V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

Whitbeck & Associates, P.C.,	)	
Plaintiff,	)	
v.	)	Case No: CL 71003
WESLEY C. SMITH,	)	
Defendant	)	
CHERI SMITH,	)	
Defendant	)	

#5 – REPLY

A pdf copy of this document is available at: http://www.liamsdad.org/court_case/interpleader

COMES NOW the co-Defendant, Wesley C. Smith, and files this REPLY to Cheri Smith's motions of Jan 19, 2007, and requests the Court enforce the Escrow Agreement and hold the funds until such time as the co-defendants sign an agreement for its release, as required by the Escrow Agreement. In support of his REPLY the Defendant states as follows:

1. The Defendant hereby incorporates all statements and arguments in the previously filed #2 – Position On Disposition Of Funds, #3 – Reply & Motion For Sanctions, #4 – Demand For Jury Trial & Evidentiary Hearing, which clearly point out that established case law restricts the court in this case to enforcing the escrow agreement and that the court has no authority to go beyond the escrow agreement.

2. The only argument put forth by co-defendant Cheri Smith has been a claim of a court order in a different case (Chancery 53360). Cheri Smith did not present a single statute, Rule, or case precedent in support of her motions to release funds. Cheri Smith made no legal argument whatsoever that would allow the court in this Interpleader case to release funds contrary to the Escrow Agreement.

3. The position submitted by Cheri Smith amounts to nothing less than her asking the court to revoke the Escrow Agreement and disperse the funds in violation of the agreement.

The claimed order is null and void and unenforceable

Lack Of Subject Matter And Personal Jurisdiction Due To Failure To Serve Process

4. PROCESS is the **combination** of the Bill Of Complaint and the subpoena in chancery "**served as a single paper**". See Bendele v. Commonwealth, 29 Va. App. 395, 398, 512 S.E.2d 827, 829 (1999) and LIFESTAR v VEGOSEN, CAV Record No. 031376 (2004).

5. In LIFESTAR v VEGOSEN the Virginia Court Of Appeals vacated the trial court's order on the grounds that "process" was never served on Lifestar and thus Lifestar "… was not properly before the trial court." which deprived the court of jurisdiction. This is similar to the case here where the Mother filed for divorce in June of 2003 but did not serve the Father with 'process'. The Father did eventually see a copy of the Bill Of Complaint but there is nothing at all in the record to indicate the Father ever received 'process', the combination of subpoena in chancery and Bill Of Complaint (and if fact did not) before the June 2004 one-year time limit. Thus the issue is similar to LIFESTAR v VEGOSEN as in process not being served rather than debating how it was served. [note in a divorce case **how** process is served IS a requirement unlike many other types of cases such as Lifestar]

(in equity, "process" is the "subpoena in chancery, which the clerk would have attached to a copy of the filing"). Rule 3:3(c) then underscores that **these two documents, "served as a single paper," constitute "process"** because "[n]o judgment shall be entered against a defendant who was served with process more than one year after who was served with process **more than one year after commencement of the action against him.**

It is the "process" which must reach the defendant to vest the court with jurisdiction. **Without service of the "process," the court acquires no jurisdiction.**

…Vegosen argues that the saving provision of Code 8.01-288 cures any defect of service so as to give the court jurisdiction. Again, we disagree.

… Code 8.01-288 states, in pertinent part, that "process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter." (Emphasis added). **By its plain language the statute applies only when "process" has reached "the person to whom it is directed.**" Id. "Process" under Code 8.01-288 is the same "process" as defined under Rule 3:3(c). In the case at bar, **"process" never reached Lifestar because the papers served on it did not constitute a notice of motion for judgment under Rule 3:3.**

Under its clear terms, Code 8.01-288 is designed to cure defects in the manner in which "process" is served. **It cannot cure defects in the "process" itself.** Since Lifestar never received "process," Code 8.01-288 does not apply. The trial court erred in concluding otherwise.

