DA 22-0700

IN THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF:

JEREMY LOOK, an individual person,

Cross-Claimant and Appellant,

v.

CASEY McGOWAN, MEGAN McGOWAN AND KAREN SPAWN McGOWAN, heirs to an estate,

Appellees.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Ninth Judicial District Court,
Glacier County, Cause No. DV-21-60
The Honorable Robert G. Olson Presiding

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I. STATEMENT OF THE ISSUES

A. The District Court incorrectly determined that Mr. Look materially breached the parties' Third Amendment to their Buy-Sell Agreement because his $100,000 payment would have arrived to the Title Company on Monday morning instead of Friday afternoon, although 1) the object of their contract was for McGowans to sell the Property to Look, 2) Look had substantially performed all essential contract requirements, 3) McGowans would have received not only substantially all of their expected benefit under the contract, but the entire benefit under their contract; finally, 4) Mr. Look has offered to remedy the immaterial breach by completing the transaction, continuously, since July 23, 2021.

B. Specific performance was an equitable remedy included in the Buy-Sell Agreement and available to the District Court to resolve this matter in a way that would have put the parties in the same position they would have been had they fulfilled their obligations to accomplish the object of their contract, on their own.

C. Attorney fees and costs should be awarded to Look on appeal because he was required to initiate this legal action to force McGowans to fulfill the promises they made in the Buy-Sell Agreement.

II. STATEMENT OF THE CASE

Rather than any misuse of the judicial process, this appeal is simply to require McGowans to fulfill the promises they made under their Buy-Sell

Agreement with Mr. Look. Look's bank delivering his $100,000 deposit to the Title Company on Monday morning instead of Friday afternoon was an immaterial breach that does not excuse McGowan's from performing their promises under the Buy-Sell Agreement.

The object of their contract was for McGowans to sell Look the Property for $250,000 cash on a date to be determined. The parties negotiated several versions of the Buy-Sell Agreement and negotiated several closing dates. The negotiation was not formal, with McGowans missing several deadlines, the Title Company asking for extensions, and Mr. Look offering ideas for how to close the transaction, as well.

The final version of their Buy-Sell Agreement required Look to deposit $100,000 by Friday afternoon, July 23, 2021. Look warned McGowans that his bank had a deadline for completing such wire transfers. So, to assure his deposit would arrive on Friday afternoon, McGowans needed to give his sufficient notice. McGowans knew about Look's bank's deadline.

Regardless, McGowans waited to agree to the Third Amendment until after Look's bank's 2:00 PM deadline, suggesting they knew Look's $100,000 deposit would not arrive by Friday afternoon, but they agreed to proceed anyway.

Now, however, McGowans claim that Look's bank delivering his $100,000 deposit to the Title Company on Monday morning, instead of Friday afternoon,

was somehow a material breach that would have harmed McGowans to the point of excusing them from fulfilling the promises they made under the Buy-Sell Agreement. Importantly though, McGowans have never suggested how the delay would have harmed them, at all, let alone substantially.

Look disagrees that his bank delivering his deposit to the Title Company on Monday morning instead of Friday afternoon was a material breach that excuses McGowans' performance.

III. STATEMENT OF THE FACTS

On June 3, 2021 (two days late), McGowans accepted Look's offer to purchase property they inherited but never visited (Property), for $250,000 cash with $5,000 down as earnest money and closing scheduled for July 9, 2021. Look and McGowans signed a standard, pre-printed Buy-Sell Agreement to memorialize their agreement.

On July 6, 2021, First American Title Company (Title Company) asked the parties to delay the closing date from July 9, 2021, to July 21, 2021. *Look's Affidavit* @ (12), *Complaint* page 15 (second amendment). Look had performed all his obligations and was ready to close the transaction. *Id*. But he agreed to the second amendment, because he was committed to working *with* McGowans to execute the material terms of their Agreement. They rescheduled closing for July 21, 2021.

