

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY FAMILY COURT

Appellate Case No. 2023-001376

Justin McGeeRespondent,

v.

Lindsay F. McGee.....Petitioner.

Return to Petitioner’s Motion to Strike Affidavit of James Nolan and All References to the Nolan Affidavit to and Seal

Respondent Justin McGee (“Husband”) respectfully requests this Court deny the Motion to Strike Affidavit of James Nolan and All References to the Nolan Affidavit to and Seal filed by Petitioner Lindsay F. McGee (“Wife”) yesterday afternoon.¹ In this most recent motion, Wife seeks to strike the Nolan Email, which Husband moved to file under seal as an attachment to his Return to Petitioner’s Motion to Supplement the Record. Both the Motion to Seal and the Return were filed on November 13, 2023.

Wife cites no court rule, statute, or authority to require striking the Nolan Email, which Husband provided to the Court as a provisionally sealed document. Even assuming such authority exists, Wife’s evidentiary arguments for striking the Nolan Email go to its weight, not its

¹ Husband filed no affidavit of James Nolan and is not aware that one exists. Husband assumes the Motion refers to the email Husband submitted to the Court for consideration under seal (the “Nolan Email”). Apart from striking the Nolan Email, Wife appears to consent to the sealing of the email, which is the relief Husband sought in his Motion to Seal. To the extent Wife now consents to sealing the Nolan Email, Husband agrees that it should not be filed in the public record.

admissibility. In any event, Husband does not use the Nolan Email for the truth of the matter asserted, and Husband anticipates otherwise establishing its authenticity when this matter is back before the Family Court and discovery is available to the parties. Until then, this Court's consideration of the Nolan Email under seal is appropriate.

Husband again asks the Court to expedite consideration and briefing of this matter such that the Family Court can proceed with the parties' divorce and custody action. Both state statute and an administrative order by the South Carolina Supreme Court necessitate expedited resolution of this matter. Otherwise, Wife will continue to file new motions and belated affidavits/arguments with this Court to prolong the stay of the Family Court proceedings into the holidays and delay the inevitable resolution of the parties' contentious divorce.

Argument

I. Wife's arguments to strike the Nolan Email fail.

Wife is correct that the South Carolina Rules of Evidence apply to proceedings under the Homeland Security Act.² S.C. Code Ann. § 17-30-110(A)(3) ("Unless otherwise provided by federal law or Rules of Court, all South Carolina Rules of Evidence apply."). Assuming without conceding that this Court has jurisdiction to consider Wife's Motion to Suppress, Husband agrees the Court must apply the authentication and hearsay rules Wife cites. Wife is incorrect, however, that these evidentiary rules require striking the Nolan Email.

First, Husband is aware of no South Carolina case establishing the proper admissibility standards for physical evidence in proceedings under the Homeland Security Act. As these proceedings are expedited, civil, and based on a summary record, the closest corollary appears to be the summary judgment standard under Rule 56, SCRCF. Under Rule 56, the movant is required

² S.C. Code Ann. § 17-30-10 to -145.

to provide affidavits and testimony that “shall set forth such facts as *would be* admissible in evidence” Rule 56(e), SCRCF. This lenient standard does not require that testimony sufficient to establish admissibility be provided in open court but merely requires the movant to establish facts showing how the evidence *would be* admissible at trial. This “would be” admissibility standard is critical here, as Husband is defending against Wife’s claims without the benefit of established discovery procedures. Husband has a limited ability to establish authenticity and admissibility without the benefit of the subpoena power, which he would have at trial. That said, Husband has provided sufficient facts to establish at this junction that the Nolan Email would be admissible. Namely, Husband established how he received the Nolan Email, that he did nothing to prompt its delivery, and that he had no part in sending it. And contrary to Wife’s claim, (Mot. to Strike at 3), the Nolan Email does contain the message header information showing it was transmitted electronically. The version of the Nolan Email submitted to the Court as a proposed document under seal is an exact copy—directly printed to .pdf from Husband’s email account in Microsoft Outlook—of the email Husband received.

