IN THE
COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2006

NO. 110

Montgomery Mutual Insurance Company,

Petitioner,

v.

Josephine Chesson, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

REPLY BRIEF OF *AMICI CURIAE*, MARYLAND DEFENSE COUNSEL, INC., NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE NATIONAL MULTI HOUSING COUNCIL

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I. THE UNDISPUTED STATE OF THE ART ESTABLISHES THAT DR. SHOEMAKER'S NOVEL TECHNIQUES AND DIAGNOSES ARE NOT GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY.

As demonstrated in Amici's opening brief, the current state of the generally accepted science in cases of indoor mold exposure is set forth in *Damp Indoor Spaces and Health* by the Institute of Medicine of the National Academy of Sciences ("IOM Report"). Neither Appellees nor Amicus Curiae, Maryland Trial Lawyers Association (collectively, "Appellees") dispute that the IOM Report is the generally accepted state of the art related to mold exposure. Nor could they.

The Centers for Disease Control and Prevention, precisely in order to determine areas of consensus in the scientific community, asked the Institute of Medicine ("IOM") of the National Academy of Sciences to convene a committee of experts to "conduct a comprehensive review of the scientific literature regarding the relationship between damp or moldy indoor environments and the manifestation of adverse health effects...." INSTITUTE OF MEDICINE, COMMITTEE ON DAMP INDOOR SPACES AND HEALTH, *Damp Indoor Spaces and Health*, Washington D.C.: National Academies Press (2004) at 2 (E-257).[1] After reviewing hundreds of tests, studies, reports and papers, the IOM Report concluded that only a limited set of human health effects were generally accepted to be attributable to indoor mold exposure and only a certain set of diagnostic techniques were generally accepted as reliable for that purpose. Neither Dr. Shoemaker's novel diagnoses nor his novel diagnostic techniques are included. It is no wonder then that both Appellees and Amicus chose to ignore this 355-page state of the art report.

The IOM Report remains the most exhaustive and comprehensive review of the human health effects resulting from indoor mold exposure and, consequently, represents the current standard by which to judge whether techniques and diagnoses are generally accepted in the relevant scientific community. *See* Centers for Disease Control and

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[1] As noted in Amici's Brief, the IOM Report was attached in full in the Appendix to Petitioner's Brief that was submitted in the Court of Special Appeals. References to the IOM Report as provided in Petitioner's Appendix shall be cited as (E-___).

Prevention, Morbidity and Mortality Weekly Report, *Mold Preventions Strategies and Possible Health Effects in the Aftermath of Hurricanes and Major Floods*, at 12 (June 9, 2006)(stating that the IOM Report "remains the most current and authoritative source of information on this subject.")(attached as Exhibit E to Amici's Brief). The IOM Report has taken conflicting studies and reports and has distilled what techniques and human health effects are generally accepted by the relevant scientific community. The IOM Report is exactly the type of nationally recognized, scientific publication that is appropriate for this Court to take judicial notice of its reliability. *See* Md. R. 5-201(b)(stating, "A judicially noticed fact must be one not subject to reasonable dispute that is...capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.").

As demonstrated in Amici's Brief, The IOM Report concluded that only a limited set of human health outcomes could be associated with mold exposure or damp building environments, including upper respiratory tract symptoms, asthma attacks triggered in persons with pre-existing asthma, hypersensitivity pneumonitis, wheeze and cough. The IOM Report also concluded that there was not enough evidence to support an association between any toxic effects and exposure to mold or damp buildings. *Id.* at 254 (E-508). Although Appellees would have this Court accept Dr. Shoemaker's opinion that "sick building syndrome" is a disease (App. Brief at 1) or that mold is "toxic" (App. Brief at 12), these assertions are not generally accepted in the relevant scientific community. The IOM Report did not recognize "sick building syndrome" or Dr. Shoemaker's "biotoxin-associated illness" as possible clinical diagnoses. To the contrary, the IOM Report specifically determined that "sick building syndrome" lacks consistent diagnostic criteria and is more appropriately considered a "term used to describe a combination of nonspecific symptoms." *Id.* at 250 (E-504). The term "biotoxin-associated illness" was never referenced – demonstrating that the diagnosis not only lacks generally acceptance in the relevant scientific community, but that it was not even considered as an emerging alternative, even if as yet unaccepted, diagnosis.