CONCLUSION Vegosen's failure to serve Lifestar with a notice of motion for judgment pursuant to Rule 3:3 meant Lifestar never received process and was not properly before the trial court. Since the process was defective, as distinguished from the manner of service, the savings provision of Code 8.01-288 does not apply. Because the trial court lacked jurisdiction over Lifestar, it erred in entering a default judgment. Since the default judgment is void for lack of jurisdiction, the trial court also erred in failing to grant Lifestar's motion to set that judgment aside under Code 8.01-428(A)(ii). We will therefore vacate the default judgment entered May 17, 2002, reverse the trial court's final judgment order entered June 10, 2002, and remand the case. Reversed, vacated and remanded.
LIFESTAR v VEGOSEN, CAV Record No. 031376 (2004).

In this class of cases, the question of the jurisdiction of the court usually resolves itself into one of whether or not there has been "due process," whether **the process has been served in the time and manner required by law,** or service has been waived. Of course, the defendant must be properly brought before the court, else there will be no jurisdiction over him and a judgment against him will be void. Shelton v. Sydnor, 126 Va. 625, 630, 102 S.E. 83, 85 (1920). Simply put, "'"One of the essentials of due process is notice."'" Walt Robbins, Inc. v. Damon Corp., 232 Va. 43, 47, 348 S.E.2d 223, 226 (1986)

6. The record indicates Proof Of Service On J. Whitbeck, Jr. but there is nothing in the record to indicate the Father was ever served with process by **any means at any time**, let alone in the manner specified by and within the time required by law, thus the trial court did not have either personal **nor subject-matter jurisdiction** and its orders in this case are null and void and unenforceable.

7. § 20-99.2 - Service in divorce and annulment cases states: "A. In any suit for divorce or annulment or affirmation of a marriage, process may be served in any manner authorized under § 8.01-296." Service upon John Whitbeck, an attorney hired by the Defendant to handle a **different prior case**, is not one of the prescribed methods listed in § 8.01-296 for service on the Defendant. § 8.01-314 sets conditions allowing for service on an attorney only "…**after** entry of general appearance by such attorney". Given the service in question was to start the case it was impossible for Mr. Whitbeck to have entered a general appearance in this case until **after** the Plaintiff was required to serve process on the Defendant. Accordingly, the service on John Whitbeck did not comply with § 20-99.2.

8. The legislature made clear its intention that compliance with laws and rules relating to service of process are to be strictly followed in divorce cases and prohibits the court from waving the requirement if the Defendant received process in a way other than that prescribed by statue:

§ 8.01-288. Process received in time good though neither served nor accepted. **Except for process commencing actions for divorce** or annulment of marriage or other actions wherein **service of process is specifically prescribed by statute,** process which has reached the person to whom it is directed within the time prescribed by law, if any, shall be sufficient although not served or accepted as provided in this chapter.

9. Compliance with the Code sections at issue here, relating to procedures for instituting a divorce case, is mandatory and jurisdictional. The Plaintiff did not comply with them, therefore, **this court did not acquire jurisdiction of any kind, neither personal nor subject-matter jurisdiction.**

…if a statute provides for constructive service, **the terms of the statute authorizing it must be strictly followed or the service will be invalid**…" Khatchi v. Landmark Rest. Assoc., 237 Va. 139, 142, 375 S.E.2d 743, 745

(1989) (citations omitted).

"**A court acquires no jurisdiction over the person of a defendant until process is served in the manner provided by statute, and a judgment entered by a court which lacks jurisdiction over a defendant is void as against that defendant.**" Slaughter v. Commonwealth, 222 Va. 787, 791, 284 S.E.2d 824, 826 (1981).

Although the court may have believed it acquired personal jurisdiction based on father's execution of the Consent to Adoption form, the **acquisition of personal jurisdiction is based on the receipt of notice which complies with the Due Process Clause.** See Price v. Price, 17 Va. App. 105, 112, 435 S.E.2d 652, 657 (1993) (citing Kulko v. Superior Ct., 436 U.S. 84, 91, 98 S. Ct. 1690, 1696, 56 L. Ed. 2d 132 (1978)).