Husband’s affidavit authenticating the Nolan Email does more than Wife has in seeking the admissibility of evidence in support of her claims. For example, as Husband pointed out in his most recent briefing, Wife failed to file an affidavit establishing either when she located the CamDuck or what she knew about it to substantiate her claim that the CamDuck was “newly discovered evidence.”³ At least Husband has supported his claims through affidavits intended to satisfy the “would be” admissibility standard potentially applicable to these proceedings.

³ In her Reply to Petitioner’s Motion to Supplement the Record, Wife belatedly filed an affidavit purporting to fix the deficiencies in her prior filing. That affidavit was a procedurally improper attempt to add an affidavit and restrict Husband’s ability to respond, as the South Carolina Appellate Court Rules do not provide for a sur-reply. As a result, Husband objects to Wife using her Reply to include new affidavits/arguments. Wife’s attempts to play procedural “gotcha” at

Second, contrary to Wife’s argument, (Mot. to Strike at 4), the Nolan Email is not offered for its truth and, therefore, is not hearsay. Hearsay “is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Although the Nolan Email is a statement, Husband does not seek its admission in these proceedings to establish that Wife actually committed adultery with someone named James “Jimmy” Nolan or otherwise engaged in illegal activity as detailed in the email. Instead, Husband offers the Nolan Email to demonstrate there are other sources available through discovery in the Family Court proceedings in which he could establish Wife’s adultery and drug abuse independent of any alleged wiretap. *See* S.C. Code Ann. § 17-30-65; *see also Resha v. United States*, 767 F.2d 285, 287–88 (6th Cir. 1985) (citing 18 U.S.C. § 2515 and discussing limitations of suppression under the Federal Wiretap Act). It is the sender’s knowledge about what the CamDuck recordings allegedly contain that is material—not whether the sender’s allegations are true. As a result, the Nolan Email is not being used for the truth of the matter asserted and is admissible under Rule 802, SCRE.⁴

Husband’s expense are further evidence that these proceedings are fundamentally flawed. Wife asks this Court to impose liability on Husband without fairly giving him the ability to evaluate the evidence she presents or refute the points she belatedly raises. In any event, Wife’s belated affidavit raises issues directly related to the Nolan Email, (Suppl. Reply Aff. of Wife in Supp. of Mot. to Suppress Evid. ¶¶ 10–11), so Husband addresses these new claims in limited fashion here to prevent filing additional motions and again delaying resolution of this matter.

⁴ Wife’s suggestion that Husband needs the Nolan Email to be offered for the truth of the matter asserted in order to prove her adultery, (Suppl. Reply Aff. of Wife in Supp. of Mot. to Suppress Evid. ¶ 10), ignores the fact that Wife already independently admitted to committing adultery with her paramour, Dan Fowler. (**Exhibit 1**, Excerpts from Wife’s Resps. to Pl.’s First Set of Interrogs., ¶ 12; **Exhibit 2**, Excerpts from Wife’s Supp’l Answers to Pl.’s First Set of Interrogs., ¶ 12; Aff. of Wife ¶ 12 (filed with Wife’s original Motion to Suppress)). Thus, the Nolan Email just provides corroboration of an ongoing adulterous relationship, potentially with another individual. Husband has no need to use the Nolan Email for the truth of Wife’s adultery when she has independently admitted it.

If the Nolan Email were offered for its truth, then it would otherwise be admissible through hearsay exceptions, including Rules 803(6) (business records from the email service provider) and 804(3) (statement against interest) of the South Carolina Rules of Evidence. To establish these evidentiary exceptions, however, Husband would need the benefit of the subpoena power, which he does not currently have given the stay of the underlying Family Court proceedings.⁵ This is yet another reason why these summary proceedings are more appropriate in the Family Court than in an original proceeding before this Court.⁶

Therefore, Wife's evidentiary arguments are unavailing and do not serve as a basis for this Court to strike the Nolan Email.

II. The Court should expedite any additional briefing and consideration in this matter.

Wife's Motion to Strike represents yet another attempt to delay resolution of these proceedings. This Court should reject Wife's attempt to prolong the appellate stay and expedite consideration of the underlying Motion to Suppress.

