CERTIFICATION OF WORD COUNT: 5391

COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	FILED COURT OF APPEALS STATE OF COLORADO FEB 21 2007 Clerk, Court of Appeals
Lower Court: Jefferson County District Court Lower Court Judge: Hon. Jack W. Berryhill Lower Court Case No.: 2005CV946	
Defendants-Appellants: LAFARGE NORTH AMERICA, INC.; LAFARGE WEST, INC.; and SAFECO INSURANCE COMPANY OF AMERICA v. **Plaintiff-Appellee:** TRICON KENT CO.	▲Court Use Only▲
Attorneys for *Amici Curiae* American Subcontractors Association, Inc. and American Subcontractors Association of Colorado PREEO SILVERMAN GREEN & EGLE, P.C. Gilbert R. Egle, #13722 1401 Seventeenth Street, Suite 800 Denver, Colorado 80202 Phone No. (303) 296-4440 FAX No. (303) 296-3330 E-Mail: Gil@Preeosilv.com	Case No: 06CA595

BRIEF OF *AMICI CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AND AMERICAN SUBCONTRACTORS ASSOCIATION OF COLORADO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Amici curiae American Subcontractors Association, Inc. and American Subcontractors Association, Colorado, by its attorneys, Preeo Silverman Green & Egle, P.C., respectfully submits this Brief in support of the Answer Brief of the Appellee, Tricon Kent Co. and its position that the Judgment of the trial court should be affirmed.

I. PRELIMINARY STATEMENT

The American Subcontractors Association (ASA National) is a national nonprofit trade association representing the interests of approximately 5,000 member companies that provide labor, materials and services on construction projects throughout the United States. The American Subcontractors of Colorado (ASA Colorado) is the local chapter of ASA National and is a trade association representing approximately 130 subcontractors and suppliers in Colorado. The businesses consist of subcontractors, fabricators, suppliers and manufacturers.

Subcontractors perform approximately 80-90% of the work on commercial construction projects, like the public works project in this case. ASA's primary focus is the equitable treatment of subcontractors in the construction industry. ASA has acted in the interest of subcontractors by promoting legislation and by intervening in significant legal actions that affect the construction industry at large.

ASA and it's members support the Appellee, Tricon Kent Co. ("Tricon"), in this appeal and support their position that the judgment of the trial court should be upheld. ASA further supports the position that if a "no damage for delay" clause applies under the facts of this case, then interpretation of the clause and its application should be strictly construed. In addition, there are a number of recognized exceptions to such a clause that should be recognized by this Court and enforced in Colorado.

II. STATEMENT OF THE CASE

ASA adopts the statement of the case contained in the Appellee's brief. ASA supports the Appellee in asking this court to affirm the trial court ruling awarding damages to Tricon Kent Co. and that such damage claims are not barred by the "no damage for delay" clause in the subcontract between Lafarge and Tricon..

III. SUMMARY OF ARGUMENT

A "no damage for delay" clause when found in a construction contract, must be strictly construed and its application limited by both the words of the contract and the foreseeable risks contemplated by the parties. Such a clause and the surrounding facts, should be carefully analyzed to determine whether one of several commonly recognized exceptions apply, thereby limiting or preventing application of such a

risk-shifting clause. Furthermore, consideration must be given to the impact a "no damage for delay" clause has on construction industry and, in particular, the large group of subcontractors who perform the majority of work on construction projects. Equitable and just guidelines should be established in order to further the public policy of the State of Colorado in a positive way to best benefit the overall success of the construction industry.

IV. ARGUMENT

1) The Terms of a "No Damage for Delay Clause" Must be Strictly Construed and its Application Limited.