The IOM Report also conducted an exhaustive review of diagnostic and exposure assessment techniques used to diagnose alleged mold-related health claims. *See id.* at 90-124 (E-374 – E-378) (identifying and assessing diagnostic and exposure-assessment techniques). Again, the absence of any reference to Dr. Shoemaker's VCS test and CSM treatment demonstrates that his diagnostic techniques are not generally accepted techniques for diagnosing mold-related illness. The use of these techniques for this purpose is unique to Dr. Shoemaker.

Appellees fail to offer any critique or countervailing arguments to the research, analyses and conclusions of the IOM Report. Appellees instead focus solely on critiquing the authors of position papers published by the American Academy of Allergy, Asthma and Immunology ("AAAAI") and the American College of Occupational and Environmental Medicine ("ACOEM"). See MTLA Brief at 5-11. These ad hominem attacks provide no evidence that Dr. Shoemaker's reliance on VCS tests and CSM treatment or his diagnoses of "sick building syndrome" or "biotoxin associated illness" are generally accepted in the relevant scientific community.

II. THE PROPER STANDARD OF REVIEW REGARDING APPLICATION OF *FRYE-REED* IS *DE NOVO*, NOT ABUSE OF DISCRETION.

Appellees incorrectly assert that the Court's review is limited to whether the trial court abused its discretion in refusing to apply *Frye*-Reed to Dr. Shoemaker's testimony. Although the admissibility of expert testimony is a matter generally committed to the discretion of the trial court, appellate review of a trial court's decision regarding admissibility under *Frye-Reed* is *de novo*, not abuse of discretion. *Clemons v. State*, 392 Md. 339, 359, 896 A.2d 1059, 1071 (2006)(*citing Wilson v. State*, 370 Md. 191, 201 n. 5, 803 A.2d 1034, 1040 n.5 (2002)). Prior to exercising discretion to admit novel expert testimony, the court must first determine that the testimony at issue is reliable as a matter of law. *Wilson*, 370 Md. at 201, 803 A.2d at 1039. In *Wilson*, this Court held that the admissibility of novel expert testimony, even in the absence of a *Frye-Reed* hearing, was subject to *de novo* review. *Id.* This Court's *de novo* review is "not limited to the information contained in the record and [the Court] can and should take judicial notice of law journal articles, articles from reliable sources in scientific journals and other publications bearing on the acceptance by recognized experts that a particular process has achieved." *Clemons,* 392 Md. at 359, 896 A.2d at 1071 (internal citations removed). Under *Frye-Reed*, Dr. Shoemaker's novel techniques and diagnoses based upon those techniques must be subjected to the *de novo* review of this Court.

An abuse of discretion standard of review would never be appropriate for the threshold *Frye-Reed* determination. Under the abuse of discretion standard, as the Court of Special Appeals has explained, the appellate court could be "dealing with that 80% bulge of the bell-shaped curve wherein the trial judge, within her discretion, could have gone either way and still been affirmed." *CSX Transp. v. Miller*, 159 Md. App. at 198; 858 A.2d at 1068-69 (analyzing review of the trial court's decision in *Wood v. Toyota*, 143 Md. App. 512, 760 A.2d 315 (2000)). This Court, to the contrary, has provided that inconsistent rulings on the reliability of novel scientific techniques or processes and opinions based on those techniques and processes "would be intolerable." *Reed v. State*, 283 Md. 374, 388, 391 A.2d 364, 371 (1978). This problem is avoided by vigorous and consistent applications of the *Frye-Reed* test, which ensures that "[a]s long as the scientific community remains significantly divided, results of controversial techniques will not be admitted and all [litigants] will face the same burdens." *Id.* The abuse of discretion standard may apply to other determinations regarding the admissibility of expert testimony under Maryland Rule 5-702 (e.g., assistance to the trier of fact, whether the witness is qualified, the appropriateness of the expert, etc.), but only after the threshold *Frye-Reed* analysis for novel scientific evidence is satisfied.

