THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge
Case No.: 2022-CP-26-06296

Appellate Case No. 2024-000786

Anna Coggeshall; Bryan Coggeshall; and Katherine Coggeshall .....Respondents

v.

William Bertram von Herrmann and The Von Herrmann Law Firm. ..... Appellants.

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT

I. The Homeland Security Act must be strictly construed because it created a cause of action where none existed previously, and Respondents' cited authority do not support avoiding strict interpretation.

Respondents argue that the statute should not be strictly construed because, although it is a penal statute, it is a "hybrid" statute with civil provisions and the civil provision should be interpreted separately, citing cases from New York. *See Bounkhoun v. Barnes*, 2018 WL 1805552 (W.D.N.Y. April 17, 2018); *Wiggins v. Gordon*, 455 N.Y.S.2d 205 (Civ. Ct. 1982). **Resp. Br. 14-15**. Respondents assert these cases somehow permit this Court to not strictly construe the Act. **Resp. Br. at 15**.

Respondents' argument is wrong for multiple reasons. First, the statute must be strictly construed regardless of whether it is a penal statute because the statute creates a cause of action where none previously existed and, therefore, is in derogation of common law. *See, e.g.*, *Simpson v. Sanders*, 314 S.C. 413, 415, 445 S.E.2d 93, 94 (1994) (finding elective share statute was statute of creation in derogation of common law because common law previously permitted spouse to leave out surviving spouse from will and, therefore, the statute had to be strictly construed).

Second, although the statute authorizes a civil remedy, the civil remedy is available only if it is proven someone violated the crime. S.C. Code Ann. § 17-30-135 (A) ("Any person whose . . . electronic communication is intercepted, disclosed, or used *in violation of this chapter* has a civil cause of action . . . ." (emphasis added)). Thus, the civil remedy is linked to a criminal portion of the statute.

Last, the cases Respondents cite do not stand for the proposition that a court can avoid strict interpretation of a penal statute when the plaintiff is proceeding under a civil remedy the statute authorizes. *Bounkhoun* involved legal malpractice, and the client accused its former

attorneys of violating a criminal statute containing a civil remedy. *Bounkhoun*, 2018 W.L. 1805552, at *2. The attorneys argued the client could not pursue a civil remedy without the attorneys first being convicted of violating the criminal statute because the statute included the language "in addition to" when authorizing the civil remedy. *Id.* at *3. The court found that a conviction was not a prerequisite to the civil remedy because the civil remedy could be severed and was distinct from the criminal portion. *Id.* at *5. The court said nothing of avoiding strict interpretation of a civil remedy in a penal statute. *See id.*

The court noted a split in case law in which some courts imposed an additional prerequisite to stating a claim, but did not address the "stricter standard" because the facts alleged stated a claim under both. *Id.* at *5. *Wiggins* is merely an example of one court recognizing the stricter standard and also says nothing of ordinary versus strict interpretation. *Wiggins*, 455 N.Y.S.2d at 207 (stating the criminal statute should be "carefully reserved for the extreme pattern of legal delinquency, which falls within the restrictive contemplations of that statute"). The reference to meeting both standards in *Bounkhoun* is irrelevant here because if the Court finds attorney immunity applicable, then the facts alleged do not state a claim under the Act.

Therefore, this Court should strictly construe the Act regardless of Respondents proceeding under the authorized civil remedy.

II. Federal cases interpreting the Federal Wiretap Act are not persuasive because attorney immunity is determined by state law, not federal, and states vary in whether they recognize attorney immunity and how it applies to statutes.

Respondents argue that, even if the statute is strictly construed, this Court should conclude Appellants may still be held civilly liable. **Resp. Br. at 15**. Respondents assert that nothing in Act exempts attorneys and law firms from its requirements. Respondents highlight that the Act is patterned after the federal wiretap statute and, therefore, federal cases interpreting the federal

statute are persuasive in interpreting South Carolina's Act. **Resp. Br. at 16**. The federal cases cited, however, are unpersuasive because the strength and applicability of the attorney immunity doctrine varies by state and in its application.