This case involves issues concerning the application and enforcement of a contract clause commonly known in the construction industry as a "no damage for delay" clause. The generally recognized purpose for such a clause is to shift the risk of many delay-related costs from one party to another, typically downhill from an owner to a general contractor or, as in this case, from a general contractor (Lafarge) to a subcontractor (Tricon). A "no damage for delay clause" may take a variety of forms depending on the specific contract terms and the facts and circumstances of a particular construction project. Most "no damage for delay" clauses contain terms that allow for an extension of time but provide limited or no compensation for

damages, often with encompassing language that prevents recovery for any delays whatsoever. The clause at issue in this case contains the following language:

> Section 6. Delays. (a) In the event the Subcontractor's performance of this Subcontract is delayed or interfered with by the acts of the Owner, Contractor or other subcontractors, you may request an extension of time for performance of same, as hereinafter provided, but shall not be entitled to any increase in the Subcontract price or to damages or additional compensation as a consequence of such delays or interference, except to the extent that the prime contract entitles the Contractor to compensation for such delays and then only to the extent of any amounts that the Contractor may, on behalf of the Subcontractor, recover from the Owner for such delays.

A no damage for delay clause such as this has been described as a clause that effectively converts what would be a "compensable delay" into an "excusable" or non-compensable delay. 5 *Bruner and O'Connor on Construction Law*, § 15:75 (2006). The effect is to prevent payment for a variety of costs a subcontractor incurs when work on a construction project is delayed. When found in a subcontract and enforced against the subcontractor, such a clause can have a devastating impact. Its effect is to relieve one party of the burden of delays costs and place that burden squarely on the shoulders of another party. Often, as Lafarge argues in this case, that

burden would fall to the subcontractor even when the subcontractor did not cause the delay. As such, it functions as a risk shifting or exculpatory clause.

In the law of contracts it is a well-recognized principle that judicial interpretation of a contract begins with the rule that a contract is to be construed according to its terms. It is also well recognized that exculpatory provisions in contracts are to be strictly construed. Colorado case law repeatedly supports this position with its courts having stated this principle in many opinions. The leading case of *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) states that "an exculpatory agreement, which attempts to insulate a party from liability for his own negligence, must be closely scrutinized, and in no event will such an agreement provide a shield against a claim for willful and wanton negligence." Id. at 376. When these principles are applied to an exculpatory term such as a "no damage for delay" clause, courts have taken seriously their obligation to strictly construe such a clause. Although this is a matter of first impression in the Colorado Appellate Courts, counts in many other jurisdictions have carefully reviewed and strictly construed a "no damage for delay" clause. A summary of this approach has been stated as follows:

§ 6. Rule of strict construction.

> While a "no damage" clause cannot be treated as meaningless and futile, the courts accord it a strict construction, whether it is ambiguous or unambiguous, because of the harsh results which may flow from the enforcement of the clause. Such clause is strictly construed against the owner or contractee and various principles support this rule; namely, that a contract will be strictly construed against the person who drafted it, and doubts will be resolved against such person; that stipulations against liability are not favored and are to be strictly construed, especially in relation to liability because of one's own fault; and that forfeitures are not favored and provisions therefor must be strictly construed. (Citations omitted.)

Maurice T. Brunner, Annotation, *Validity and Construction of 'No Damage' Clause With Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187, § 6 (1976).

As a result, most Courts take a narrow view of the application of a "no damage for delay" clause, in part, because the harsh result of enforcement.[1]

---

[1]Of note is the fact that the Appellants, in their brief, fail to mention the principles of strict construction or their application to the clause at issue in this case. The "no damage" clause has been invoked by Lafarge in an effort to prevent a valid claim by Tricon Kent. In order to succeed, Lafarge must overcome these principles of strict construction, which it has not done.

In Colorado, statutory restrictions on the enforcement of such a clause already exist in the public sector where the right of any public entity to assess damages against another party for delay is limited as follows:

> C.R.S. §24-91-103.5(1)(a) Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.

Although this statute has not yet been extended to private construction or to relationships such as those directly between a contractor and subcontractor at issue in this case, the intent is clear. There should be a limitation on the extent of the application of a "no damage for delay" clause and such a clause should be strictly construed.

2) This Court Should Recognize and Approve the Well Recognized Exceptions to the Enforcement of a "No Damage for Delay" Clause.

In most courts throughout the country, when issues concerning the application of a "no damage for delay" clause are considered (in addition to the rules of strict construction), multiple exceptions are also recognized and applied. In the Appellants' opening brief in this case, recognition is given to some of those exceptions.