10. The courts have in fact frowned upon any bypassing of the formal rules/laws of service.

The formality of process serves a legitimate purpose. Process is official notice which informs the opposing party of the litigation and instructs the party when and where it must respond. Without this official notice, the recipient knows neither if the action was filed nor when it was filed. The party would not know when critical time limits expire**. Without process a party would need to resort to other means to obtain essential information.** The practical solution is to telephone the clerk of court to ask if and when the action was filed. However**, a party relies on the informal information received over the telephone at its own risk.** If the information is incorrect, it acted at its own peril. "But one who takes the shortcut of asking the clerk's employees to examine the record for him relies on the response at his peril." School Bd. v. Caudill Rowlett Scott, Inc., 237 Va. 550, 556, 379 S.E.2d 319, 322 (1989).

11. Without proper legal service upon the Defendant the court does not have personal (in personam) jurisdiction over the Defendant and thus is without jurisdiction to proceed with the case.

An absence of personal jurisdiction may be said to destroy `all jurisdiction' because the requirements of subject matter and personal jurisdiction are conjunctional. Both must be met before a court has authority to adjudicate the rights of parties to a dispute. If a court lacks jurisdiction over a party, then it lacks `all jurisdiction' to adjudicate the party's rights, whether or not the subject matter is properly before it. See, e.g. Kulko v. Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 1696 (1978)

VA § 8.01-328.1 A. A court may exercise personal jurisdiction over a person… 9. Having maintained within this Commonwealth a matrimonial domicile at the time of separation of the parties upon which grounds for divorce or separate maintenance is based… Jurisdiction in subdivision 9 is **valid only upon proof of service of process pursuant to § 8.01-296…**

Order Void - Lack Of Subject Matter Jurisdiction

12. Subject-matter Jurisdiction in a divorce case is by statute, failure to comply with the statutes results in a failure of subject-matter jurisdiction.

"**Jurisdiction in a divorce suit is purely statutory**, Watkins v. Watkins, 220 Va. 1051, 1054, 265 S.E.2d 750, 752 (1980), and does not encompass broad equitable powers not conferred by statute." 2 Va. App. at 19, 340 S.E.2d at 580.

13. When the circuit court's power to act is controlled by statute, the circuit court is governed by the rules of **limited jurisdiction** and must proceed within the statute's strictures. Any action taken by the circuit court that exceeds its jurisdiction is void and may be attacked at any time.

"Though a court be one of general jurisdiction, when its power to act on a particular matter is controlled by statute, the court is governed by the rules of limited jurisdiction."); In re M.M., 156 Ill.2d 53, 619 N.E.2d 702 (1993)

("Special statutory jurisdiction is limited to the language of the act conferring it, and the court has no powers from any other source. ... [T]he authority of the court to make any order must be found in the statute. Levy v. Industrial Comm'n (1931), 346 Ill. 49, 51, 178 N.E. 370, 371."); Skilling v. Skilling, 104 Ill.App.3d 213, 482 N.E.2d 881 (1st Dist. 1982)

"**When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.**" Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982). See also Commonwealth v. Brown, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000).

"the legislature prescribes that a court's jurisdiction to hear and determine controversies involving a statutory right is limited in that **certain facts must exist before a court can act in any particular case.**"); Keal v. Rhydderick, 317 Ill. 231 (1925)

"It is an undoubted general principle of the law of divorce in this country that the courts either of law or equity, possess no powers except such as are conferred by statute; and that, **to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority must be found in the statute, and cannot be looked for elsewhere,** or otherwise asserted or exercised." McCotter v. Carle, 149 Va. 584, 593-94, 140 S.E. 670, 673-74 (1927) (citation omitted).

Order Void - No Grounds For Divorce When Mother Filed For Divorce

14. The Court granted the divorce based on one-year separation and set the date of separation as Dec 2002 which was only 6 months prior to the June 2003 filing for divorce. Given that the parties were not separated for one year prior to filing for divorce, the court was without authority to grant divorce based on one-year separation.