III. THE CORRECT APPLICATION OF *FRYE-REED* DEMANDS THE EXCLUSION OF DR. SHOEMAKER'S TESTIMONY OR, IN THE ALTERNATIVE, A *FRYE-REED* HEARING TO DETERMINE WHETHER HIS TESTIMONY IS RELIABLE.

In this case, the Court of Special Appeals, relying solely upon its own precedents, crafted two exceptions to the *Frye-Reed* inquiry to justify the admission of

Dr. Shoemaker's novel medical testimony: (1) that expert opinions based in part upon generally accepted practices were not subject to the *Frye-Reed* inquiry and (2) that expert opinions concerning the cause or origin of an individual's condition are not subject to *Frye-Reed* at all. *See* Brief of Amici Curiae at 25. Appellees rely heavily on these exceptions to avoid the application of the *Frye-Reed* inquiry here, but do not attempt to reconcile these exceptions with this Court's *Frye-Reed* case law.

Appellees concede *Frye-Reed* is the standard for determining the reliability of novel scientific evidence offered at trial. *Reed v. State*, 283 Md. 374, 381, 391 A.2d 364, 368 (1978). In adopting the *Frye* standard, this Court held that both novel techniques and opinions based upon novel techniques are equally subject to the "general acceptance" standard. *Id.* at 388, 391 A.2d at 371. This Court has further established the *Frye-Reed* inquiry must be applied unless the trial court's judicial notice can establish the reliability, or not, of scientific testimony based upon novel scientific techniques and methodologies. *See Wilson v. State*, 370 Md. 191, 201803 A.2d 1034, 1039-40 (2002); *see also Clemons*, 392 Md. at 364, 896 A.2d at 1073. There is no support in this Court's rulings for the Court of Special Appeals' general exceptions to the *Frye-Reed* rule.

A. Novel Scientific Evidence Based "In Part" on Non-Novel Techniques from Frye-Reed Analysis.

Appellees assert that *Clemons v. State* is not instructive to the application of *Frye-Reed* in this case. MTLA at 24. To the contrary, this Court's most recent analysis of the application of *Frye-Reed* in Maryland courts is highly instructive in this matter. In *Clemons*, this Court excluded expert testimony based on comparative bullet lead analysis ("CBLA") because there was a lack of general acceptance of the process in the scientific testimony. *Clemons*, 392 Md. at 371, 896 A.2d at 1078. Importantly, in *Clemons*, the issue was not the admissibility of the tests themselves, it was the admissibility of the expert opinion testimony based upon CBLA evidence. In determining admissibility of the expert's testimony under *Frye-Reed*, the Court conducted an extensive *de novo* review of multiple academic and forensic journals, commission reports and studies, and judicial decisions excluding CBLA evidence. *Id.* at 364-71, 896 A.2d at 1074-78. The Court, citing contradictions in the scientific literature, excluded the expert opinion testimony in *Clemons* "because several, but not all, of the fundamental assumptions underlying the expert's testimony [were] not generally accepted by the relevant scientific community." *Id.* at 372, 896 A.2d at 1079.

The *Clemons* case serves as a model for the *Frye-Reed* analysis in Maryland courts. The *Clemons* opinion is instructive on the method of reviewing novel scientific testimony, and on the threshold determination of general acceptance that serves as the basis for excluding novel scientific expert testimony. Under *Clemons*, when a review of the relevant scientific evidence demonstrates an ongoing debate in the relevant scientific community regarding the fundamental assumptions underlying an expert's testimony, that expert testimony must be excluded under *Frye-Reed.* Moreover, the *Clemons* decision established that the novel scientific techniques underlying an expert's opinion cannot be immunized from *Frye-Reed* analysis by the expert's simultaneous reliance upon other generally accepted scientific techniques. If some, but not all, of the fundamental assumptions underlying an expert's testimony are not generally accepted by the relevant scientific community, then that expert's testimony should be excluded under *Frye-Reed* – regardless of whether the expert employs some generally accepted techniques.