⁵ Contrary to Wife's suggestion, (Mot. to Strike at 4–5), Husband would need the subpoena power to obtain account and subscriber information from the email host to confirm the authenticity of the Nolan Email. Husband would also likely need the ability to subpoena and depose Fowler about the Nolan Email to determine whether he located Husband's Gmail address on the South Carolina Bar's publicly available Attorney Information System and sent the email from a fabricated account.

⁶ The lack of established discovery procedures also leaves Husband without the ability to question Wife's credibility based on the belated affidavits and arguments she recently provided to this Court. Those affidavits claim that Husband fabricated the Nolan Email—he did not, and his affidavit confirms he played no part in sending the Nolan Email. Wife further claims the Nolan Email is fabricated because she has “never engaged in the sort of activities described in the email[.]” (Suppl. Reply Aff. of Wife in Supp. of Mot. to Suppress Evid. ¶ 10). However, text messages between Wife and Fowler, which Wife produced during discovery, call this claim into question. Yet Husband has been unable to effectively defend against Wife's claims and question her credibility given the lack of a scheduled hearing in this case and Wife's repeated efforts to supplement the record without giving Husband or his experts an opportunity to examine the evidence on which she relies.

Two different authorities necessitate expediting this matter. First, the statute under which Wife purports to bring her Motion to Suppress expressly requires expedited consideration. S.C. Code Ann. § 17-30-110(3). Indeed, the parties are aware of this requirement, as the Court previously denied Husband's consent motion for an extension of his briefing deadline on the basis of expedited consideration. Since that time, however, Wife has filed three additional motions that do little, if any, to advance the merits of her Motion to Suppress. Husband respectfully requests this Court put an end to Wife's endless protraction by expediting consideration of the Motion to Suppress.

Second, an administrative order from the South Carolina Supreme Court requires expedited consideration of this matter. *See Re: Expediting Appeals in Matters Involving Child Custody and Visitation*, S.C. Sup. Ct. Order dated Nov. 17, 2022. As Husband explained in his Return to Petitioner's Motion to Supplement the Record, issues of custody, visitation, and decision-making as to the parties' three minor children remain in limbo given the stay imposed by this Court. Although the Family Court set a hearing to review its temporary order de novo on September 18, 2023, this Court's stay prevented that hearing from proceeding. Without another hearing, the parties are left with no visitation schedule for the holidays, and Husband has no available remedy for Wife's failure to share in the costs of their children's health insurance and childcare.⁷ Although the doctrine of unclean hands presents yet another reason Wife should be precluded from the relief she seeks, further delaying consideration of Wife's Motion to Suppress only serves to harm the best interests of the parties' children. Husband therefore respectfully requests this Court expedite its consideration of the Motion to Suppress and allow the Family Court to resolve urgent issues

⁷ Husband cannot move the Family Court to require Wife's compliance with her obligations to contribute given this Court's stay.

involving the children's interests in a manner consistent with the Supreme Court's administrative order.

Conclusion

For the reasons set forth above, Husband respectfully requests this Court deny Wife's Motion to Strike the Nolan Email and expedite consideration of Wife's Motion to Suppress.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

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Attorneys for Respondent Justin McGee

Columbia, South Carolina
November 21, 2023

Exhibit 1(Defendant's Responses to Plaintiff's First Set of Interrogatories)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
JUSTIN M. McGEE,)
)
Plaintiff,)
)
-vs-)
)
LINDSAY FOREBACK McGEE,)
)
Defendant.)
_____)

