IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Judge George James, Jr., Circuit Court Judge
James F. Barber, Supervising Circuit Court Judge

Formerly Pending before the South Carolina Court of Appeals

Howard Hammer.....Appellant

v.

Shirley Hammer.....Respondent

Case No.: 2009-CP-40-05911
Appellate No.: 2013-001652

1634 Main, L.P.....Plaintiff/Appellant

v.

Shirley Hammer a/k/a Shirley Grace Hightower.....Defendant and Third Party Plaintiff/Respondent

v.

Howard Hammer.....Additional Defendant On Counterclaim/Appellant

Case No.: 2010-CP-40-2889
Appellate No.: 2013-001634

REPLY BY ADDITIONAL DEFENDANT ON COUNTERCLAIM/APPELLANT HAMMER TO RESPONDENT'S INITIAL BRIEF IN CASE NO.: 2010-CP-40-2889

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I.

THE RESPONDENT'S "REPLY BRIEF" CONCEDES THAT "FRUSTRATION" IS AN EMOTIONAL DAMAGE. HER WITHDRAWAL OF HER PRAYER FOR SUCH DAMAGES AND HER LACK OF PROOF OF SUCH DAMAGES COMPEL REVERSAL OF THE LOWER COURT'S AWARD.

FRUSTRATION

There can be little doubt that the lower court was seeking a platform for an award for the Respondent in the face of the nearly impossible constraints imposed by the Respondent's gutting of her own damage claim by (1) her outright and unqualified *withdrawal of any claim for emotional distress damages* and (2) her failure to provide cognizable proof for attorneys' fees in either the merits trial or the sanctions proceeding. At critical junctures the lower court, perceiving the void, could not have been more transparent in guiding the Respondent along concerning what he needed to allow him to award attorneys' fees (i.e., his admonition to her to re-serve the sanctions motion properly and within a proper time line, which she nonetheless failed to do, and his elucidation for her that the attorneys' fee entries tendered to the court were essentially incomprehensible and non-probative without further details, which she never provided). Against this insurmountable challenge the lower court, rather than dismissing the claim for Respondent's failure to prove damages, cast about for an alternative basis for a damage award and fashioned a novel stand-alone element, i.e., "frustration," a concept wholly new to the jurisprudence of this state when, as here, erected outside the ambit of emotional distress.

"Frustration" of the kind found by the lower court must fall within the all-embracing definition of mental distress in order to constitute an element of damage in an abuse of process claim. The alternative definition introduced by the Respondent in her "Reply Brief" relates to contract principles, has not even a tangential connection to anything in this case, and amounts to pure sophistry in a feeble attempt to circumvent the conundrum created by the lower court's reliance on "frustration" (clearly a mental or emotional response) juxtaposed against the

Respondent's voluntary withdrawal of her claim for any emotional damages. The all-inclusive nature of the term "emotional distress," which was precisely the kind of damages for which the Respondent originally pled, is fully defined in *Black's Law Dictionary* as follows:

> "A highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's conduct; emotional pain and suffering. Emotional distress, when severe enough, can form a basis for the recovery of tort damages—Also termed emotional harm; mental anguish; mental distress; mental suffering. . . ." "Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It also includes *all* highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." (Citing *Restatement [Second] of Torts § 46*) (Emphasis added). *Black's Law Dictionary, (9th ed. 2009)*

A review of the development of the law of South Carolina related to emotional distress makes crystal clear how carefully this Court has set forth the limits for recovery based on mental or emotional elements. While some early decisions did allow recovery for mental or emotional damages absent the stringent requirements of today (*See, e.g., Padgett v. Colonial Wholesale Distributing Co.,* 232 S.C. 593, 604, 103 S.E.2d 265, 270 [1958] [allowing shock with a physiological basis injury to be submitted to the jury because "nervous shock or paroxysm, or a disturbance of the nervous system is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism."]), this Court has clearly rejected that approach in recent decades by requiring objectively verifiable criteria for recovery of emotional distress by any name, "frustration" obviously being one. Specifically, in *Hudson v. Zenith Engraving Co.,* 273 S.C. 766, 770, 259 S.E.2d 812, 813 (1979), this Court held that "[i]n order to prevail in a tortious action in which the sole damages alleged are those of mental anguish, plaintiff must show that the conduct on the part of defendant was extreme and outrageous, causing distress that is of an extreme or severe nature." In 1981, this Court formally recognized the tort of outrage (or intentional infliction of emotional distress). *See Ford v. Hutson,* 276 S.C. 157, 276 S.E.2d 776 (1981). (It should be noted here that the Respondent withdrew from consideration by the lower court her claim for intentional

infliction of emotional distress and therefore could not recover on that basis regardless of what name the lower court might give it.) Thereafter, in *Dooley v. Richland Memorial Hospital,* 283 S.C. 372, 322 S.E.2d 669 (1984), this Court rejected an invitation to recognize a general tort of negligent infliction of emotional distress beyond intentional and reckless conduct because the plaintiffs had failed to make any showing of physical injury to support their claim. The Court recognized that one criticism of permitting a tort for negligent infliction of emotional distress was "that it will allow for fraudulent claims" and that "[o]ne method of eliminating this danger has been to require some type of physical injury in addition to any claimed emotional injury." 283 S.C. at 375, 322 S.E.2d at 671. The cautious evolution took another step with *Kinard v. Augusta Sash & Door Co.,* 286 S.C. 579, 336 S.E.2d 465 (1985), where this Court recognized the tort of negligent infliction of emotional distress, but with the most stringent restrictions:

> (a) the negligence of the defendant must cause death or serious physical injury to another;
>
> (b) the plaintiff bystander must be in close proximity to the accident;
>
> (c) the plaintiff and the victim must be closely related;
>
> (d) the plaintiff must contemporaneously perceive the accident; and
>
> (e) the emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.

