State of New Hampshire
Supreme Court

NO. 2011-0216

2012 TERM

MARCH SESSION

In the Matter of Steven R. Cotran and Diane M. Cotran

RULE 7 APPEAL OF FINAL DECISION OF
MANCHESTER FAMILY DIVISION

BRIEF OF PETITIONER/APPELLANT STEVEN COTRAN

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Steven Cotran and Diane Cotran[1] got divorced by joint petition in 2006. JOINT PETITION FOR DIVORCE (Feb. 15, 2006), *Appx.* at 1. Steven has been selling real estate for over 20 years, Diane is also a licensed real estate professional, PERSONAL DATA SHEET (Feb. 23, 2006), *Appx.* at 2; MOTION TO RECONSIDER (Feb. 7, 2011), *Appx.* at 49, and the decree awarded them business interests in their respective brokerage agencies. PERMANENT STIPULATION ¶12 (Feb. 14, 2006), *Appx.* at 4.

I. Property Settlement: Antrim Land, Promissory Note, Mortgage

During the marriage they individually and jointly accumulated many parcels of real estate. One of them, in Antrim, comprises 189 acres of mountainous land in current-use with no road or water frontage. It may someday have timber value, but not yet. Because it is landlocked, it is considered undevelopable, and the town assessed its value at $149,100. REAL ESTATE NETWORK CARD (Apr. 20, 2010) (exhibit to record document 110), *Appx.* at 43; *Trn.*[2] at 9-10.

Paragraph 15 of the stipulated decree divided the parties non-homestead real estate. It gave Steven the "Raw land, Antrim, NH" … "free and clear of all right, title and interest of Diane," and provided that Diane "shall execute quit claim deeds transferring her interest to Steven in … the Antrim land." PERMANENT STIPULATION ¶15 , *Appx.* at 4.

Paragraph 15 of the stipulated decree also provided for a three-installment payment from Steven to Diane:

- $250,000 due by February 15, 2006;
- $25,000 due by August 31, 2006; and
- $50,000 due by July 31, 2007. *Id.*

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[1]Because the parties have the last same name, they are referred to here by they first names.

[2]Citations to the transcript refer to *Transcript of Hearing Motion Hearing Before Jennifer Lemire Marital Master* (Jan. 3, 2011).

At the time of the first payment in February 2006, Steven was to "deliver to Diane a promissory note in the amount of … $75,000 secured by [two] mortgages:

- $25,000 secured by a mortgage on the Antrim lot; and
- $50,000 secured by a mortgage on other land. *Id.*

Paragraph 15 also provided that "the interest rate on the promissory note shall be at the rate of 6% per annum," and that interest will "accrue against the unpaid balance of the note from April 1, 2006, but only if Steven fails to tender the … $25,000 payment by August 31, 2006 and/or the $50,000 payment by July 31, 2007." *Id.*

Finally, paragraph 15 provided that Diane would discharge the Antrim mortgage "[u]pon payment of the … $25,000" in August 2006, and the other mortgage upon satisfaction of the property settlement. *Id.*

II. Stalemate and Mediation

The first and second payments were made, and the promissory note was executed. In October 2007, however, Diane complained that the final $50,000 installment had not been remitted by the July 2007 deadline. She thus requested the court hold Steven in contempt and order the amount be paid with interest. MOTION FOR CONTEMPT (Oct. 12, 2007), *Appx.* at 13. Steven objected on the grounds that he was unable to pay because of the "continued precipitous decline in real estate sales and values," and that despite long hours and diligent effort, and having placed most of his real estate holdings on the market, he could not raise the money. PETITIONER'S OBJECTION TO RESPONDENT'S MOTION FOR CONTEMPT (Oct. 30, 2007), *Appx.* at 17.

The parties attended a hearing in January 2008. The court held that Steven was indeed unable to pay the $50,000:

> Because real estate sales have become extremely sluggish in the past year, Petitioner's income as a real estate broker has been reduced. Moreover, there are more vacancies in the rental properties he owns and many tenants have fallen behind in rent payments, some of whom have had to be evicted. Moreover, in order to meet the monthly expenses of the various rental properties owned by Petitioner, he has had to borrow against the dwindling equity in his real estate holdings, the value of which is also declining. For that reason, Petitioner's debt has increased dramatically in order to meet the expenses of all the rental property he owns and manages.

