. § 78B-11-129(1)(e)] superfluous.” *Id.*

A minority of courts, Arizona¹⁰, Massachusetts¹¹, Tennessee¹², and Texas¹³, have found jurisdiction to be proper. Even though the

⁵ *Nebraska Department of Health v. Struss*, 623 N.W.2d 308 (Neb. 2001).

⁶ *Karcher Firestopping v. Meadow Valley Contractors*, 204 P.3d 1262 (Nev. 2009).

⁷ *In re Arbitration, State of N.C. & Davidson & Jones Construction Co.*, 323 S.E.2d 466 (N.C. Ct. App. 1984).

⁸ *Double Diamond Construction v. Farmers Coop. Elevator Association*, 656 N.W.2d 744 (S.D. 2003).

⁹ *Connerton, Ray & Simon v. Simon*, 791 A.2d 86 (D.C. 2002).

¹⁰ *Wages v. Smith Barney*, 937 P.2d 715 (Ariz. Ct. App. 1997).

¹¹ *Fazio v. Emp’rs’ Liability Assur. Corp.*, 197 N.E.2d 598 (Mass. 1964).

¹² *Boyle v. Thomas*, 1997 WL 710912 (Tenn. Ct. App. Nov. 17, 1997).

Utah Court of Appeals did not decide the issue directly, some have interpreted the *Hicks* decision as aligning Utah with the minority position.¹⁴

Contrary to Westgate's argument, CPG's position reaffirms the public policy favoring arbitration by ensuring a degree of finality before finding a right of appeal as of right, while preserving the important URAP Rule 5 appeals for interlocutory orders if the trial court errs in vacating an award. Westgate's argument, that under CPG's interpretation a prevailing party could be denied appellate review indefinitely (Response Brief at 23), fails to recognize that URAP Rule 5 appeals, the appeal being pursued in this matter, exist to protect a party from an erroneous trial court decision. It is CPG's position, not Westgate's, which ensures review that a "court-ordered 'do over' is necessary." *Id.* It is CPG's position driving this appeal that the trial court's "do over" order is not necessary in this case, and that this Court should reverse that lower court order. Westgate's argument is aimed at the contrary result, preventing this Court from reviewing the trial court's "do over" order.

¹³ *East Texas Salt Water Disposal Co. v. Werline*, 307 S.W. 3d 267 (Tex. 2010).

¹⁴ *Id.* at 273.

Finding that a trial court order (which vacates an arbitration award thus mandating a denial of a concurrent motion to confirm) does not create a right of appeal under the Uniform Arbitration Act is consistent with the statute's dictate that trial courts must first rule on motions to vacate, correct or modify. See Utah Code Ann. § 78B-11-123. Such an understanding does not cause any conflict within the Uniform Arbitration Act. Utah Code Ann. § 78B-11-129(1)(c), which grants a right of appeal if a trial court denies a motion to confirm, protects the arbitration process from a trial court refusing to confirm an award simply because it disagrees with the result of the arbitration. Unless there is a motion to vacate, to correct or to modify, a trial court "shall issue a confirming order." See Utah Code Ann. § 78B-11-123. Subsection (c) of Utah Code Ann. § 78B-11-129(1) provides a right of appeal from an order which fails to follow Utah Code Ann. § 78B-11-123. But there is no basis for an appeal under subsection (c) when the trial court grants a motion to vacate an award because the trial court has acted as authorized in the Act.

This Court should find that there is no appeal pursuant to Utah Code Ann. § 78B-11-129(1)(c) because the trial court vacated the award pursuant to Utah Code Ann. § 78B-11-123. As a result of the

vacatur decision, CPG, the prevailing party in the arbitration, can have recourse to URAP Rule 5 to seek review of the basis for the order to vacate. Such a finding by this Court protects the public interest in arbitration, interprets the Uniform Arbitration Act consistently, and protects litigants from errors by trial courts.

II. Arbitrator Burbidge's First Cousin Relationship with George Burbidge, an Attorney Not Involved in This Matter, Does Not Justify Vacating the Award.

Westgate argues that the Court can affirm the trial court's decision under one of two standards, the neutral arbitrator's failure to disclose a known, existing and substantial relationship, or any arbitrator's failure to disclose any fact, including existing or past relationships with a party, their counsel or representatives, a witness or another arbitrator, if a reasonable person would consider that fact likely to affect the impartiality of the arbitrator.

Westgate is wrong on both counts. First, assuming *arguendo* that Arbitrator Burbidge, nominated by CPG, was a neutral arbitrator, the relationship between Arbitrator Burbidge and attorney Burbidge was not substantial and thus did not need to be disclosed. It is undisputed that the law firms of Arbitrator Burbidge and attorney Burbidge have been adverse to each other in litigation, and that

Richard Burbidge and George Burbidge have been adverse to each other in litigation. It is also uncontroverted that the Burbidges have no close familial relationship, have no active social relationship, have no business relationship with each other, have no personal connection to each other, do not speak with each other with any regularity, and have no financial relationship of any kind. (R. 5979-5980; 5982; 6076).

There is no applicable relevant standard in Utah law or anywhere which defines a first cousin relationship as de jure substantial. Westgate's attempt to make such an argument relies, not on the UPUAA or on the American Arbitration Association's Code of Ethics (the AAA Canons), but on training materials which list categories of relationships which could lead to vacatur. (Response Brief at 33-34). Westgate seeks to elevate an entry in a training list to binding status, something which the authors of the UPUAA and the AAA Canons did not do. Tellingly, Westgate cites to no court decision from any jurisdiction for support of its argument that a first cousin relationship is per se substantial and disqualifying.