On July 20, 2021, Look contacted his bank to prepare for tomorrow's scheduled closing. He learned that although he *could* transfer the entire sum, if necessary, it would work better to deliver the purchase price in two transfers, instead of one. *Look's Affidavit* @ (14). So later that day, Look asked his realtor to ask McGowans' realtor if they had any objection to extending the closing to August 2, 2021. Later that night, Look's realtor informed him McGowans will agree to extend the closing date until August 2, 2021, if Look could provide proof of funds, wire $100,000 by Friday, July 23, 2023, and sign the closing documents. *Id*. @ (17) (second deposit). Look agreed to McGowan's proposal (Third Amendment), signed it on July 21, 2021, and sent it back to McGowans for their signature.

Look knew the proposal to wire transfer $100,000 by Friday would be a challenge because of the short notice and his bank's deadline for submitting wire transfer requests, particularly if McGowans late notice did not give him enough time to meet his bank's deadline. *Id*. @ (33). But Look was committed to executing the material terms of their Agreement, so he agreed to the Third Amendment and asked his realtor to notify him as soon as McGowan agreed, so he could initiate the transfer. *Id*. @ (33). Look knew that if McGowans notified him they accepted the third amendment early enough in the day, his bank would have time to transfer the money by the end of the day; worst-case-scenario, it would arrive early the following Monday morning. *Id*.

On July 23, 2021, Look awoke early and contacted his realtor to ask if McGowans had agreed to the third amendment, yet. *Id*. Although he showed proof of funds, and had signed the closing documents, his bank has a cut-off time for wire transfers. *Id*. @ (34). He asked if a screenshot of his bank account would suffice to show McGowans his proof of funds, because the money was available, but the bank needs time to execute the transfer. *Id*. And although he is willing to proceed, after McGowans withdrew at the last minute, last time, he must be sure they agree to this proposal before he transfers that much money. *Id*.

But instead of timely notifying Look, McGowans waited until after 2:30pm on July 23, 2021to notify him they accepted the Third Amendment, giving him less than three business hours to transfer the money. *Id*. @ (36). Predictably, McGowans did not leave him enough time to initiate the transfer before his bank's cut-off deadline. *Id*. Shortly after his bank's deadline to submit wire transfer requests expired., Look notified McGowans that they had not left him enough time to complete the transfer this afternoon, but his bank would complete the transfer first thing Monday. *Id*. @ (38).

But instead of accepting Look's $100,000-deposit on Monday morning and completing the deal on August 2, 2021, as they agreed, McGowans realized they had accepted too low of an offer, and now was their chance to get out of this bad deal. *Reply in Support of Motion to Dismiss and Motion for Summary Judgement on*

Crossclaims, P 2.

Although Look had agreed to multiple delays at McGowans request throughout the transaction, and overlooked minor errors and discrepancies throughout the process, this minor delay was a deal-breaker for McGowans. *Motion to Dismiss*. They claimed Look's substantial performance was not good enough. Although they failed to claim how such a short delay would harm they, claimed they could terminate the deal anyway. *Id*.

Look disagreed, but once again, he contacted his bank to pause the wire transfer; assuming this was just one more delay in a transaction filled with them. *Look's Affidavit* @ (39). He emailed the parties to initiate discussion about how to proceed next week. *Id*, But McGowans refused to engage. *Id*. They blamed *Look* for this latest delay, although he had done everything in his power to complete the deal, including forgiving or agreeing to their multiple, sometimes days-long delays and breaches, with everybody working under the same "time is of the essence" clause. Mont. Code Ann. § 28-3-602.

On January 20, 2022, McGowans filed their *Reply in Support of their Motion to Dismiss* (Reply). In it, McGowans admit they made a bad deal and wanted to get out, top of page 2, "The rest of Look's arguments are an attempt at obfuscation to further his desire **to buy this property at a bargain-basement price"**. (Emphasis added).

Even if McGowans think they made a bad deal and want out, they signed a Buy-Sell Agreement with Look. Mont. Code Ann. § 1-3-208. He simply asks the Court to enforce it; to keep them from walking away from the promises they made.

IV. STANDARD OF REVIEW

This Court reviews for clear error a district court's findings of fact. *Pastimes, LLC v. Clavin*, 2012 MT 29, ¶18, 364 Mont. 109, 274 P3d 714. Clear error exists if substantial credible evidence fails to support the findings of fact, if the district court misapprehended the evidence's effect, or if the Court has a definite and firm conviction that the district court made a mistake. *Pastimes, LLC*, ¶ 18. The Court reviews for correctness a district's court's conclusion of law. *Varano v. Hicks, 2012 MT 195*, ¶ 7, 366 Mont. 171, 285 P.3d 592.