B. Expert Medical Causation Testimony Is Equally Subject to *Frye-Reed* Scrutiny.

Appellees, like the Court of Special Appeals, attempt to rely on *CSX Transportation, Inc. v. Donald E. Miller*, 159 Md. App. 123, 858 A.2d 1025 (2004), *cert. dismissed, CSX Transp., Inc. v. Miller*, 387 Md. 351 (2005) and *Myers v. Celotex Corporation, et al.*, 88 Md. App. 442, 594 A.2d 1248 (1991), *cert. denied, Fibreboard Corp. v. Myers*, 325 Md. 249 (1992) to establish a general exception for expert medical causation opinions. Neither *Miller* nor *Myers* creates this general exception or is otherwise instructive on the application of *Frye-Reed* in this matter.

In *Myers*, the Court of Special Appeals reversed the trial court, holding that the plaintiff's expert should have been permitted to state his opinion as to how asbestos fibers cause cancer. *Myers*, 88 Md. App. at 455, 594 A.2d at 1255. The *Myers* court did not hold that *Frye-Reed* did not apply to medical causation expert generally; the court held that *Frye-Reed* did not apply in that case because the doctor did not provide a novel or controversial assertion (i.e., exposure to asbestos can cause cancer) and this non-novel assertion was arrived at by non-novel techniques. *Id.* at 458, 594 A.2d at 1256. Defendants sought to challenge testimony on *how* asbestos causes cancer, but the court provided that this challenge was irrelevant because the jury was charged with "*whether* the decedents' cancer was the result of asbestos exposure," not how. *Id.* at 459, 594 A.2d at 1257 (emphasis in original). *Frye-Reed*, therefore, did not apply because the only novel part of the expert's testimony challenges was not at issue. Conversely, here, Dr. Shoemaker's admittedly novel diagnoses and techniques are central to the claimants' right to recover and thus require application of *Frye-Reed.*

In their opening brief, Amici cited *Aventis v. Skevofilax* for the proposition that this Court did not recognize any sweeping exception of all medical expert causation opinions from *Frye-Reed* analysis. *See* Brief of Amici Curiae at 27-28. Appellees do not dispute this point, but instead seek to distinguish Dr. Shoemaker's opinion factually from the opinion at issue in *Aventis.* MTLA 22-23. In *Aventis*, this Court provided that in the absence of peer-reviewed scientific publications supporting a link between genetic polymorphisms and autism, the medical expert's causation opinion would have faced a "daunting hurdle" under the *Frye-Reed* standard. *Aventis v. Skevofilax*, -- Md.--, 2007 WL 49659, *21 n. 18 (2007). This Court's precedents confirm that expert medical causation opinions are not inherently excluded from *Frye-Reed* scrutiny under this Court's *Frye-Reed* jurisprudence.

Appellees cite *Riley v. USAA*, 161 Md. App. 573, 871 A.2d 599 (2005), in which the Court of Special Appeals, explaining *Myers,* stated "the fact that an expert's medical opinion is not generally accepted by the medical community does not stand as an *automatic* bar to its admissibility." *Id.* at 585-86, 871 A.2d at 606-07 (2005)(emphasis added). The *Riley* panel's explanation of *Myers* is inconsistent with the broad gloss applied by the panel below and suggests that the novelty of the medical causation opinion, while not an "automatic bar" to admissibility, is indeed a consideration in determining whether an expert's medical opinion could be justifiably barred. Thus, it would appear that panel opinions of the Court of Special Appeals are inconsistent on whether, expert medical causation opinions have or have not been *per se* eliminated from *Frye-Reed* scrutiny.

Significantly, in justifying the admission of the expert in *Myers*, the *Riley* court noted, "We were careful to add, in that case, that the challenged expert's opinion, while not generally accepted, was also not uniquely held by that expert alone." *Riley*, 161 Md. App. at 586, 871 A.2d at 606. The court's reasoning further suggests that if the medical expert's opinion was in fact "unique" that it could have been properly considered for exclusion under *Frye-Reed*. Here, Dr. Shoemaker's diagnoses of "biotoxin associated illness" – of which he considers "sick building syndrome" a subset – is in fact "unique" and is based upon the application of multiple novel tests and diagnostic techniques unique to his practice. As a unique medical causation opinion, Dr. Shoemaker's opinion could have been subject to *Frye-Reed* even under the principles espoused in *Myers* as more fully explained in *Riley*. The Court of Special Appeals' panel opinion in this matter, therefore, provides a conflicting interpretation of the possibility of *Frye-Reed's* application to medical causation testimony to that set out in *Riley*.