IN THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

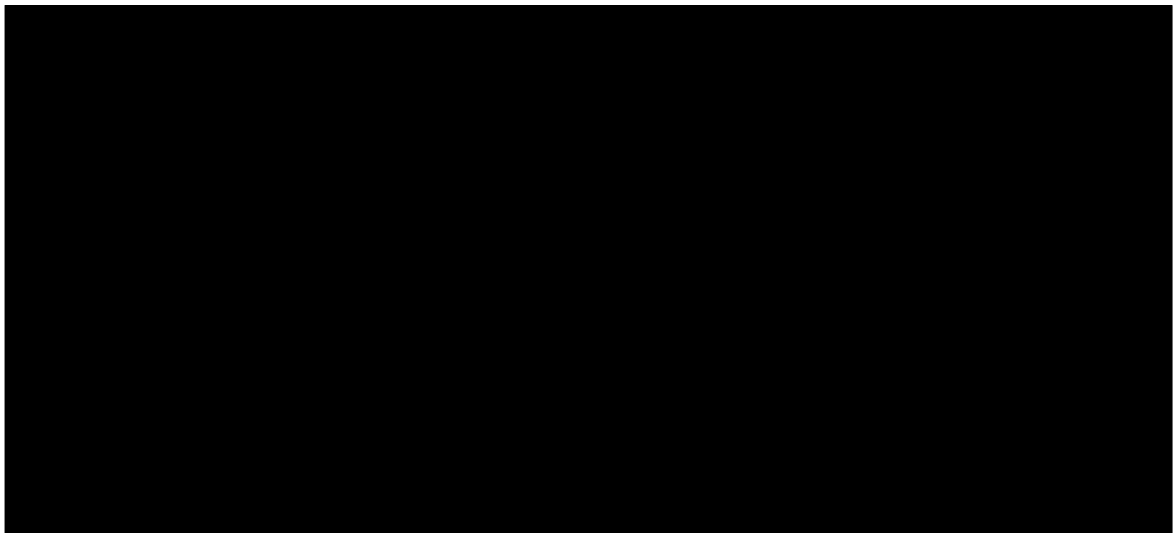
**DEFENDANT’S RESPONSES TO
PLAINTIFF’S FIRST SET OF
INTERROGATORIES**

CASE NO. 2022-DR-10-3072

**TO: PLAINTIFF, JUSTIN M. McGEE, AND HIS ATTORNEY, JERRY N. THEOS,
ESQUIRE:**

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:



ANSWER: [REDACTED]

12. List any sexual interactions you've had or participated in with anyone during your marriage, other than the Plaintiff. For the purposes of these requests, the term "sexual interaction" shall include sexual intercourse, oral sex, fondling, petting, kissing, genitalia exposure, sensual massaging, cybersex, sexting, virtual sex, video chatting of a sexual nature, the sending or receiving of explicit or nude photographs or videos, and any other such conduct. For each such occurrence, identify the other participant(s), set forth the date and time each such interaction occurred, the nature and extent of the interaction, the place where the interaction occurred, and identify and list any tangible evidence or documents that exist regarding each occurrence.

ANSWER: Defendant objects to this Interrogatory because it seeks information in the possession of, known to, or otherwise equally available to the plaintiff. Without waiving said objection and further answering, Defendant states she first engaged in sexual activity with Stephen Daniel Fowler on September 4, 2022. Defendant cannot recall the date of every interaction with Mr. Fowler; however, Plaintiff is in possession of certain GPS trackers and other reports that would indicate the date and duration Mr. Fowler was at 664 McCutchen and/or that Defendant was at Mr. Fowler's residence located on Blackrail Court.

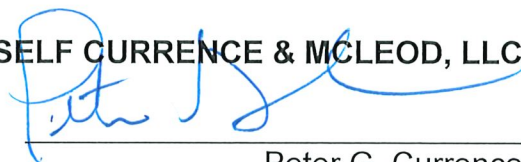
Defendant engaged in sexual activity with Mr. Fowler on occasions where the two were together inside one another's residence for a period exceeding one (1) hour. Defendant and Mr. Fowler have not engaged in intercourse outside of the two (2) residences identified. Defendant and Mr. Fowler have kissed in public; however, Defendant cannot recall every kiss she shared with Mr. Fowler outside of their respective residences.

ANSWER: [REDACTED]

[REDACTED]

[REDACTED]

MCDUGALL SELF CURRENCE & MCLEOD, LLC



Peter G. Currence
Attorney for the Defendant
791 Greenlawn, Suite 4
Columbia, SC 29209-2641
(803)776-3130

August 11, 2023.