However, Appellants appear to rely solely on the South Carolina case of *Williams Electric Co., Inc. v. Metric Constructors, Inc.*, 480 S.E.2d 447, 449 (S.C. 1997), and list, with very limited discussion, only three of the applicable exceptions: " bad faith, abandonment of the contract, and active interference." Appellants' Brief, at p. 21. Courts and numerous other authorities describe the recognized exceptions in a variety of ways, but most certainly recognize and enforce exceptions in addition to those listed by Appellants.[2]

The Appellants rely primarily on the cases *W.C. James, Inc. vs. Phillips Petroleum Company*, 45 F.2d 22 (10thCir. 1973) and *Allen-Howe Specialties Corporation vs. U.S. Construction, Inc.*, 611 P.2d 705 (Utah 1980). Although these opinions may be distinguished from the present case[3], the courts in both of these cases

---

[2]The *Williams* court actually recognizes five exceptions which include: "(a) delay caused by fraud, misrepresentation, or other bad faith; (b) delay caused by active interference; (c) delay which has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; (d) delay not contemplated by the parties; and (e) delay caused by gross negligence. *Id.* at 448.

[3]In its Answer Brief, the Appellee, Tricon Kent, has discussed in detail and distinguished the *W.C. James* and *Allen-Howe* opinions based on both the law and the facts of this case. ASA hereby adopts that analysis and will not restate the distinguishing arguments herein.

recognized the existence and importance of exceptions to the application of a no damage for delay clause.

In *Allen-Howe*, the court discussed the "active interference" exception. In its discussion of that exception, the Court acknowledged that the "active interference" exceptions may apply if there is some affirmative, willful act, in bad faith, to unreasonably interfere with the contractor's compliance with the terms of the construction contract." In *W.C. James*, the Tenth Circuit also recognized exceptions which include "fraud, bad faith, coercion or other inequitable conduct...." Id. at 25. Other courts have readily applied other exceptions as well. 74 A.L.R. 3d 187, § 7 and cases cited therein; Cheri Turnage Gatlin, *Contractual Limitations on the Right to Recover Delay Damages and Judicial Enforcement of Those Limitations*, The Construction Lawyer (Fall 2002); and 5 *Bruner and O'Connor on Construction Law*, § 15:75-15:80 (2006).

While there is some variation on the categorization and descriptions of exceptions among various courts and jurisdictions, the primary exceptions generally recognized by courts include delays not covered by the terms of the contract clause, delays not contemplated by the parties, delays of unreasonable duration (abandonment), delays caused by active interference of the owner/prime contractor

(bad faith); and waiver of the clause by the owner/prime contractor. The exceptions at issue in this case are those involving delays not covered by the terms of the clause or otherwise not contemplated by the parties and active interference by Lafarge. These exceptions should be applied to prevent the enforcement of Lafarge's "no damage for delay" clause.

A brief analysis of each of these exceptions is important for this Court's consideration in evaluating the scope and application of the exceptions as direct limitations on the enforceability of a no damage for delay clause. The exceptions that are applicable and that should be enforced in this case will be discussed first.[4]

(a) Delays Not Covered by the Terms of the Clause or Otherwise Not Contemplated by the Parties

The basic premise behind a binding and enforceable contract is that there must be an agreement or meeting of the minds by the parties as to the essential terms of the contract. When interpreting a contract the court must ascertain the terms, and the intent of the parties in order to determine the agreement of the parties to be enforced. *East Ridge of Fort Collins, LLC v. Larimer and Weld Irrigation Company*, 109 P.3d 969, 974 (Colo. 2006). In this analysis courts must consider the relationship between

[4]In its Brief, Tricon identifies the exceptions at issue in this case as "delays not contemplated by the parties" and the "interference" exception.

the parties and the particular circumstances surrounding the transaction. *Ozark Dam Constructors v. United States*, 127 F. Supp. 187 (Ct. CL. 1955). Terms not within the scope of the agreement will not be imposed by a court or enforced.