V. SUMMARY OF ARGUMENT

The object of the parties' contract is clear and unambiguous: for McGowans to sell Look the Property for $250,000 cash on a date to be agreed upon, August 2, 2021, most recently. Their Buy-Sell Agreement and each Amendment references a provision saying time of the essence. To satisfy that provision, Look had 1) fulfilled all his obligations up until now, 2) signed the Third Amendment on July 21, 2021 (two (2) days before McGowans signed it), 3) provided McGowans proof of his available funds to complete the entire cash purchase, and 4) warned them

that he would agree to deposit $100,000 by Friday, July 23, 2021, but if they did not agree to the Third Amendment before 2:00 PM that day, his bank would refuse to initiate the wire transfer (because of its cutoff time for wire transfers that size). In that case, McGowans would have to accept his $100,000 payment on Monday morning, July 26, 2021, instead of Friday afternoon. McGowans did not suggest that receiving the money on Monday morning instead of Friday afternoon would be a deal killer. Look transferring his $100,000 payment on Monday morning rather than Friday afternoon was not a material breach excusing McGowan's performance.

Because McGowans accepted Look's offer in the Buy-Sell agreement and each amendment, but then, refused to consummate the transaction anticipated by this Agreement within the time provide in the Agreement, Look may demand that McGowans specifically perform their duties and obligations under this agreement. Buy-Sell Agreement, lines 243-250. In other words, McGowans were not excused from fulfilling their obligations because they caused Look to deliver his $100,000-deposit on Monday morning instead of Friday afternoon.

By waiting to notify Look until after 2:00 PM on Friday, July 23, 2021, that they accepted the Third Amendment, McGowans knew his bank did not have enough time to complete the transfer on Friday afternoon. Because of McGowans' late notification, they assumed they could either accept Look's $100,000 on

Monday morning and close the transaction or, claim that he breached their contract so they could terminate it and pursue higher offers.

The District Court incorrectly determined that Look materially breached the parties' Buy-Sell Agreement because although McGowans knew he was ready, willing, and able to deliver both the $100,000-deposit and the rest of the $250,000-cash transaction, they knowingly delayed accepting his offer until they knew it would be too late for him to timely deliver the Deposit. The immaterial beach does not excuse McGowans performance. Had McGowans notified Look of their acceptance an hour or so earlier, Look would have delivered his Deposit, and the transaction would have proceeded. Therefore, this Court issuing an order demanding McGowans specifically perform their obligations under the Buy-Sell Agreement is the appropriate remedy.

VI. ARGUMENT

A. Look Did Not Materially Breach the Contract.

If a party does not comply with a single term in a contract, or amendment to a contract, the non-breaching party is not automatically relieved of its obligations to perform unless that breach is material. *Flaig v. Gramm,* 199. MT 181 ¶25, 295 Mont. 297, 983 P.2d 396. A breach of contract is not material if the breaching party substantially performed all essential contract requirements. *Davidson v. Barstad,* 2019 MT 48, ¶23, 395 Mont. 1, 435 P.3d 640. In other words, a breach is

not material if the non-breaching party has or will substantially receive "the expected benefit of the contract." *Davidson*, ¶23, citing *Stan Clauson Assoc., Inc. v. Coleman Bros. Constr.*, LLC, 297 P.3d 1042, 1045 (Colo. App. 2013). Substantial performance occurs when the breaching party has performed all "major aspects of the contract but has deviated in insignificant particulars that do not detract from the benefit" expected by the non-breaching party had the breaching party "literally performed all "major aspects of the contract but has deviated in insignificant particulars that do not detract from the benefit" expected from the non-breaching party had the breaching party "literally performed." *Davidson*, ¶ 23. The doctrine of "substantial performance" saves a party who has largely fulfilled their obligations under a contract from suffering major loss merely because they have unintentionally fallen short in some small way that does not affect the essence of the contract.