First, there is a significant difference between the application of a state common law in the face of a state statute and state common law in the face of a federal statute, the latter of which raises preemption issues. *See, e.g.*, *Eggleston v. United Parcel Serv., Inc.*, 428 S.C. 373, 379, 834 S.E.2d 713, 715 (Ct. App. 2019) (discussing preemption under the supremacy Clause of the United States Constitution and finding federal statute preempted state common law claims); *see also Taylor v. Tolbert*, 644 S.W.3d 637, 656 (Tx. 2022) (noting how state law cannot modify federal law when finding Texas' common law attorney immunity defense inapplicable to federal wiretap claims). Respondents voluntarily dismissed their federal wiretap claim and, therefore, there are no preemption issues. This case deals solely with the application of state common law to a state statute.

Second, the strength of attorney-immunity is determined by state law, not federal, and states vary in whether they recognize the immunity and how it applies to state statutes. For example, *Nix v. O'Malley* involved claims against an attorney arising under the federal wiretap act and Ohio's wiretap statute, where Nix, the party whose communications were intercepted, sued O'Malley and Weston, Hurd (O'Malley's attorney), arguing the pair violated federal and Ohio wiretap statutes when (1) O'Malley disclosed the communications to his attorney; (2) his attorney used the communications to prepare O'Malley's defense to wiretap allegations; and (3) his attorney disclosed the actual communications in a public filing for summary judgment. 160 F.3d 343, 348 (6th Cir. 1998).

The *Nix* court recognized that the disclosure to the attorney (1) and the attorney's use of the communication in a litigation context to prepare a defense (2) were privileged, and neither were subject to liability under implied "adjudication" and "defense" exceptions. *Id.* at 351. The court held the disclosure and use were necessary functions of wiretap law. *Id.* Importantly, these defenses were *implied* by the court because the wiretap statutes do not specifically provide for them. *Id.*

The *Nix* court found that disclosing the communications in a public filing was not entitled to Ohio's attorney immunity law. However, Ohio's attorney-immunity law was the common law privilege that protects attorneys who republish defamatory statements while defending their client. *Id.* at 352. The court did not discuss an equivalence to South Carolina's attorney immunity doctrine, which is a separate and much broader doctrine from the immunity from defamation for statements made during judicial proceedings. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002) ("Any communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot form the basis for a cause of action for libel or slander." (quoting *Kropp v. Prather*, 526 S.W.2d 283, 286 (Tex. Civ. App. 1975)).

The other cases Respondents cite are just as irrelevant. *United States v. Wuliger* is from the same circuit as *Nix* and *Nix* cites *Wuliger*, but *Wuliger* involved an attorney's criminal conviction under the federal wiretap act and whether he should have been given a special jury instruction on the standard for "reason to know the communications were intercepted" to include his duties as an attorney, which the court declined. *United States v. Wuliger*, 981 F.2d 1497, 1504-05 (6th Cir. 1992). State common law, attorney immunity, and the civil remedy were not at issue in *Wuliger*.

Pyankovska v. Abid involved claims against an attorney under the federal wiretap statute and Nevada's wiretap statute when he filed transcripts of intercepted communications on the public docket. 65 F.4th 1067, 1071 (9th Cir. 2023). The district court dismissed claims against the attorney under the *Noerr-Pennington* doctrine, which is an immunity based on the First Amendment ensuring "that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved." *Id.* at 1076 (quoting *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000)). *Pyanskovska* never addressed any form of state law attorney immunity as applied to either the federal wiretap statute or Nevada's wiretap statute and, therefore, has no bearing on the question before this Court.