A contractor who enters into a construction contract with a "no damage for delay" clause could be found to have contemplated the ordinary and usual type of delays that a contractor or subcontractor may encounter in the progress and completion of the work. Delays not within that scope may be deemed to be not reasonably foreseeable and therefore outside the application of the "no damage for delay" clause. For example, in *J.R. Stevenson Corp. v. Westchester County*, 493 N.Y.S.2d 819 (N.Y.A.D.2, 1985), the court found that the contractor could not have anticipated that the project owner would issue over 1,000 drawing revisions during the course of the project. Another example is found in *Buckley & Co. v. State*, 356 A.2d 56 (N.J. Super. Ct. L. Div. 1975), where delays resulting from erroneous city plans were not within the contemplation of the parties at the time the contract was signed.

Whether the facts support an exception is a question of fact. *Hawley v. Orange County Flood Control District*, 27 Cal. Rptr. 478 (Cal. App. 1963). In *Hawley*, the court said, "The question of whether or not the delay damage clause was intended by

the parties to prevent recovery under the particular circumstances here involved resolves itself into a factual question requiring the weighing of all the facts presented." In this case, the impact to Tricon arose from the timing and delayed installation of a retaining wall and the impact on traffic lanes and work zone overlap that differed from the original specifications. These procedures certainly were different than those in the original specifications or contemplated by Tricon. These facts lay the groundwork for this exception. As a result, the application of this exception is a question that must be determined in each particular case by the trier of fact, just as the jury did in the present case.

(b) Delays Caused by Active Interference by the Owner/Prime Contractor (Bad Faith)

Courts may also deny enforcement of a no damage for delay clause when actions or conduct on the project may be attributable to the owner's/general contractor's[5] interference in the progress of the work. Some courts may look for acts of bad faith, fraud, concealment or willful misrepresentation to support this exception. 74 A.L.R. 187 § 7(b). But, bad faith is not always required. Interference may be

[5]The cases often refer to the owner's interference. However, as with Lafarge in this case, interference may also be caused by a general contractor which will directly impact the work of a subcontractor. Therefore, the terms are used together in this Brief.

found from other acts or events on a project that impact a subcontractor's ability to perform its work.

The owner interference exception has been applied repeatedly in cases where the owner has prematurely issued a notice to proceed, thereby causing or forcing a contractor to proceed with work when the site was not ready or other facets of the project had been delayed. *American Bridge v. State*, 283 N.Y.S. 577 (N.Y. App. Div. 1935). In the *American Bridge* case, owner interference was found resulting from the owner's premature notice to proceed. The owner knew certain piers had encountered difficulty and would not be ready as planned, but nevertheless issued a notice to proceed with fabrication of certain steel structures necessary for the construction of a bridge. As a result, the court found that the damages did not result from a delay but from the "act of the state in directing that fabrication proceed despite the delay." Id. at 581. In that court's opinion, such conduct amounted to active interference by the owner.

A similar result was reached in *United States Steel Corporation v. Missouri Pacific Railroad Co.*, 668 F.2d 435 (8th Cir. 1982), where the railroad issued a notice to proceed when at the same time it had knowledge of delays to the subsurface work

necessary for United States Steel to proceed in a timely and economical fashion.[6] As a result, the court held that "Mopac's active interference created an exception to the enforceability of the no damage clause in the contract." Id. at 440.

Another very pertinent example is found in *Blake Construction Co., Inc. v. C.J. Coakley*, 431 P.2d 569, 579 (D.C. Ct.App. 1981), where the court said, "We deem the trial court to have been correct in determining delays here were not contemplated by the parties to the subcontract and resulted from conduct amounting to active interference, largely due to Blake's improper work sequencing." Id.

This exception should also be applied to situations where, as here, the owner/general contractor alters job site access in a way that prohibits a subcontractor from performing its work in an efficient and anticipated sequence. Delays of this nature run directly contrary to the well known implied covenants found in construction contracts. *Blake*, at 576. See discussion in Section 3 below. When such

---

[6]This impact is similar to that found in the case of *John E. Green Plumbing & Heating v. Turner Construction*, 742 F.2d 965, 966 (6th Cir. 1984) cert denied 471 U.S. 1102 (1985) where the Court considered and distinguished a delay damage claim for damages resulting from a hindrance of the work. *Id.* There, the Court found that the type of damages suffered were not delay damages but rather were damages suffered "from obstacles created by Turner." *Id.* at 967.

facts are found, this exception applies and the no damage for delay clause should not be enforced.