"The act relied upon for divorce must be alleged and **proved to have occurred prior to the bringing of the suit . . . .**" Beckner v. Beckner, 204 Va. 580, 583, 132 S.E.2d 715, 717-18 (1963). see also Johnson v. Johnson, 213 Va. 204, 210, 191 S.E.2d 206, 210 (1972).

We hold that the court erred by entering the final divorce decree because the grounds for divorce alleged in the bill of complaint **did not exist when the bill was filed and, thus, the court lacked jurisdiction to entertain the suit at the time it was filed.** JONES v JONES, MAY 30, 2000, Record No. 2580-99-3

Code 20-91(A)(9)(a) provides that a "no-fault" divorce may be granted only after an application has been filed properly alleging that the parties have lived separate and apart for the requisite time. See Moore v. Moore, 218 Va. 790, 796, 240 S.E.2d 535, 538 (1978) **The ground for divorce alleged is a statutory element and jurisdictional prerequisite to filing the suit for divorce** under Code 20-91(A)(9)(a). The grounds must be properly alleged and proven.

15. In order to have jurisdiction the court must find that either party had a clam under Code 20-91 at the time the Plaintiff filed the suit (June 2003), as the Court's ruling did not specify a ground for divorce that existed in June of 2003 the Court was without jurisdiction to issue any order as such the order is null and void and unenforceable.

Void Due To Myriad of Due Process violations

16. As if the above wasn't sufficient to demonstrate a lack of jurisdiction the court seemed bent on making sure it lost jurisdiction, if it ever had it, by violating the Due Process Rights of the Father, by such actions as allowing the Mother to skip the notice requirements and enforcing them against the father, refusing to enforce the fathers subpoena's for documents, ruling promptly on the mothers motions even doing so ex parte without an emergency, while refusing to rule on the fathers motions for 6 months or more at a time. The court even allowed hearsay evidence to be submitted by the GAL then encouraged the GAL to leave and skip the custody portion of the trial. The Court refused to let the father make proffers for an appeal. At every turn the court seemed determined to rule for the mother and against the father no matter what evidence was presented. From start to finish the "trial" was nothing less than a Kangaroo Court with the outcome having been predetermined the moment Judge Potter took the case.

17. The Courts gender biased efforts went so far as to rule the marriage broke up over money even though both parties stated for the record that was not the case and by ruling adultery by the mother was not proven in spite of her admitting to adultery in court and the father submitting photo's, email, etc to corroborate her affair. This intentional erroneous ruling lead directly to the order being void due to the above mentioned no grounds for divorce existed when the mother filed for divorce.

Null And Void Orders - void and unenforceable prior to reversal

18. A void order may be challenged in any court, at any time, and even by third parties. A void order has no legal force or effect. As one court stated, **a void order is equivalent to a blank piece of paper.**

This principle of law was stated by the U.S. Supreme Court as:

“Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply **VOID, AND THIS IS EVEN PRIOR TO REVERSAL.**” [Emphasis added]. Vallely v. Northern Fire and Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116 (1920). See also Old Wayne Mut. I. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907); Williamson v. Berry, 8 How. 495, 540, 12 L. Ed, 1170, 1189, (1850); Rose v. Himely, 4 Cranch 241, 269, 2 L.Ed. 608, 617 (1808).

Since a void order has no legal force or effect there can be no time limit within which to challenge the order or judgment. Further since the order has no legal force or effect, it can be repeatedly challenged, since no judge has the lawful authority to make a void order valid.Bates v. Board of Education, Allendale Community Consolidated School District No. 17, 136 Ill.2d 260, 267 (1990) (a court "cannot confer jurisdiction where none existed and cannot make a void proceeding valid."); People ex rel. Gowdy v. Baltimore & Ohio R.R. Co., 385 Ill. 86, 92, 52 N.E.2d 255 (1943).