DECREE ON PETITIONER'S PETITION FOR MODIFICATION AND RESPONDENT'S MOTION FOR CONTEMPT (Feb. 1, 2008), *Appx.* at 25. Thus the court denied the contempt. Instead it gave Diane permission to attach Steven's real estate in the amount of $60,000, which was the $50,000 still owing plus rounded interest. PETITION TO ATTACH WITH NOTICE (Jan. 29, 2008), *Appx.* at 23; DECREE ON PETITIONER'S PETITION FOR MODIFICATION AND RESPONDENT'S MOTION FOR CONTEMPT (Feb. 1, 2008), *Appx.* at 25.

To unfold the legal and financial stalemate, the parties entered mediation. ASSENTED TO MOTION TO CONTINUE EVIDENTIARY HEARING (Feb. 13, 2009) (document not in appendix).

III. Agreement: "Immediately Placed on the Market for Sale"

The resulting agreement, approved by the court, forms the basis for this appeal. AGREEMENT (May 19, 2009), *Appx.* at 30; ASSENTED TO MOTION TO APPROVE TERMS OF SETTLEMENT AGREEMENT (Aug. 26, 2009) (granted), *Appx.* at 32.

The agreement was intended to structure how "the outstanding … payment of $50,000 … shall be paid." AGREEMENT ¶ 1. The first $10,000 came from Steven liquidating an IRA. The $40,000 remainder would be satisfied by:

> Steven's land in Antrim, NH shall be immediately placed on the market for sale. Upon sale of the Antrim property, but in no event later than December 1, 2010, the balance of $40,000.00 shall be paid to Diane.

AGREEMENT ¶ 1.b. Upon these payments, Diane would discharge the attachments and mortgages. *Id.* at ¶ 2. Although the interest then due was waived, the agreement provided that "[i]n the event of Steven's non-compliance with the terms herein, interest shall be due and payable per the Mortgage and Promissory Note at the rate of 6% per annum from April 1, 2006 forward with credit given for any payments that have been made." *Id.* at ¶ 1.c.

IV. Marketing but no Sale

Within two weeks of entering the agreement with Diane, Steven executed a standard form "Exclusive Listing Agreement" between he and his real estate firm concerning the Antrim land. *Trn.* at 9; EXCLUSIVE LISTING AGREEMENT (June 1, 2009) (exhibit to record document 110), *Appx.* at 41. The standard listing agreement indicated an asking price of $99,000, that a "for sale" sign may be placed on the property, and that it will be advertised at the agency's discretion.

The standard-form contract has a dozen yes/no check-boxes so users can easily select common contract terms. Two of the boxes indicate whether the broker-agency is authorized to "submit property documents" and "submit property listing data" "to MLS" or "any electronic database" system. EXCLUSIVE LISTING AGREEMENT ¶ 5 ("Special Conditions") (capitalization altered). The contract here has a "yes" in each of these boxes, next to which is handwritten asterisk. The next paragraph of the contract is entitled "Additional Provisions" with lines for fill-in. Handwritten there is another asterisk and the words: "May be input to MLS AFTER April 1, 2010." *Id.* ¶ 6 (capitalization and underlining in original). The listing agreement thus indicates that the property would not be listed on MLS immediately, but would be the following spring.

This arrangement is known as a "pocket listing," and has the potential of a higher return because it eliminates costs associated with the involvement of a second real estate broker. *Trn.* at 9;

MOTION TO RECONSIDER (Feb. 7, 2011), *Appx.* at 49.

Steven made no secret of the arrangement, and readily disclosed the listing agreement to Diane when she asked. LETTER FROM ATTORNEY STERNENBERG TO ATTORNEY CHENELLE (Apr. 23, 2010) (exhibit to record document 110), *Appx.* at 40.