Marsh v. Curran involved claims against an attorney under the federal wiretap statute and Virginia's wiretap statute, along with common law claims, when the attorney used intercepted communications in the context of a divorce proceeding, specifically when questioning an adverse witness—the wife's romantic partner. 362 F. Supp. 3d 320, 325 (E.D. Va. 2019). The court first seemed to recognize the defense of unclean hands could apply, but not at the 12(b)(6) stage. *Id.* at 327. Unclean hands is not explicitly recognized under wiretapping statutes but the court's willingness to entertain the defense despite no statutory language allowing it suggests implied common law defenses are applicable to wiretapping claims. Nevertheless, the issue was a litigation privilege and absolute immunity for attorneys, which the court declined to adopt. *Id.* at 328. The court, however, was never asked to address whether a qualified attorney immunity defense, such as that recognized in South Carolina, would apply to Virginia's wiretap statute. *See generally id.* In fact, it does not appear that Virginia has formally recognized a similar attorney immunity doctrine. *DuBrueler v. Hartford Fire Ins. Co.*, 4 Va. Cir. 135, 1983 WL 210333, at *3

(Va. Cir. Ct. Sept. 9, 1983) (citing Minnesota attorney-immunity doctrine and noting Virginia had not expressly adopted the doctrine).

Babb v. Eagleton involved federal wiretap claims against an attorney who asserted as a defense Oklahoma common law litigation privilege that purportedly shielded attorneys from defamation for statements made in the course of judicial proceedings. 616 F. Supp. 2d 1195, 1207 (N. D. Okla. 2007). There were no argument or analysis on the equivalent of South Carolina's attorney-immunity to state wiretapping claims and, therefore, *Babb* is not relevant to this Court's analysis.

Lewton v. Divingnzzo likewise involved only federal wiretap claims where the attorney asserted a common-law immunity and litigation privilege, but the court considered only federal cases and noted the only litigation privilege defense recognized to federal wiretap claims is for disclosure to an attorney defending wiretap claims. 772 F. Supp. 2d 1046, 1057 (D. Neb. 2011). The court refused to exercise supplemental jurisdiction over the state common law claims and defenses and claims under Nebraska's wiretap statutes. *Id.* at 1060-61. Therefore, the *Lewton* court's analysis is not relevant to the application of a state common law defense to a state statute in South Carolina.

Finally, *United States v. Crabtree* involved whether there was a "clean hands" exception to the prohibition on the court receiving evidence of intercepted communications under the federal wiretap statute if the government was not involved in the interception, which the court declined to recognize. 565 F.3d 887, 889 (4th Cir. 2009). State law was not at issue.

In sum, this Court should strictly construe South Carolina's Homeland Security Act to determine if the state common law defense of attorney immunity applies without relying on

unpersuasive and easily distinguishable federal cases from courts that did not address similar defenses to state claims.

III. Recognizing attorney immunity's application to the Homeland Security Act does not have the effect of displacing the Act.

Respondents misconstrue Appellants' argument on attorney immunity's application to the Act, stating Appellants assert it is an absolute bar to liability contrary to the express language of the Act. **Resp. Br. at 22**. Respondents segue that misconstruction into an argument that the legislature could have expressly excluded attorneys from application under the Act like it did with other categories of persons, or in other statutes. **Resp. Br. at 23**.

As Appellants argued in their brief, however, attorney immunity is not an absolute defense, it is qualified by requirements that the attorney act in the scope of representation with client knowledge and consent. It bars Respondents' claims because Respondents allege the offending conduct took place within the qualifications of the defense. This is precisely why the circuit court dismissed Respondents' common law invasion of privacy claims.

The clarification between absolute and qualifying is important because the doctrine insulates attorneys from liability for limited actions, not as a class of people in general. Because the defense doesn't immunize attorneys absolutely, an attorney as a "person" could be civilly liable if the actions are outside the defense. If there are circumstances where an attorney could still be liable, then there is no reason to expressly exempt attorneys as a group from the Act's application.

Respondents also misunderstand the effect of recognizing that the defense applies to the Act. It appears that Respondents believe recognizing the defense under the Act means it would exclude attorneys as a class from the Act's definition of "person" or that it would "authorize" violations of the Act that are not authorized. **Resp. Br. at 23-24**. This reasoning is faulty. First, recognizing the defense applies does not remove attorneys from the definition of "person."