**Exhibit 2 (Defendant's Supplemental Answers to
Plaintiff's First Set of Interrogatories)**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
JUSTIN M. McGEE,)
)
Plaintiff,)
)
-vs-)
)
LINDSAY FOREBACK McGEE,)
)
Defendant.)
_____)

IN THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

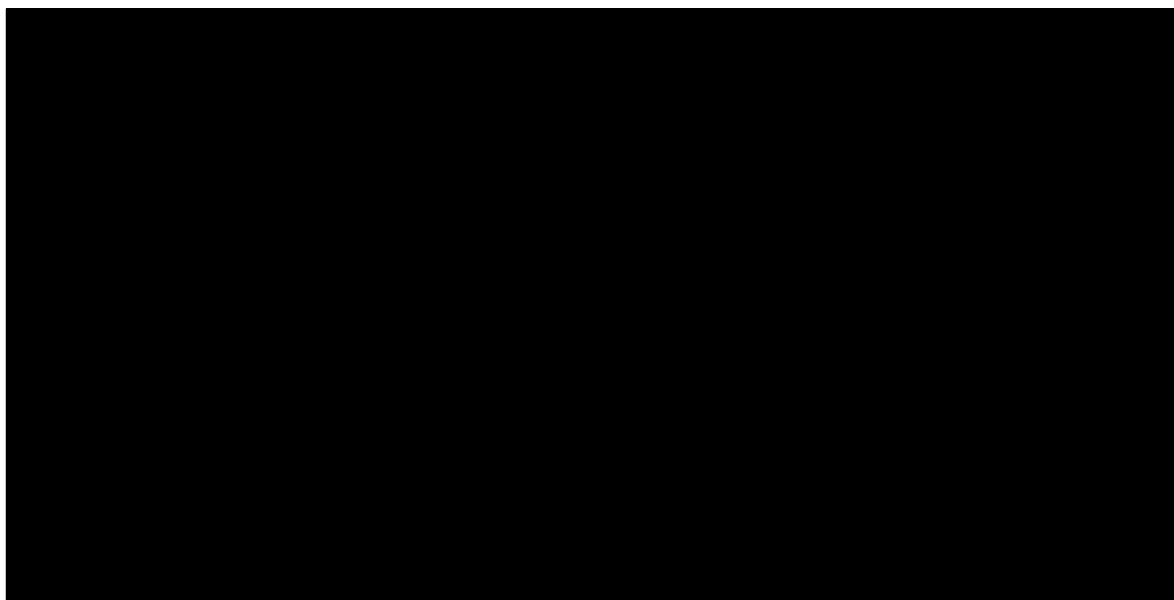
**DEFENDANT'S SUPPLEMENTAL
ANSWERS TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES**

CASE NO. 2022-DR-10-3072

**TO: PLAINTIFF, JUSTIN M. McGEE, AND HIS ATTORNEYS, JERRY N. THEOS,
ESQUIRE AND MARIE-LOUISE RAMSDALE, ESQUIRE:**

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:



disclose what specifically was exchanged, set forth the value of the items exchanged, and describe the means of transfer for what was exchanged (specifically setting forth whether the exchange was conducted via any courier or sent via any delivery service such as FedEx, USPS, UPS, DHL, etc.).

ANSWER:

[REDACTED]

[REDACTED]

11. List all items of personal property, tangible gifts, or other items of any monetary value you have given or transferred to another person, other than a family member, from January 1, 2018 to present, specifically including but not limited to any such occurrences involving the following persons: Christopher Jay Forino, Karen Keys, Stephen Daniel Fowler, Sarah Kersey, Brittney Roberts, Emily Jones, Alyse Dye Hulteen, and Sarah Dawn Hull.

ANSWER:

[REDACTED]

12. List any sexual interactions you've had or participated in with anyone during your marriage, other than the Plaintiff. For the purposes of these requests, the term "sexual interaction" shall include sexual intercourse, oral sex, fondling, petting, kissing, genitalia exposure, sensual massaging, cybersex, sexting, virtual sex, video chatting of a

sexual nature, the sending or receiving of explicit or nude photographs or videos, and any other such conduct. For each such occurrence, identify the other participant(s), set forth the date and time each such interaction occurred, the nature and extent of the interaction, the place where the interaction occurred, and identify and list any tangible evidence or documents that exist regarding each occurrence.