Steven put up a "for sale" sign and solicited buyers privately. *Trn*. at 9, 15-16. He conducted the marketing in this manner because he had once previously listed the land on MLS but had been unsuccessful in selling it, *id*., and because he had in mind some timber buyers who he hoped would be interested as an investment. *Trn*. at 9, 15-16. Later in the summer when he still hadn't sold it, he determined it would be better to wait until spring to put it on MLS. This is because he knew that real estate deals are rarely consummated in the winter, that timberland is generally unwalkable in the winter, and that this parcel, being landlocked, made winter access particularly difficult. *Trn*. at 15; LETTER FROM ATTORNEY STERNENBERG TO ATTORNEY CHENELLE (Apr. 23, 2010) (exhibit to record document 110), *Appx.* at 40. From his experience he also understood the phenomenon of "aging" – when a property sits on MLS for a long time it is perceived as being stale or unsalable – and that he should wait until spring to avoid it. *Id.*

In accord with the asterisked term in the listing agreement, Steven put the property on the MLS system on April 9, 2010. REAL ESTATE NETWORK CARD (Apr. 20, 2010) (exhibit to record document 110), *Appx.* at 43.

Despite Steven's perseverance, and despite the land being in the MLS system throughout the 2010 spring and summer best-sales season, it unfortunately attracted no buyer. Nonetheless, on November 30 Steven paid Diane the $40,000 he owed her – the day before the expiration of the period specified in their May 2009 agreement. *Trn*. at 10; CHECK 1533 FROM STEVEN TO DIANE

(Nov. 30, 2010) (exhibit to record document 110), *Appx.* at 44.[3]

V. What Constitutes Placing on the Market for Sale?

A few days later, in December 2010, Diane petitioned the court that Steven be held in contempt for not putting the land on MLS during 2009, and also seeking not only the $40,000, but also interest, fees and costs. MOTION TO BRING PETITION FOR CONTEMPT FORWARD (Dec. 8, 2010), *Appx.* at 34. Steven objected and asked for summary judgment. He pointed out he had immediately placed the land on the market as the parties' agreement specified, that he had complied with the parties' agreement, and that even though the land hadn't sold, he had paid Diane in full as he had contractually promised. VERIFIED OBJECTION TO MOTION TO BRING PETITION FOR CONTEMPT FORWARD AND MOTION FOR SUMMARY JUDGMENT (Dec. 20, 2010), *Appx.* at 37.

Two weeks later in January 2011, the parties appeared at hearing and made offers of proof. After reviewing the history, the court acknowledged Steven's $40,000 payment on the cusp of the deadline. It noted that the issue:

> turns on the question of whether or not [Steven] having executed an Exclusive Listing Agreement with his own real estate agency and as broker, without placing the property on the MLS, constitutes placing the property "on the market for sale" as required by the May 19, 2009 Agreement. The Court finds that it does not.

ORDER ON RESPONDENT'S PETITION FOR CONTEMPT AND PETITIONER'S MOTION FOR SUMMARY JUDGMENT at 2 (Jan. 19, 2011), *Appx.* at 45.

The court reasoned that the contract didn't merely require Steven to pay Diane $40,000 by a date certain, but that the term requiring that the land "shall be immediately placed on the market for sale" was included "for the reason that they recognized that this was a payment that had been

[3]This check is in the amount of $42,000. Of that, $40,000 is applicable to the issues here, and the remaining $2,000 concerns a child support payment not before this court. *See,* AGREEMENT ¶ 3.b. (May 19, 2009), *Appx.* at 30.

long outstanding … and ought to be paid at the earliest possible date." ORDER at 3.

The court found that Steven's explanation regarding the market for and saleability of raw land, the wisdom of his efforts to market to timber investors, his determination the land would not likely be sold during winter, and his insight on the aging of MLS listings, "lacks credibility." ORDER at 3. The court thus held that Steven "did not substantially comply with the requirement to immediately place the property 'on the market for sale.'" ORDER at 3.

Accordingly, the court denied Steven's motion for summary judgment, and instead held him in contempt, and awarded Diane $13,100 in interest and $1,300 for attorneys fees. ORDER at 3-4. Steven's motion for reconsideration was denied without elaboration. ORDER ON PETITIONER'S MOTION TO RECONSIDER (Feb. 23, 2011), *Appx.* at 53. Mr. Cotran appealed.