The Court of Special Appeals opinion in *CSX Transp., Inc. v. Miller* also fails to justify the lack of *Frye-Reed* scrutiny to Dr. Shoemaker's novel scientific testimony. In *Miller*, the medical expert opined as to the etiology of a patient's developing arthritis from walking on large "ballast" stones over a long period of time in a railyard. *Miller*, 159 Md. App. at 187, 858 A.2d at 1062. The Court found that the doctor employed a medical and general ergonomic analysis of stresses and strains that may cause long-term injury to the human body. *Id.* Because the medical diagnosis of arthritis resulting from physical strain caused by difficult walking conditions is not a novel or controversial assertion and no novel tests or techniques were employed in reaching that diagnosis, *Frye-Reed* did not apply. Thus, *Frye-Reed* was found not to apply, not because the causation opinion of the expert was at issue, but because there was nothing novel about the opinion or techniques employed. Here, again, Dr. Shoemaker's novel diagnoses and the use of multiple novel techniques unique to his practice are distinguishable from the expert whose non-novel opinion and techniques were challenged in *Miller*. *Miller*, therefore, is not instructive in determining the application of the *Frye-Reed* analysis to Dr. Shoemaker's novel techniques and diagnoses.

Appellees, like the Court of Special Appeals, rely nearly exclusively on *Myers* and *Miller* to craft a general exemption from *Frye-Reed* for medical experts. Not only is this exemption not supported by the holdings in these cases; this exemption is inconsistent with the adoption of the *Frye* test in Maryland and this Court's *Frye-Reed* jurisprudence. The *Frye-Reed* inquiry must be applied unless the trial court's judicial notice can establish the reliability, or not, of scientific testimony based upon novel scientific techniques and methodologies – regardless of the nature of the expert's testimony. This Court has not adopted a blanket exemption for novel medical causation opinions. In fact, this Court has provided that novel medical causation opinions are not per se exempt from the evidentiary hurdle imposed by *Frye-Reed.* Dr. Shoemaker's novel techniques and diagnoses, therefore, are properly subject to the *Frye-Reed* analysis.

IV. APPELLANT NEITHER REQUESTED THIS COURT ADOPT *DAUBERT* NOR THAT IT REQUIRE A *FRYE*-REED HEARING IN EVERY CASE.

Appellees incorrectly assert that Appellant asks this Court to "institute *Daubert* proceedings in all cases involving expert testimony." MTLA Brief at 27. At no point has Appellant asked this Court to employ *Daubert* or even a *Daubert*-like analysis. Appellant has only asked this Court to apply the principles of its *Frye-Reed* jurisprudence.

Appellees similarly mischaracterize Appellant's arguments as requesting "that expert opinion and in particular medical opinion be subject to a hearing in every case to determine the so-called validity of that physician's opinions." MTLA Brief at 2.

Appellant makes no such request. To the contrary, Appellant requests that the *Frye-Reed* inquiry – specifically adopted to govern the admissibility of novel scientific testimony – be applied to experts, medical or otherwise, that rely upon novel scientific techniques and opinions. Appellant's request will not have the expansive effect of subjecting all physician opinions to a *Frye-Reed* analysis.

V. APPELLEES IGNORE *FRYE* PRECEDENT AND SEEK SUPPORT IN A *DAUBERT* RULING.

Appellees fail to address the application of the *Frye* analysis to expert medical causation opinions in the indoor mold context in *Fraser, et al. v. 301-52 Townhouse Corp., et al.* 2006 NY Slip Op. 51855(U). *See* Exhibit M to Brief of Amici Curiae. This Court, under its *de novo* review, can look to such other judicial opinions that have considered similar questions. *See Clemons*, 392 Md. at 364, 896 A.2d at 1074 (*quoting Wilson*, 370 Md. at 201 n. 5, 803 A.2d at 1040 n.5). In *Fraser*, the New York trial court held a *Frye* hearing to consider whether plaintiffs' claims of numerous injuries resulting from inhalational mold exposure were accepted in the relevant scientific community. After an exhaustive review of articles, books, reports and position statements, the New York court concluded that scientific research had not established support for plaintiffs' alleged injuries and excluded scientific testimony attempting to link the plaintiffs' alleged injuries with mold exposure. *See* Exhibit M at 5. This case serves as a recent example of a proper application of *Frye* to the mold exposure and injury claims currently before this Court.