ANSWER: Defendant objects to this Interrogatory because it seeks information in the possession of, known to, or otherwise equally available to the plaintiff. Without waiving said objection and further answering, Defendant states she first engaged in sexual activity with Stephen Daniel Fowler on September 4, 2022. Defendant cannot recall the date of every interaction with Mr. Fowler; however, Plaintiff is in possession of certain GPS trackers and other reports that would indicate the date and duration Mr. Fowler was at 664 McCutchen and/or that Defendant was at Mr. Fowler's residence located on Blackrail Court.

Defendant engaged in sexual activity with Mr. Fowler on occasions where the two were together inside one another's residence for a period exceeding one (1) hour. Defendant and Mr. Fowler have not engaged in intercourse outside of the two (2) residences identified. Defendant and Mr. Fowler have kissed in public; however, Defendant cannot recall every kiss she shared with Mr. Fowler outside of their respective residences.

13. Please identify and provide a description of any gifts or monetary amounts given to or received from any person, other than the Plaintiff, with whom you've engaged in any "sexual interaction" during the marriage, or any funds spent or expense incurred in furtherance of such a relationship or sexual interaction with such persons, including but not limited to jewelry, clothing, real property, vehicles, subscriptions, memberships, travel expenses, etc., whether paid to you, to said person, paid by you directly, or paid by said person directly. State the date of each occurrence, the item(s) given or received or the basis for such expense, the specific value of the item or dollar amount spent or given, the

casualty claims, personal property, business equipment, rental property, leases, partnerships, corporations, or any other form of entity or ownership. For each asset, please provide the following information:

- A. The nature and specific identification of the asset.
- B. The date acquired.
- C. The source of the acquisition.
- D. The cost of the acquisition.
- E. The source of all funds or other considerations for the acquisition.
- F. The value as of the date of acquisition.
- G. The value as of the present time.
- H. The names, addresses, and telephone numbers of any other holders of interest therein, stating the nature and extent of the interest.
- I. The contribution which you made to the acquisition and retention of the asset.
- J. Whether you classify the asset as marital or non-marital property.
- K. Details of any transfers of equity interest in the asset, other than by gift or inheritance, since the date of marriage.

ANSWER: | [REDACTED]

[REDACTED]

[REDACTED]

MCDUGALL SELF CURRENCE & MCLEOD, LLC



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Attorney for the Defendant
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August 25, 2023.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY FAMILY COURT

Appellate Case No. 2023-001376

Justin McGeeRespondent,

v.

Lindsay F. McGee.....Petitioner.

Proof of Service

I, the undersigned partner of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent Justin McGee, certify that I have served all parties in this action with a copy of the document(s) set forth below by email:

Document(s): **Return to Petitioner’s Motion to Strike Affidavit of James Nolan and All References to the Nolan Affidavit to and Seal**

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Columbia, South Carolina
November 21, 2023

Matt Abee

From: Matt Abee
Sent: Tuesday, November 21, 2023 4:30 PM
To: 'pete@mscmlaw.com'; 'Dick.whiting@whitinglawsc.com'
Cc: 'lizzie@mscmlaw.com'; 'Jerry@Theoslaw.com'; 'Brittany Point'; 'Jackie'; 'ml@ramsdalelaw.com'; 'Lori Ross'; 'liz@stringerlaw.us'; Morgan Spires; 'Andrew Fischer'
Subject: Service Copy: Return to Motion to Strike - McGee v. McGee (No. 2023-001376) - 079821.01501
Attachments: Return to Motion to Strike Nolan Email - McGee.pdf; Exhibit 1 - Wife's Responses to Plaintiffs First Set of Interrogatories.pdf; Exhibit 2 - Wife's Supplemental Answers to Plaintiffs First Set of Interrogatories.pdf; Proof of Service - Return to Motion to Strike.pdf

Pete and Dick,

For service on you by email under Supreme Court Order No. 2022-05-06-03, please find our Return to Petitioner's Motion to Strike Affidavit of James Nolan and All References to the Nolan Affidavit to and Seal.

Please feel free to contact me should you have any questions. Thanks.

-Matt



MATT ABEE **PARTNER**
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