Attorneys still come within the definition of "person" if the defense is recognized, the attorney would simply be immune if the actions fell within the scope of attorney immunity. *See Taylor v. Tolbert*, 644 S.W.3d 637, 651 (Tx. 2022) ("[Plaintiff] suggests a false dichotomy. In reality, attorneys can be persons to whom the statute applies and also immunized from civil liability for the kind of conduct the immunity defense protects.").

Second, recognizing the defense applies to civil liability under the Act is not akin to "authorizing" the actions for interception or use. The very purpose of the defense is to immunize attorneys from civil liability for actions that would otherwise be unauthorized.

Respondents argue that the principle the common law is not displaced is limited to when the statute is on the same subject as the common law. **Resp. Br. at 25**. Respondents assert that, because the Homeland Security Act does not address the "same subject" as attorney immunity, "no presumption arises that the South Carolina Legislature intended the Homeland Security Act not to displace the common-law principle of attorney immunity." **Resp. Br. at 26**. The argument is absurd. Certainly, some cases discussing a statute's effect on common law mention a statute on the same subject as the common law does not change the common law unless clear and unambiguous. *See, e.g.*, *Nuckolls v. Great Atl. & Pac. Tea Co.*, 192 S.C. 156, 5 S.E.2d 862, 864 (1939). However, Respondents' argument would turn this presumption on its head and create an absurdity—a statute displaces common law on a *different* subject on which it is silent but does not displace common law on the *same* subject without clear and unambiguous language. If the goal of statutory interpretation is to determine legislative intent and that is primarily derived from the language of a statute, it could not be the legislature's intent in passing a statute to displace common law on a totally different subject.

In addition, Respondents attempt to distinguish *Taylor* by referencing the differences between the Homeland Security Act and the Texas Wiretap statute, stating that unlike Texas' statute the Homeland Security Act contains an exclusivity clause. **Resp. Br. at 27**. This difference, however, does not compel the opposite conclusion because the *Taylor* court relied on other reasoning to support the conclusion the state common law defense did not apply to the federal statute and federal cases have implied a limited litigation privilege, indicating the statute is not "exclusive."

The *Taylor* court recognized that the Texas statute did not contain the phrase "[e]xcept as otherwise specifically provided" as the federal statute did. *Taylor*, 644 S.W.3d at 654. However, the court first concluded that a state common law defense would not apply to the federal wiretap statute. *Id.* The court also discussed that no federal cases had recognized a similar level of attorney immunity under the federal statute. *Id.* Therefore, although the court considered the exclusivity language, it was not the only or primary reasoning.

Further, despite this exclusivity language in the statute, federal courts have implied a litigation privilege that shields attorneys from liability when using or disclosing intercepted text messages to defend against wiretapping claims. *See, e.g.*, *Nix*, 160 F.3d at 351 (finding the disclosure of intercepted communications to an attorney and that attorney's use of them to prepare a defense to wiretapping charges were implied "adjudication" and "defense" exceptions to federal wiretap claim, despite those exceptions not being explicit in the statute). If the exclusivity clause is truly exclusive, then there would not be adjudication and defense exceptions. The fact that courts recognize these exceptions to the federal statute indicates the exclusivity language isn't all that exclusive. Therefore, the provision in the Homeland Security Act does not mandate finding South Carolina's attorney immunity doctrine inapplicable. Further, as otherwise explained,

recognizing the defense would not authorize the interception or necessarily shield attorneys from criminal prosecution or ethical discipline.

IV. When a claim is subject to dismissal as a matter of law, it must be dismissed even if the facts as alleged would support the purported claim.

Respondents argue that Appellants misapprehend the circuit court's reasoning, contending that dismissal is not appropriate because they have stated a claim under the 12(b)(6) standard; specifically, that they have alleged Respondents knew the communications were intercepted and used them. **Resp. Br. at 29**. But Respondents then argue that Appellants' state of mind is outside this appeal and the only question is whether attorney immunity applies. **Resp. Br. at 29**.