Absent any support for Westgate's position, the trial court's decision cannot be upheld. For a relationship to be 'substantial' there

ought to be some substance to the relationship. When, as here, the relationship consists of first cousins with a 19 year age gap, virtually no personal interaction, no business or financial interaction of any kind, and less of a social relationship than many unrelated attorneys, it is not reasonable or rational to classify that relationship as substantial. Likewise, it is not reasonable or rational to expect a neutral arbitrator to even recognize the relationship as one which must be disclosed.

Second, no reasonable person would consider the relationship between the Burbidges to be likely to affect the impartiality of the arbitrator. The Burbidges' relationship is marked by professional adversarial activities, and a complete lack of familial, social or financial association. Utah Code Ann. § 78B-11-113(1) lists the type of facts which a reasonable person would consider likely to affect the impartiality of the arbitrator: "(a) a financial or personal interest in the outcome of the arbitration proceeding; and (b) an existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceedings, their counsel or representative, a witness, or another arbitrator." Utah Code Ann. § 78B-11-113(1). Although the list is not all inclusive, it is illustrative of the type of relationships which

might trigger the need to disclose. The Burbidge relationship is not similar to any of these factors.

Westgate's argument that the first cousin relationship is an existing relationship ignores the reasonable person requirement of Utah Code Ann. § 78B-11-113(1). The Utah Code does not require that all existing or past relationships must be disclosed, but only that those relationships must be disclosed if a reasonable person would consider those relationships to affect the impartiality of the arbitrator. Westgate does not address what standard is required by the reasonable person.

Courts which have addressed the reasonable person standard generally describe it as an objective standard. For example, the Fourth Circuit has listed four factors relevant to a determination of whether a reasonable person would conclude that the impartiality of the arbitrator could be affected. Those factors are (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he or she is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration

proceeding. *Consolidated Coal Co. v. Local 1643, United Mine Workers of America*, 48 F.3d 125 (4th Cir. 1995). Applying these standards to the Burbidge relationship leads to the conclusion that a reasonable person would not consider it likely to affect the impartiality of Arbitrator Burbidge.

Similarly, Judge Posner, in the Seventh Circuit's decision of *Merit Insurance Co. v. Leatherby Insurance Co.*, found: "the test in this case is not whether the relationship was trivial; it is whether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship between Clifford and Stern was so intimate—personally, socially, professionally, or financially—as to cast serious doubt on Clifford's impartiality." *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 679 (7th Cir. 1983).

In finding the district court erred in vacating the award, Judge Posner observed: "[t]o uphold the district court's vacation of the arbitration award in the absence of actual or probable partiality or corruption would open a new and, we fear, an interminable chapter in the efforts of people who have chosen arbitration and been disappointed in their choice to get the courts—to which they could

have turned in the first instance for resolution of their disputes—to undo the results of their preferred method of dispute resolution.” *Id.* at 682.

The specter of such forum shopping by disappointed parties, as noted by Judge Posner, is no red herring as Westgate conjectures. (Response Brief at 27, n.7). See *Morelite Construction Corp. v. NY City District Council Carpenters Benefit Fund*, 748 F.2d 79, 85 (2nd Cir. 1984); and *Mahnke v. Superior Court*, 180 Cal. App. 4th 565, 579; 103 Cal. Rptr. 3d 197, 206 (2009). This case is also such an example. Westgate does not deny that it did not pursue the obvious similarity between the name of Arbitrator Burbidge and attorney Burbidge until after the decision of award was issued by the arbitration panel.

That is why it is important for this Court to mandate that there be some substance to any relationship before a reasonable person can consider that relationship likely to affect the impartiality of an arbitrator. In this case, no reasonable person could conclude that the existing relationship, such as it is, between Arbitrator Burbidge and attorney George Burbidge, could be likely to affect the impartiality of the arbitrator.

Moreover, attorney George Burbidge is neither a party to the arbitration proceeding nor counsel in the arbitration as contemplated in Utah Code Ann. § 78B-11-113(1). Westgate makes the perplexing argument that attorney George Burbidge should be treated as a party because his firm, acting as CPG's counsel, could collect attorney fees in this matter. (Response Brief at 31). Of course, attorney Burbidge is not a party to this litigation. The term 'party' has a definite meaning which does not include the litigant's counsel, much less another attorney in the law firm representing the litigant. But even the terms were synonymous, attorney Burbidge and arbitrator Burbidge have no relationship which a reasonable person could consider likely to affect the arbitrator's impartiality.¹⁵

CONCLUSION

This Court should find that it has jurisdiction to hear this URAP Rule 5 appeal, and should reverse the vacatur decision of the trial court.

¹⁵ Although not addressed in the Brief of the Appellant, the issue of attorney Burbidge not being a party is properly addressed here since it was first raised by Westgate in its Response Brief. See URAP 24(c) (Reply Brief may respond to new matter set forth in the opposing brief).

Dated this 13th day of October, 2011.

CHRISTENSEN & JENSEN

A handwritten signature in black ink, appearing to be "L. Rich Humphreys", written over a horizontal line.

L. Rich Humphreys

Karra J. Porter

Scot A. Boyd

Alain C. Balmano

Defendants/Appellant

CERTIFICATE OF SERVICE


I hereby certify that two copies of **REPLY BRIEF OF APPELLANT** were mailed to the following this 13th day of October, 2011:

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