SUMMARY OF ARGUMENT

Steven Cotran first points out that there are many ways to sell real estate. He notes that because the parties did not specify any particular way, how to sell it was left to his discretion. He argues that despite trying a variety of ways, none of which worked, he performed under the agreement. Finally, he notes that because he nonetheless paid Diane Cotran what he owed, she suffered no harm, and thus he cannot be liable for damages. Accordingly, he insists the court was in error by holding him in contempt and ordering him to pay interest, fees and costs.

ARGUMENT

I. Many Ways to Sell Real Estate

There is no standard way to sell things, and in a market economy how things may be sold is a story re-written daily. In 1903 this Court held that liquor in possession of an innkeeper was "kept for sale" when boarders understood it was available for a price. *See e.g.*, *State v. Wenzel*, 72 N.H. 396 (1903). Today things are sold on Ebay and Craigslist.

What selling means depends upon the context of the transaction. *State v. Stone*, 114 N.H. 114, 117 (1974) ("The words 'sell' or 'sale' must be interpreted within the context of the whole statute of which they are a part."). In the commercial context, "'sale" consists in the passing of title from the seller to the buyer for a price." RSA 382-A:2-106. "'Marketing [a] product'" means simply 'to offer for sale' or 'to sell' in a market." *Ice Bros., Inc. v. Bannowsky*, 840 S.W.2d 57, 60 (Tex. App. 1992). For purposes of tort liability, canned meat is "place[d] on the market for sale" when "the public is invited to purchase" it. *Nelson v. Armour Packing Co.*, 90 S.W. 288, 289 (Ark. 1905).

Allowing a court, rather than the market, to define what constitutes "for sale" is not in the spirit of free enterprise protected by the New Hampshire Constitution. N.H.CONST., pt. II, art. 83 (public interest to control all "who endeavor to … destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means").

As to real estate, there are many ways to sell it. The Multiple Listing Service (MLS) is one, but there are others. Classified-advertisement publications which include land sales are available at convenience stores. Craigslist has an active New Hampshire "real estate for sale" section. *See* <http://nh.craigslist.org/>. People now sell land on the internet, *Trn.* at 9, using Facebook, Twitter, and LinkedIn. Courts including the First Circuit have long held there are enough other ways to sell

real estate that the MLS system does not constitute an antitrust violation. *See*, *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803(1st Cir. 1988); *State v. Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127 (Iowa 1981); *see also* Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems As Restraints of Trade*, 70 COLUM. L. REV. 1325, 1329 (1970).

One of the ways brokers sell real estate is a "pocket listing," which is "a private listing without advertising or any official posting." *Payne v. Harbin*, 562 S.E.2d 772, 774 (Ga. App. 2002). The method has been long and widely used by real estate professionals. *See e.g.*, *Robertson v. Carmel Builders Real Estate*, 92 P.3d 653, 658 (N.M. Ct.App. 2003).

Pocket listings are used for the purpose of pitching a property to known possible investors, *Payne v. Harbin*, 562 S.E.2d at 772, when a property is "thought to have quick sales potential," Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems As Restraints of Trade*, 70 COLUM. L. REV. 1325, 1329 (1970), when "the market has a low inventory of comparable properties in it, or in a "vendor-dominated market." Barlow Burke, Jr., LAW OF REAL ESTATE BROKERS § 3.03 (3d ed. 2011). They potentially make more money for the broker because commissions are not split with any colleagues, *Trn.* at 9, and have been both praised and criticized on a variety of grounds. *See e.g*. Michael K. Braswell & Stephen L. Poe, *The Residential Real Estate Brokerage Industry: A Proposal for Reform*, 30 AM. BUS. L.J. 271, 273 (1992) (criticizing both "pocket listing" and MLS system for creating conflicts of interest, potential racial steering, etc.).

In any event, the pocket listing sales technique is neither novel nor radical, and is just one accepted method of real estate sales.