Respondents' argument is confusing. The facts as alleged assert Appellants' actions occurred in the context of representing their client, Mr. Fulmer. If attorney immunity applies under the Homeland Security Act, Respondents' allegations that Appellants knew the communications were intercepted are inconsequential to the appeal: dismissal is appropriate because the facts, as alleged and taken as true, do not state a cause of action as a matter of law because Appellants are entitled to immunity under those facts.

V. Contrary to Respondents' contentions, policy considerations apply to interpreting whether attorney-immunity applies under the Act.

Respondents argue this Court should not consider the policy implications of the Act because the language is plain and unambiguous, and must be enforced as written. The statute, however, is capable of more than one interpretation on whether common law defenses apply to its violation. Because statute is silent on the topic and it is capable of more than one interpretation, the statute is ambiguous and must be construed, which opens up policy considerations of the various potential interpretations. *See S.C. Dept of Soc. Servs. v. Lisa C.* , 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008) ("If a statute is susceptible to two reasonable interpretations, it is ambiguous."); *id* ("When 'a statute is ambiguous, the Court must construe the terms of the

statute.'" (quoting *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002)). Thus, this Court should consider the policy implications of refusing to recognize attorney immunity's application to the Act.

Also attempting to counter the policy implications, Respondents highlight an attorney's ethical obligations (**Resp. Br. at 30-31**), that the violation of the Homeland Security Act is a felony (**Resp. Br. at 31**), that using the information from the communications falls within the crime/fraud exception to attorney-client privilege[1] (**Resp. Br. at 32**), and then analogize to the Rules of Professional Conduct and disciplinary cases (**Resp. Br. at 32-33**).

As Appellants argued in their brief, however, attorney immunity is a defense to civil liability. Attorney immunity does not shield an attorney from disciplinary proceedings or criminal prosecution. *See generally Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 530, 339 S.E.2d 887, 890 (Ct. App. 1986) (noting attorneys are subject to disciplinary proceedings not insulated by attorney immunity). Respondents are not agents of the State of South Carolina prosecting a crime under the Homeland Security Act, or the Office of Disciplinary Counsel pursuing disciplinary proceedings for ethical misconduct. Respondents are private individuals seeking monetary relief for a civil claim. Because the attorney-immunity defense applies to civil claims and Respondents are pursuing a civil claim, references to crimes and ethical misconduct are not relevant to this Court's determination.

Furthermore, while interpreting the ambiguous statute, the court must do so to avoid an absurd result. *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 218, 222, 670 S.E.2d 371, 373 (2008); *see Enos v. Doe*, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App.

[1] The attorney-client privilege is not at issue and the crime/fraud exception to the prohibition on sharing privileged information is irrelevant.

2008) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.").

To hold that the Act abrogated attorney-immunity would lead to an absurd result, holding persons criminally liable for actions clearly not intended under the statute. Under the statute, a person who discloses or uses the contents of an intercepted communication knowing or having reason to know it is intercepted is guilty of a felony. S.C. Code Ann. § 17-30-20 (3), (4). There is no explicit exception under the statute for state prosecutors. It is lawful to intercept a communication when one of the parties gives prior consent to the interception. S.C. Code Ann. § 17-30-30 (B), (C). But there is no indication that later use of those intercepted communications can be consented to. There is an exception to the admissibility rule for *criminal* prosecution for violating laws prohibiting interception. S.C. Code Ann. § 17-30-65 (A). But there is no corresponding exception for civil claims of violating the Act. *See* S.C. Code Ann. § 17-30-135. And cases alleging civil liability are entitled to a jury trial. *Id.*

Thus, according to Respondents' arguments on attorney-immunity and interpretation of the Act, Respondents' attorney's "use" of the intercepted communications to bring a civil lawsuit would violate the statute (note the statute for civil damages permits the person to bring a claim, but says nothing excluding the person's attorney's use of the communications to bring the claim); Respondents' attorney's disclosure of the evidence in discovery in this case would violate the Act, and Respondents would not be able to introduce evidence of the intercepted communications into evidence before the jury. Important here is that the Act does not indicate the person whose communications were intercepted can consent to their use *after* the interception.