It is clear and well established law that **a void order can be challenged in any court. Old** Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907) ("jurisdiction of any court exercising authority over a subject `may be inquired into in every other court **when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings,**' and the rule prevails whether `the decree or judgment has been given, in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states.'"); In re Marriage of Macino, 236 Ill.App.3d 886 (2nd Dist. 1992) ("if the order is void, it may be attacked at any time in any proceeding, "); Evans v. Corporate Services, 207 Ill.App.3d 297, 565 N.E.2d 724 (2nd Dist. 1990) ("a void judgment, order or decree may be attacked at any time or in any court, either directly or collaterally"); Oak Park Nat. Bank v. Peoples Gas Light & Coke Co., 46 Ill.App.2d 385, 197 N.E.2d 73, 77 (1st Dist. 1964) ("that judgment is void and may be attacked at any time in the same or any other court, by the parties or by any other person who is affected thereby."). [Emphasis added].

A voidable order is an order that must be declared void by a judge to be void; a void order is an order issued without jurisdiction by a judge and is void ab initio and does not have to be declared void by a judge to be void. Only an inspection of the record of the case showing that the judge was without jurisdiction or **violated a person’s due process rights**, or where fraud was involved in the attempted procurement of jurisdiction, is sufficient for an order to be void. Potenz Corp. v. Petrozzini, 170 Ill. App. 3d 617, 525 N.E. 2d 173, 175 (1988). In instances herein, the law has stated that the **orders are void ab initio and not voidable because they are already void.**

There is a misconception by some attorneys and judges that only a judge may declare an order void, but this is not the law: (1) there is no statute nor case law that supports this position, and (2) should there be any case law that allegedly supported this argument, that case would be directly contrary to the law established by the U.S. Supreme Court in Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116 (1920) as well as other state courts, e.g. by the Illinois Supreme Court in People v. Miller. Supra. A party may have **a court vacate a void order, but the void order is still void ab initio**, whether vacated or not; a piece of paper does not determine whether an order is void, it just memorializes it, makes it legally binding and voids out all previous orders returning the case to the date prior to action leading to void ab initio.

in 1991, the U.S. Supreme Court stated that, "Since such jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it. …[Would be an] unlawful action by the appellate court itself." Freytag v. Commissioner, 501 U.S. 868 (1991); Miller, supra. Following the same principle, **it would be an unlawful action for a court to rely on an order issued by a judge who did not have subject-matter jurisdiction and therefore the order he issued was Void ab initio.**

Escrows Are Irrevocable, Require Strict Compliance

19. The funds in the account were generated by the sale of real estate held by the Defendant's as tenants by the entireties. Neither Defendant has offered any evidence of any agreement or understanding to the effect that these funds in this account were to be held in any manner other than by Mr. Whitbeck for the Defendant's as tenants by the entireties.

20. The court did not create nor require the funds to be deposited in an Escrow Account. Thus the Court has no authority to control the fund other than interpreting the Escrow Agreement.

21. The Agreement, as titled by the parties, was an escrow agreement. It set out specific conditions for the release of the escrowed funds and made no reference to or provision for substantial compliance with those conditions.

22. Releasing funds per court order entered in case Chancery 53360 is not a condition set by the Escrow Agreement allowing release of funds.

23. The position submitted by Cheri Smith amounts to nothing less than her asking the court to revoke the Escrow Agreement and disperse the funds in violation of the agreement.

24. Per established case law, Escrows are irrevocable which neither party can revoke during the escrow period without the consent of the other. See Chaffin v Harpham 166 Ark 578, 266 SW 685; Home-Stake Royalty Corp. V McClish, 187 Oka 352, 103 P2d 72;

25. It is also established case law that the Court has no authority to go beyond the contract among interpleading claimants. Interpleading the funds does not void the Escrow Agreement but only changes who holds the escrowed funds. The Court only has the authority to enforce the Escrow Agreement and may not distribute the funds in a manner contrary to that of the Escrow Agreement.