Instead of addressing the *Fraser* opinion, Appellees directed this Court to *Chapin v. A&K Parts, Inc.*, a Michigan case applying the *Daubert* standard to determine the admissibility of an expert medical causation opinion in an asbestos malignancy case. MTLA Brief at 25. At issue in that case were competing opinions as to the significance of epidemiological studies. This case is wholly inapplicable here. First, the court employed the *Daubert* standard in determining the threshold inquiry on admissibility. Second, as the Court of Special Appeals found in the *Myers* case noted above, testimony regarding the admissibility of medical opinions relating asbestos to cancer is not the type of novel diagnosis that triggers the *Frye-Reed* standard.

VI. APPELLANT DOES NOT CONTEST DR. SHOEMAKER'S QUALIFICATIONS, BUT HAS DEMONSTRATED THAT HIS NOVEL TECHNIQUES AND DIAGNOSES ARE NOT GENERALLY ACCEPTED IN THE RELEVANT SCIENTIFIC COMMUNITY.

Appellees recite at length Dr. Shoemaker's alleged experience and qualifications to support the admission of his testimony in this matter. *See* Brief of MTLA at 11-17. This approach, however, is a distraction from the issues relevant to this Court's *Frye-Reed* determination in this matter and confuses the requirements of an expert's qualifications with the admissibility of novel expert testimony under Md. Rule 5-702. Appellees' extensive recital of Dr. Shoemaker's education, publications, lectures, and testimony goes to whether he is "qualified as an expert by knowledge, skill, experience, training, or education" under Md. Rule 5-702(1). Dr. Shoemaker's qualifications as an expert, however, are not at issue in this matter.

Similarly, Appellees assert that Dr. Shoemaker has been called upon fifty-seven times to testify as an expert, but list less than a dozen cases and fail to present the substance of Dr. Shoemaker's testimony, the nature of the testimony, and whether Dr. Shoemaker's testimony was subject to an admissibility challenge. All of that is beside the point. Testifying in other matters does not render an expert's opinion "generally accepted in the relevant scientific community."

Here, the challenge to the admissibility of Dr. Shoemaker's novel scientific testimony is "whether a sufficient factual basis exists to support the expert testimony" under Md. Rule 5-702(3). It is under Md. Rule 5-702(3) that the Maryland courts apply the *Frye-Reed* analysis to novel scientific testimony. Dr. Shoemaker's publications, speaking engagements, and testimony do not pertain to the *Frye-Reed* analysis unless they establish that his admittedly novel techniques and opinions are generally accepted in the relevant scientific community.

Appellees cite no reports, presentations, books or other publications, other than Dr. Shoemaker's own, demonstrating that his novel techniques and diagnoses are generally accepted in the relevant scientific community. Dr. Shoemaker himself is unable to cite to any published literature relying on his novel techniques and diagnoses. *See* Exhibit B to Brief of Amici Curiae at 23. Dr. Shoemaker has also testified that he is unaware of any doctors, hospitals or institutions employing his tests, techniques and diagnosis. *See id.* at 30-31. No one else in the relevant scientific community relies on Dr. Shoemaker's novel techniques or diagnoses to assess and treat human health effects associated with inhalational mold exposure. In the face of an utter lack of any affirmative evidence establishing that Dr. Shoemaker's novel techniques and diagnoses are generally accepted in the relevant scientific community, Dr. Shoemaker's testimony should be excluded under *Frye-Reed*, or, at the very least subject to a *Frye-Reed* hearing.

CONCLUSION

Appellees and Amicus Curiae MTLA have failed to provide any substantive support establishing that Dr. Shoemaker's novel techniques and diagnoses are generally accepted in the relevant scientific community. The *de novo* application of *Frye-Reed* here supports the exclusion of Dr. Shoemaker's testimony or, at the very least, remand for a *Frye-Reed* hearing by the Circuit Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of March, 2007, copies of the foregoing Motion of Amicus Curiae were sent by first-class mail to:

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