A "'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract." Davidson, ¶ 23. A material breach is a breach that "touches the fundamental purpose of the contract and defeats the object of the parties in making the contract." *Flaig*, ¶ 25. Mont. Code Ann. § 28-2-601.

This Court has held that a party's consideration fails when that party's failure to perform was material to the contract. *Norwood v. Service Distributing,*

Inc., 2000 MT 4, ¶ 33, 297 Mont. 473, ¶ 33, 994 P.2d 25, ¶ 33. Furthermore, a party's material failure to perform must actually damage the party claiming the right to rescind. *Norwood*, ¶ 26. A non-material breach does not relieve the non-breaching party from performance but merely entitles the party to enforce the contract at law or in equity. *Norwood*, ¶¶ 29-32; see also, *Restatement (Second of Contracts*, § 229 (1981) (non-occurrence of a condition of performance does not forfeit reciprocal performance of other party unless material to the agreement).

In other words, a party is not automatically excused from further performance of their contract obligations if the other party commits a breach; if the breach is relatively minor and not of the essence, the non-breaching party is still bound by the contract and may not abandon performance. *Estate of Gleason v. Central Life Ins. Co.*, 2015 MT 140, 379 Mont. 219, 350 P.3d 349 (2015) (generally, a non-breaching party must continue to perform its obligations under a contract unless the breach was material to the contract.). See also *Flaig*, ¶ 25 ("[F]or a breach to justify the non-breaching party's suspending performance, the breach must be significant enough to amount to the nonoccurrence of a constructive condition of exchange") (quoting E. Allan Farnsworth, Contracts § 8.16, at 611 (1982). In fact, some courts define a "breach of contract" as a "material failure of performance" of a duty arising under or imposed by an agreement. *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). In

other words, for a breach of contract to be material, it must go to the root or essence of the agreement between the parties or be one that touches the fundamental purpose of the contract and defeats the object of the parties in entering the contract, see *Flaig*, ¶ 25.

When a breach which goes to only part of the consideration or is incidental and subordinate to the main purpose of the contract, . . .; the non-breaching party is still bound to perform their part of the agreement, and their only remedy for the breach consists of the damages they have suffered. A rescission is not warranted by a mere breach of contract not so substantial and fundamental as to defeat the object of the parties in making the agreement. *Cady v. Burton*, 257 Mont. 529, 538, 851 P.2d 1047, 1053 (1993).

If the breach is non-material, the non-breaching party can sue only for partial breach, cannot stop further performance by the breaching party, and must perform the remainder of their own contact obligations. *First Interstate Bank of Idaho v. Small Bus. Admin.*, 868 F.2d 340, 345 (9th Cir. 1989) (explaining material breach as one in which the bargained-for objective was defeated); see *Norwood*, ¶ 34.

A failure of "part" of a promised performance may warrant rescission, but only if the claiming party adequately proves that the deficient "part" of the other party's performance was in fact material to the contract. See *Norwood*, ¶ 34. If the

failure to perform was not material, however, the remedy of rescission is not available, and performance cannot be excused. *Norwood*, ¶ 34.

In determining whether a failure to perform is material, the following circumstances are significant:

(a) the extent to which the non-breaching party will be deprived of the benefit which they reasonably expected;

(b) the extent to which the non-breaching party can be adequately compensated for the part of that benefit of which they will be deprived;

(c) the extent to which the breaching party will suffer forfeiture;

(d) the likelihood that the party failing to perform will cure their failure, taking account of all the circumstances including any reasonable assurances; and,

(e) the extent to which the behavior of the party failing to perform or offers to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981).

In this case,

(a) McGowans would not have been deprived of the benefit which they reasonably expected if the Title Company would have received Look's deposit on Monday instead of Friday afternoon, particularly, because:

1) Look provided McGowans with proof that he had three-hundred twenty-one thousand, eight hundred seventy-eight dollars and forty-three cents ($321,878.43) available to complete this transaction; more than enough

to purchase the property and cover any fees he would have been responsible for.