In fact, the Act states intercepted communications are discoverable under the Act, and the judge on motion to use the intercepted communications must provide the intercepted communication and derivative evidence. S.C. Code Ann. § 17-30-105 ("Upon filing of a motion by an aggrieved person, the judge must make available to the aggrieved person or his counsel for inspection, the portions of the intercepted communication or evidence derived therefrom that would be otherwise discoverable under South Carolina law."). Likewise, the Act suggests the party whose communications were intercepted can have an expert review the material. *Id.* (determining prejudice requires the court to consider "the party's need to retain experts to review the material"). In a scenario where the communications are intercepted by the government, and attorney-immunity did not apply, the aggrieved party's attorney would be liable for disclosing the intercepted communications to the expert in preparing a defense.

Moreover, Respondents' arguments—that general language prohibiting conduct and silence on what defenses are incorporated— if carried to their logical conclusion, would result in abrogating all common law defenses and any statutory defenses not specifically mentioned in the Act. The Act does not mention the applicability of the Rules of Civil Procedure to the civil claim. By Respondents' arguments, this would prohibit relying on any of the affirmative defenses referenced in Rule 8(c) of the South Carolina Rules of Civil Procedure. Another absurd result. Accordingly, this Court should reject Respondents' arguments that lead to an absurd result and find attorney immunity applies to the Act.

CONCLUSION

South Carolina's Homeland Security Act does not clearly and unambiguously abrogate the common law attorney immunity defense. In reaching its determination, this Court should not rely on federal cases interpreting the federal wiretap statute because those cases do not address the

application of an South Carolina equivalent attorney immunity doctrine to a state wiretap statute. The closest example to the circumstances of this case is the Texas Supreme Court's opinion in *Taylor v. Tolbert*. This Court should follow Texas' example and find attorney immunity applies to the Act, reversing the circuit court and dismissing Respondents' remaining claim.

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July 7, 2025.

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THE STATE OF SOUTH CAROLINA
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I certify that I have served ***Appellants' Final Reply Brief***, upon the parties below by electronic mail, addressed as follows:

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Good morning everyone,

On behalf of Appellants William Bertram von Herrmann and The Von Herrmann Law Firm, we are providing you a copy of Appellants' Final Brief and Final Reply Brief in this case, which will be emailed to the Court today, along with the Record on Appeal, which was emailed to you on June 16th. Bound versions of the Record on Appeal, Final Brief and Reply Brief will be mailed to the court today.

Thank you and best regards,

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Re: Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall (*Respondents*) v. William Bertram von Herrmann and The Von Herrmann Law Firm (*Appellants*)
Appellate Case No. 2024-000786
State Case No.: 2022-CP-26-06296
CSVL File No.: 2283-64549

Dear Ms. Kitchings:

Please find enclosed, the following documents submitted on behalf of Appellants in this case:

1. Record on Appeal (previously provided to Respondent's counsel on June 16, 2025 via email (please see attached Proof of Service with service email) - one bound copy of the Record on Appeal (with white cover) will follow via regular mail;
2. Appellants' Final Brief, together with Proof of Service– one bound copy (with blue cover) and one unbound copy will follow via regular mail;
3. Appellants' Final Reply Brief, together with Proof of Service – one bound copy (with gray cover) and one unbound copy will follow via regular mail.
4. Copy of 7/7/2025 service email to Respondents' counsel providing Appellants' Final Brief and Final Reply Brief.

By copy of this letter, we are providing the enclosed to Respondents' counsel and advising of our communication with the Court. Please let us know if anything further is required at this time.

Sincerely yours,

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN
SKYLER C. WILSON

SCW:tjr
Enclosures: *as stated above*
cc: Richard G. Whiting, Esq.; Steven Abrams, Esq.; Kenneth R. Moss, Esq.; Robert E. Lee, Esq.
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