II. Not Just Listing, but Hustling

As the lower court noted, the parties included in their contract that the Antrim land "shall be immediately placed on the market for sale" "for the reason that they recognized that this was a payment that had been long outstanding … and ought to be paid at the earliest possible date." ORDER, *Appx.* at 45, 47.

It is understandable that Diane wanted her money. But there are no facts in the record explaining why she cared that this piece of land be sold – or how – nor whether she cared if her money came from another source. If she specifically intended an MLS listing, she could have bargained for it in the parties' agreement.

Steven had a demonstrable interest in selling the land. He owed Diane a substantial sum, both his income and total wealth had significantly declined, and meanwhile he held a property with equity but no present income potential. There is no allegation, nor facts to support one, that he had an interest in slowing or stymying its sale.

That Diane wanted her money by a date certain, and that Steven wanted to sell the land to raise it, implies nothing about how the parcel would be sold. It implies only that they shared an interest in selling it quickly and efficiently. Nothing in the record suggests or demands a particular sales methodology. The court's conclusion that it must be marketed via MLS is a non-sequitur.

The court nonetheless disparaged Steven's professional judgment regarding winter walkability, timber investment, and real estate sales techniques. The court did not take a view in any season, and the record contains no photos, plot-plan, or even a recognizable map. There is simply no basis in the record to question Steven's sales strategy.

Contrary to her complaints, Steven exceeded both Diane's reasonable expectations and his

contractual duties. He had previously tried marketing the land on MLS but it didn't sell. After their agreement, he immediately got to work marketing it anew more cleverly. Rather than just listing, in 2009 he began hustling, contacting investors he thought might be interested. When it still didn't sell, in 2010 he put it back on MLS. When it *still* didn't sell, he raised the money for Diane elsewhere, and paid her.

There is no basis to support the trial court's interpretation of the agreement as committing to list the land on MLS. Steven performed under the agreement. The court's conclusion is thus in error and must be reversed.

III. No Basis for Implying a Specific Condition of MLS Listing, nor for Insisting on Specific Performance of an Unstated Condition

The parties' agreement said only "Steven's land in Antrim, NH shall be immediately placed on the market for sale." It did not say how the land would be marketed or sold. It did not say, for instance, "Steven's land in Antrim, NH shall be immediately listed for sale on MLS." The contractual words were general, leaving to Steven's discretion the method of marketing. Diane was a real estate agent, was familiar with the profession's many marketing methodologies, and could have insisted on MLS listing if that is what she intended.

> Offer, acceptance, and consideration are essential to contract formation. There must be a meeting of the minds on all essential terms in order to form a valid contract. A meeting of the minds is present when the parties assent to the same terms.

Syncom Indus., Inc. v. Wood, 155 N.H. 73, 82 (2007) (citations omitted).

Parties are of course bound by any express conditions of performance to which the agree. *Gannett v. Merchants Mut. Ins. Co.*, 131 N.H. 266, 269 (1988) (parties had agreed that cashing check would operate as release). But general conditions do not include specific conditions, unless the specific conditions are specifically expressed, or unless clearly indicated by the circumstances. When a contract does not specify a particular method of performance, all reasonable methods are implied. *See*, *e.g.*, *Aleutian Constructors v. U.S.*, 24 Cl. Ct. 372, 379-80 (1991) (construction methods). Thus in *Flanders v. Lamphear*, 9 N.H. 201, 202 (1838), for instance, where the son committed only to supporting his father in his old age, the father could not insist the son continue maintaining him on the family homestead.

Only express conditions of a contract get specific performance. *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N.H. 401, 406 (1876) ("Having contracted subject to this express condition, the

company are not bound if the condition is shown to be broken.").

> Where the occurrence of a condition is required by the agreement of the parties … a rule of strict compliance traditionally applies. The reasoning behind this rule is that when the parties expressly condition their performance upon the occurrence or non-occurrence of an event, rather than simply including the event as one of the general terms of the contract, the parties' bargained-for expectation of strict compliance should be given effect.

Renovest Co. v. Hodges Dev. Corp., 135 N.H. 72, 78-79 (1991) (quotations and citations omitted).