2) McGowans knew Look would not have enough time in the day to complete the transfer of his Deposit unless they notified him they agreed to the Third Amendment early enough. Regardless of that knowledge, McGowans proceeded with the transaction by notifying Look that they agreed to the Third Amendment after his bank's cut-off time to complete such transfers; and,

3) Critically, whether Look delivered his deposit on Monday morning or Friday afternoon, McGowans would not have received any of that money, anyhow. Look's Deposit was to go in the Title Company's escrow account until closing; it was not going to McGowans on Friday, July 23, 2021, even if they had given Look enough time. McGowans suffered no loss.

(b) As explained above, McGowans can be adequately compensated for the part of that benefit of which they were (not) deprived, because they suffered no loss.

1) McGowans knew that delaying their acceptance of the Third Amendment would cause Look to deliver his Deposit to the Title on Monday instead of Friday.

2) McGowans would not have received any of Look's Deposit on Friday, July 23, 2001, even if they had given him enough time to complete the deposit.

3) McGowans have not even suggested how they would have been damaged because of the Title Company receiving Look's Deposit on Monday morning instead of Friday afternoon.

(c) The extent to which Look has suffered forfeiture – in terms of time (more than two years now) and money (tens of thousands of dollars in attorney's fees, so far), not to mention the stress associated with litigation, and the potential from losing his dream property – is immense:

1) Instead of completing the transaction ten (10) days later as the Third Amendment contemplated and having the parties go their own way, McGowans claimed that delivering his money to the title company on Monday morning instead of Friday afternoon was a deal killer, Look first sought to negotiate with McGowans through his realtor to just complete the transaction, as they all had agreed upon for the past three (3) months.

2) Next, after McGowans refused to complete the transaction they agreed to – apparently to pursue higher offers – Look had to defend himself against the Title Company's interpleader action – to determine how to disburse Look's five-thousand dollar ($5,000)-earnest money deposit.

3) Then, because Look unfairly lost the interpleader action on a preliminary motion with no discovery or other fact investigation, he next had to appeal that decision to this court.

(d) Throughout this transaction, Look has comported himself with standards of good faith and fair dealing. He has endeavored to simply write McGowans a check to purchase the property they agreed to sell him.

1) He consistently and timely performed his duties under the Agreement, within his control.

2) He consistently and timely communicated with McGowans about the Agreement through his realtor.

3) Look notified his realtor, who notified McGowans' realtor, that he agreed to the Third Amendment on July 21, 2023, and is prepared to complete the transfer of his Deposit as soon as McGowans agreed to the Third Amendment. But he warned them, the earlier McGowans notify him they agree to the Third Amendment, the less everybody must worry about timing.

4) As soon as he received notification that McGowans agreed to the Third Amendment, Look instructed his bank to transfer his Deposit.

Unfortunately, they were late. McGowans notified Look at about 2:30 PM that they agreed to the Third Amendment. As soon as Look learned about their

agreement, he instructed his bank to initiate the transfer of his Deposit. But they missed the cut-off time by one-half hour.

As a result, in their Response brief, McGowans represented to the Court over thirty times, that the one-half hour delay *that McGowans caused*, which would have resulted in no damage to them because the Title Company would have received his Deposit on Monday morning instead Friday afternoon, was somehow a material breach that would have prevented the parties from accomplishing the object of their contract: for McGowans to sell the Property to Look on August 2, 2021. Look respectfully requests that the Court agree that McGowans would not have been damaged.

Although Look did everything possible to facilitate the transaction under each version of their Agreement, including this Third Amendment, McGowans withheld notifying Look about their acceptance until late on July 23rd; so late that it was too late. The delay was not his fault, did not damage McGowans, and was not material. Therefore, specific performance exists to remedy the matter and put the parties in the place they would have been had they both fulfilled their obligations.

B. The District Court incorrectly determined Look is not entitled to specific performance of the Buy-Sell Agreement as an equitable remedy.

Mont. Code Ann. 27-1-411 allows for specific performance when: . . . (2) the act to be done is such that pecuniary compensation for its nonperformance

would not afford adequate relief; (3) it would be extremely difficult to ascertain the actual damages caused by the nonperformance of the act to be done; or (4) it has been expressly agreed in writing, between the parties to the contact, that specific performance thereof may be required by either party or that damages shall not be considered adequate relief.