It has, however been held that where a bank, as escrowee, brings an interpleader suit because of different interpretations of the escrow contract by the respective claimants, **the court has no authority** to go beyond the

terms of the contract to determine other matters in dispute among the interpleading claimants. Northern Trust Co v McDowall, 307 Ill App 29, 29 NE2d 865

Virginia adheres to the "plain meaning" rule courts examine the plain language of an agreement, going beyond the written contract only when its meaning is ambiguous. See Pysell v. Keck, 263 Va. 457, 460, 559 S.E.2d 677, 678-79 (2002); Douglas v. Hammett, 28 Va. App. 517, 524-25, 507 S.E.2d 98, 101 (1998); Tiffany v. Tiffany, 1 Va. App. 11, 15-16, 332 S.E.2d 796, 799 (1985). Courts shall not include or ignore words to change the plain meaning of the agreement. Southerland v. Estate of Southerland, 249 Va. 584, 590, 457 S.E.2d 375, 378 (1995). Shenk v. Shenk, 39 Va. App. 161, 173-74, 571 S.E.2d 896, 903 (2002).

26. In KENNETH A. DAVIS v. STEPHEN HOLSTEN, ET AL. Record No. 050215 November 4, 2005 the Virginia Court Of Appeals made clear that **strict compliance is required**.

Rather, we agree with the clear weight of authority that, unless the agreement provides otherwise, substantial performance will not be applied to an escrow agreement and **compliance must be strict.** See, e.g., Commonwealth Land Title Ins. Co., 13 B.R. at 951 (strictly construing term in escrow agreement which required disbursement of any remaining funds in escrow after four years from date of contracting); In re Creative Data Forms, Inc., 41 B.R. at 336-37 (declining to release $100,000 held in escrow account for debtor because the debtor failed to make some repayments on money it had borrowed); Jones, 293 S.W.2d at 551 (declining to apply substantial performance to release of escrowed funds, when release was conditioned upon sellers of real estate timely providing an abstract of good and marketable title); Love v. White, 363 P.2d 482, 484 (Cal. 1961)(holding: "In this state the terms and conditions of an escrow must be performed. The doctrine of substantial performance does not apply, and no title passes prior to full performance of the terms of the escrow agreement."); Watts v. Mohr, 194 P.2d 758, 761 (Cal. Ct. App. 1948) (refusing to apply substantial performance and to order release of funds from escrow where one party had failed to deliver timely to escrow agent a $6000 note and deed of trust to complete real estate transaction); Taft v. Taft, 26 N.W. 426, 430 (Mich. 1886) (holding: "performance of the condition must be absolute and accurate, and cannot be dispensed with on any otherwise substantial performance."); Hart v. Barron, 204 P.2d 797, 808 (Mont. 1949) (finding part performance did not apply to escrow agreement for sale of land where buyer did not timely pay taxes or obtain a loan, both of which were conditions precedent to escrow agent delivering deed to buyer); Valentine Oil Co. v. Powers, 59 N.W.2d 150, 157 (Neb. 1953) (refusing to order release of funds in escrow and citing inapplicability of substantial performance to escrow agreements where a party to oil and gas escrow agreement failed to continue drilling for oil as required by agreement). KENNETH A. DAVIS v STEPHEN HOLSTEN Record No. 050215 November 4, 2005

In the law governing performance of escrow agreements there is no doctrine of substantial compliance to be found; compliance must be full and to the letter, or else it constitutes merely noncompliance Jones V Gregg, 226 Ark 595, 293 SW 2d 545;

The question involved is one of performance of the escrow agreement, not of the ability of the parties to perform the agreement, since such ability, without full performance, cannot amount to a compliance. young v claredon twp. 132 us 340, 33 L ed 356 10 S Ct 107;

27. For such other and further reasons as may be advanced in open Court.

WHEREFORE co-defendant Wesley Smith requests the Court deny the motions of Cheri Smith, declare the divorce decree as null and void and order that the Court will hold the escrow funds until the parties strictly comply with the terms of the Escrow Agreement and submit a signed agreement for release of funds.

Respectfully Submitted,
Wesley C. Smith

_____

Wesley C. Smith, Defendant
5347 Landrum Rd APT 1, Dublin, VA 24084-5603
703-348-7766
liamsdad@liamsdad.org

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion was sent to John Whitbeck and Loretta Vardy, this 28th day of Feb 2007.

_____
Wesley C. Smith