(c) Delays of Unreasonable Duration (Abandonment)

Another exception in the enforcement of a no damage for delay clause arises in circumstances were the delay is unreasonable in length or duration. Although the scope of this exception is fairly narrow, it is nevertheless applicable in circumstances where there is an unreasonable delay similar to a project abandonment or impossibility of performance. *Hawley*, *supra*, at 483; *American Pipe & Const. Co. V. Westchester County*, 292 F. 941 (2nd Cir. 1923).

(d) Waiver of Enforcement by Owner or General Contractor

Another recognized exception to the application to a no damage for delay clause is found when an owner or prime contractor has waived the clause. Waiver is defined as voluntary or intentional relinquishment of a known right. *Dept. Of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984). To establish waiver as an exception to the enforcement of a no damage clause, the contractor must demonstrate behavior "inconsistent an intention to insist upon that party's contractual rights." *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 202 (7th Cir. 1985). In *Chicago College*, the court discussed the fact that oral assurance that delay

claims would be considered could form the basis for a claim that the "no damage for delay" clause was waived. Id. See also *Findlen v. Wichendon Housing Authority*, 553 N.E.2d 554, 556 (Mass. App. 1990), where the owner's payment of one delay claim followed by a promise to consider another claim was considered as a basis for waiver.

3) Colorado Courts Should Limit the Application of a No damage for delay Clause in Construction Contracts.

Inherent in the analysis of a "no damage for delay" clause must be the recognition and application of the equitable principles of fairness and justice together with the implied covenants found in construction contracts. Among the commonly recognized implied covenants and duties are: The duty to cooperate (also sometimes described as the duty not to interfere with the progress for timely completion of the work), *Northeast Clackamas County Elec. Co-op v. Continental Gas. Co.*, 221 F.2d 329, 224 (9th Cir. 1955); the duty to provide timely access to the construction site, *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.*, 71 Cal. App. 4th 38, 51 (Cal. App. Dist 2, 1999); the duty to coordinate the work of multiple contractors involved in the construction project, *Amp-Rite Elec. Co., Inc. v. Wheaton Sanitary Dist.*, 580 N.E.2d 662, 675-676 (Ill. App. 2 Dist. 1991); and the implied duty

to provide adequate plans and specifications, *United States v. Spearin*, 248 U.S. 132 (1918).

Each of these implied covenants and duties impose obligations on parties to the construction contract which may impact or override a "no damage for delay" clause. In addition, one of the fundamental implied obligations in a construction contract is the implied covenant of good faith and fair dealing. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995). These implied covenants together establish the basic foundation upon which courts typically rely to enforce the exceptions to the "no damage for delay" clause. *Bruner & O'Conner*, supra, at 15:75. Continued enforcement and application of these principles is critical to the well-being of the construction industry, in particular subcontractors and others who find themselves the recipients of risk shifting terms in construction contracts.

When owners and general contractors are allowed to shift the risk of economic damages for delays that result from their mistakes, negligence, bad faith or "lethargy or bureaucratic bungling," the likelihood of such events simply increases as the incentive to prevent such occurrences diminishes. *The "No Damage for Delay" Clause: A Public Policy Issue*, 75 Florida Bar Journal 8 (Oct. 2001). This establishes the basic premise on which public policy must be founded. Equity, justice and

fairness in the construction process require narrow construction of a "no damage for delay" clause. Application of the well recognized exceptions founded upon the principles of good faith and fair dealing provide substantial support.

The economic risk to subcontractors increases each time a broad "no damage for delay" clause is imposed in a subcontract relationship. The question then becomes how a subcontractor is to deal with this risk. Although owners may argue that enforcement of a no damage for delay clause is important to prevent unfounded claims for delay from contractors and subcontractors, such delays must be dealt with in a reasonable and equitable fashion, rather than by the transfer of all risk to a lower tier party in the contractual relationship.