Mont. Code Ann. 27-1-416 prevents specific performance, "except when the nonperforming party's failure to perform is only partial and either entirely immaterial or capable of being fully compensated, in which case specific performance may be compelled upon full compensation being made for the default."

In interpreting this, and associated laws, Courts in general, look to substance over form. §1-3-219, MCA, *Hoffmann v. George*, 267 Mont. 292, 883 P.2d 826. Normally, the conditions of a contract which can be instantly performed are to be performed upon the signing of the contract unless otherwise specifically stated, see § 28-3-601, MCA. *Id.* However, "There is no dispute that the equitable remedy of specific performance may be had on a valid contract or the purchase and sale of real property. § 27-1-411(2), MCA." *Id.*^

This Court has held that specific performance is an equitable remedy and is a matter of discretion for the trial Court. *Baker v. Berger*, 873 P.2d 940, *Larson v. Undem* (1990), 246 Mont. 336, 805 P.2d 1318. Specific performance is an

appropriate remedy where "the act to be done is such that pecuniary compensation for its nonperformance would not afford adequate relief." Section 27-1-411(2), MCA.

In this case, because the subject of this conflict is an immaterial breach of contract related to real estate, pecuniary compensation would not afford adequate relief; it would be extremely, if not impossible to measure Look's actual damages caused by McGowans's non-performance; and, most-importantly, the parties recognized the challenges in measuring damages, so they included specific language in their Buy Sell Agreement to address it:

> "BUYER'S REMEDIES, ". . . (B) If the Seller accepts the offer contained in this Agreement, but refuses or neglects to consummate the transaction anticipated by this Agreement within the time period provided in this Agreement, the Buyer may: . . .(2) Demand that Seller specifically perform Seller's obligation under this Agreement . . ."

C. Look should be awarded his attorney's fees and costs on appeal pursuant to the Agreement.

When a contract contains an attorneys' fees provision, the prevailing party is entitled to its attorney's fees on appeal. *Boyne USA, Inc. v. Lone Moose Meadows, LLC*, 2010 MT 133¶ 26, 356 Mont. 408, 235 P.3d 11269. The Buy-Sell Agreement in this transaction contains an attorney's fees provision and the District Court incorrectly awarded McGowans their attorney's fees. Buy-Sell Agreement, lines 300-302. This court should reverse the District Court and award Look his

attorneys' and costs of appeal. *Gibson v. Paramound Homes*, 2021 MT 112 ¶ 21, 360 Mont. 421, 253 P.3d 903 ("When entitlement to costs and attorney fee arises from contract, that entitlement includes costs and attorney' fees on appeal")

VII. CONCLUSION

The Object of their contract was for McGowans to sell the Property to Look for $250,000 cash at a time to be determined. Even if McGowans later found a buyer who was willing to pay more for the Property, McGowans had already made a deal with Look. Because McGowans had already made a promise to sell the Property to Look, the Court should enforce that promise by requiring the parties to specifically perform their obligations under the Buy-Sell Agreement. And because this legal action was required to force McGowans to keep their promise, Look respectfully requests the Court award him his reasonable attorney's fees and costs.

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11, 12, & 13 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief of Appellant is printed with proportionately spaced Times New Roman typeface of 14-point font; is double spaced except for lengthy quotations or footnotes and for quoted and indented material; and the word count calculated by Microsoft Word 2023 for Apple does not exceed 5,000 words, i.e., 4,484 words, excluding the table of contents, table of authorities, certificate of service, and certificate of compliance.

Dated this 3rd day of July 2023.

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CERTIFICATE OF SERVICE

I, Mark Jette, hereby certify that I have served true and accurate copies of the foregoing Appellant's Reply Brief to the following on this 3rd day of July 2023:

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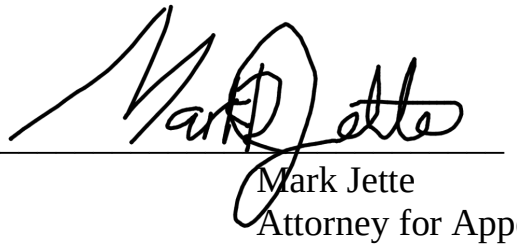

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