Courts can imply a specific condition only in peculiar circumstances. In *Fallgren v. Ry. Exp. Agency*, 98 N.H. 333 (1953), for example, there was a contract for the delivery of baby chicks. When they arrived dead and obviously useless, the court could imply a condition of *live* delivery. Other than that, "[p]arties generally are bound by the terms of an agreement freely and openly entered into, and courts cannot make better agreements than the parties themselves have entered into or rewrite contracts." *Cloutier v. Great Atl. & Pac. Tea Co., Inc.*, 121 N.H. 915, 925 (1981).

Here the terms of the contact were general. The parties had a meeting of the minds only that Steven was required to "place" the land "on the market for sale." No specific condition or methodology was agreed to. Rather it deferred to Steven's professional judgment on how it would be performed. Thus Diane cannot now insist on a specific type of performance. And because there are many ways to sell land, there is nothing peculiar here suggesting the need to imply a specific condition of marketing via MLS. Thus the court erred in reading into the contract a specific condition to which the parties did not agree.

Even when specific conditions are clearly spelled out, a party who substantially complies with them is deemed to have performed under the contract. In *Robinson v. Crowninshield*, 1 N.H. 76, 80 (1817), for instance, the contract for keeping of 100 sheep was very specific. "They were to

be ‘pastured on high ground – well salted – housed in storms – fed on the best of hay,’ and ‘special care taken at lambing.’” Nonetheless, a few died and others were lean, suggesting the keeper fell short of some of the specifics. But most were alive and fed, and this Court held that the keeper substantially performed. Likewise in *F. A. Larson Realty Co., Inc. v. Hayes*, 114 N.H. 501, 503 (1974), a land owner instructed his real estate broker to “halve” the property and sell one portion, but did not provide any clear lines or boundaries. The broker split the land in two parcels, which turned out not precisely equal. This Court found substantial performance.

Here, even if sale by MLS is implied into the agreement, Steven substantially performed. He marketed the land throughout both 2009 and 2010, with an MLS for the second half the period. Like lean lambs, he cannot be held liable when, despite his efforts, it did not sell.

Accordingly, there is no basis here for the court to imply into the contract a specific condition of MLS listing, nor for Diane to insist on specific performance of a condition to which the parties never committed. The order is in error, and should be reversed.

IV. No Harm; No Damages

In order to get contract damages, a loss must be related to the breach. *Orr v. Goodwin*, 157 N.H. 511 (2008) (liquidated damages provision in real estate sales contract reasonable where buyer who did not consummate purchase caused losses to seller); *Salem Eng'g & Const. Corp. v. Londonderry Sch. Dist.*, 122 N.H. 379 (1982) (whatever harm to plaintiff's business was not caused by defendant's action).

It is not clear here what damage Diane has suffered.

The land did not sell, but that has to do with the vagaries of the market, and not anything Steven did nor did not do. The property had been listed on MLS both before 2009, and for the 2010 sales season. Steven's attempt at other marketing methods was only in 2009. The land did not sell in either of the periods it was on MLS, nor during the pocket listing period. Diane cannot prove, and has not attempted to prove, that the non-sale was Steven's fault. Accordingly, Steven is not liable under the agreement.

Moreover, Diane got her money before the contractual deadline, and thus suffered no loss. Whether Steven raised it by selling the land or in some other way may be of emotional or intellectual interest, but is of no other import. The court erred in faulting Steven, and its order should be reversed.

CONCLUSION

"The interpretation of a contract is a question of law, which we review *de novo.* When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract." *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 546 (2008) (quotations and citation omitted).

The plain meaning of the contract terms was that Steven would immediately market the land. Because the family court misinterpreted the parties' agreement, it improperly held Steven in contempt. Accordingly the contempt should be vacated, and the award of interest, fees and costs should be reversed.

In addition, because this case involves issues of interest to the real estate industry generally, it should be placed on the regular docket, and the parties should be afforded a full oral presentation.

Respectfully submitted,

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By his Attorney,

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Dated: March 1, 2012

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Steven Cotran requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral.

I hereby certify that on March 1, 2012, copies of the foregoing will be forwarded to Kevin A. Chenelle, Esq.

Dated: March 1, 2012

Joshua L. Gordon, Esq.