One way to deal with the risk is for the subcontractor to increase its bid or to include a cost contingency to cover unknown but possible delays. But this practice would, and often does, defeat the implementation of good public policy. If subcontractors' bids are increased to deal with unknown, potential damages, they risk bidding high and not being awarded jobs for which they may otherwise be well qualified. On the other hand, subcontractors may lose work because they are competing in a bid process against other subcontractors who decide to take a greater risk with their company and its future by not including such a contingency. By doing

do, such a contractor may, in an effort to obtain work, close its eyes to the potential and very serious economic risks involved. At the same time, if delay cost contingencies are included in bids, the owner of the project may be faced with construction costs that are potentially much greater than what the actual costs of construction should be, thereby driving up the cost of construction projects. This problem immediately leads to public policy concerns. *Ozark, supra*, at 190-191.

While there may be some practical solutions available, the resolution to this problem must begin with this Court and its adoption of a position of strict construction and the acceptance of the commonly recognized exceptions to the enforcement of a "no damage for delay" clause. Without such a legal framework in place, owners/general contractors will continue to impose these potentially economically harsh clauses on subcontractors who will, in turn, continue to be faced with very serious decisions about how much risk they must undertake to obtain work and hopefully, stay in business. Enforcement of strict construction and acceptance of the limiting exceptions should be acknowledged as a valued public policy advantageous to the continued prosperity of the construction industry in Colorado.[7]

---

[7]Implementation of this policy in Colorado is already found in the public works context, where any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or

This Court's acceptance of these principles and its acknowledgment of the application of the exceptions for a "no damage for delay" clause, thereby establishing these principles as law in the State of Colorado, would serve well the Colorado construction industry and public as a whole. The impact on subcontractors (and contractors) would be an acknowledgment that exceptions to such clause will be applied which they could then take into account on bid day by providing a lower reasonable bid price without having to consider the impacts of unanticipated delays that may be encountered through no fault of their own which, without these exceptions, would impact or possibly destroy their ability to seek additional compensation. Subcontractors in particular should not be faced with this position on a daily basis. They should be able to proceed forward with their work, confidently knowing that they will be rewarded for their successful efforts and not unfairly penalized by broad-based exculpatory clauses designed to protect others from their own mistakes.

---

obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable. C.R.S. § 24-91-103.5(1)(a).

V. CONCLUSION

The American Subcontractors Association hereby urges this Court to affirm the decision and judgment of the trial court. ASA further requests that this Court clearly enunciate the law of Colorado applicable to a "no damage for delay" clause to include the principles of strict construction and the enforcement of commonly recognized and applicable exceptions. Confirmation of these legal principles is consistent with the law in many other jurisdictions and would provide a positive framework for the future interpretation and application of such contract terms.

Dated this 21st day of February, 2007.

Respectfully submitted,

PREEO SILVERMAN GREEN & EGLE, P.C.

By: _____

Gilbert R. Egle, No. 13722
1401 Seventeenth Street, Ste. 800
Denver, Colorado 80202
Telephone No.: (303) 296-4440
FAX No.: (303) 296-3330
E-Mail: Gil@preeosilv.com

ATTORNEYS FOR AMICI CURIAE AMERICAN SUBCONTRACTORS ASSOCIATION, INC. and AMERICAN SUBCONTRACTORS ASSOCIATION OF COLORADO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of February, 2007, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE AMERICAN SUBCONTRACTORS ASSOCIATION, INC. AND AMERICAN SUBCONTRACTORS ASSOCIATION OF COLORADO** was served by depositing it in the United States Mail, first class postage prepaid, to the following:

Daniel M. Gross, Esq.
Heidi C. Potter, Esq.
Berg Hill Greenleaf & Ruscitti LLP
1712 Pearl Street
Boulder CO 80301

Larry S. McClung, Esq.
Phillip B. Chupik, Esq.
Cooper & Clough, P.C.
1512 Larimer St., Suite 600
Denver, CO 80202