See id., 286 S.C. at 582, 336 S.E.2d at 465.

These developments are reviewed here to underscore not only the degree to which non-physical injuries have been circumscribed but also the extreme circumspection and vigilance exercised by this Court to guard against an opening of the floodgates of litigation, an inevitable outcome if the parameters of damages so carefully constructed by this Court can be expanded on a judge's whim.

The law of South Carolina, as enunciated by this Court, recognizes emotional distress damages in only certain specific circumstances, none of which exist here: (a) when accompanied by a physical injury, such as in a vehicular accident or otherwise authorized by statutory or case law when well pled and proved; (b) upon proof of outrage or intentional infliction of emotional distress (which here was withdrawn and dismissed by the lower court and is unappealed); and (c) negligent infliction of emotional distress in the "bystander" context (clearly inapposite here).

In the nearly thirty years since *Kinard,* this Court has refused to extend liability for emotional distress damages beyond these limited circumstances. For example:

- In *Hansson v. Scalise Buillders of S.C.*, 374 S.C. 352, 358-59, 650 S.E.2d 68, 72 (2007), the Court held in the context of an outrage claim: "Under the heightened standard of proof for emotional distress claims emphasized in *Ford,* a party cannot establish a prima facie claim for damages resulting from a defendant's t01tious conduct with mere bald assertions. To permit a plaintiff to legitimately state a cause of action by simply alleging, "I suffered emotional distress" would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something "more"-in the form of third party witness testimony and other corroborating evidence-in order to make a prima facie showing of 'severe' emotional distress."

- In *Doe v. Greenville County School District,* 375 S.C. 63, 651 S.E.2d 305 (2007), the Court refused to extend the negligent infliction of emotional distress damages to encompass a claim by parents stemming from sexual activity between their daughter and a school teacher, stating: "Because South Carolina courts have limited the recognition of negligent infliction of emotional distress claims in circumstances such as the one presented in this case to bystander liability, Mr.
  and Mrs. Doe have not stated a claim which 1s cognizable under South Carolina law."

- In *Babb v. Lee County Landfill SC, LLC,* 405 S.C. 129, 141, 747 S.E.2d 468, 474 (2013), the Court refused to allow a claim for emotional distress damages flowing from trespass and nuisance in the form of odors from a landfill: "In short, allowing recovery for personal annoyance and discomfort under the guise of trespass and nuisance would be the stealth recognition of an entirely new tort."

The Respondent will not be able to direct this Court to any judicial precedent liberalizing the recovery of emotional distress damages described in her complaint. To the contrary, *all of the cases* decided in the appellate courts of this state have held the line on recovery of emotional distress damages to the very limited circumstances described above.

In sum, the lower court's award of damages based on a finding of "frustration" must fail because (1) "frustration" *standing alone*, as here, does not fall within the ambit of any cause of action for emotional distress separately recognized by this Court, (2) the Respondent precluded an award for any type of emotional distress damages by withdrawing *in toto any emotional distress damages* (which necessarily includes "frustration") from both her abuse of process cause of action and her outrage cause of action, and (3) in any event she failed to provide any testimony whatsoever on the issue of "frustration," giving the lower court judge no basis for his finding of its existence as a foundation for his award. Rather, the lower court simply plucked from an unsupportive record an element of damage which, absent a claim for mental or emotional damages, does not exist in our jurisprudence. The Respondent clings to this finding of "frustration" as the "stealth recognition of an entirely new tort," presumably to be denominated "intentional infliction of frustration." If this Court permits the Respondent thus to prevail it will be setting a precedent directly contrary to the past decades of careful distillation of the law in this area and will open the floodgates to recovery for an endless range of human emotions with perhaps even less familiar names, a development this Court has scrupulously avoided.

Accordingly, based upon the facts and law applicable thereto it is respectfully submitted that the verdict for damages should be reversed with the cause of action for abuse of process being dismissed.

ARGUMENT
II.

THE LOWER COURT ERRED IN AWARDING SANCTIONS UNDER THE FRIVOLOUS

CIVIL PROCEEDINGS SANCTIONS ACT ("FCPSA") AND/OR RULE 11 FOR THE FOLLOWING REASONS:

A. **THE MOTION WAS NOT TIMELY MADE, NOR WAS THE JURISDICTION OF THE COURT AND THE TIME FOR MAKING OF THE SANCTIONS MOTION EXTENDED BY THE FILING OF THE APPALLENTS 59(E) MOTIONS IN VIEW OF THE SPECIFIC LANGUAGE OF RULE 59(F) CLEARLY LIMITING THE JURISDICTION OF THE TRIAL COURT TO ONLY THE 59(E) MOTION AND OBVIOUSLY NOT ALLOWING APPELLANT THE REQUIRED THIRTY (30) DAYS TO RESPOND TO THE BASES OF ANY ALLEGED MISCONDUCT.**

B. **NOT ONLY WAS THERE A FAILURE IN THE MOTION TO NOTIFY OF THE CONDUCT CONSTITUTING A VIOLATION AND TO EXPLAIN THE BASES FOR THE REQUESTED SANCTIONS AS REQUIRED BY THE FCPSA BUT ALSO A FAILURE TO ATTACH TO THE MOTION THE SUPPORTING AFFIDAVIT FOR ATTORNEYS FEES AS REQUIRED BY RULE 6(D), SCRCP.**

C. **NO EVIDENCE OF ATTONREYS FEES WERE INTRODUCED INTO THE RECORD AT THE MAY 17, 2013, HEARING ON SANCTIONS FROM WHICH THE LOWER COURT COULD DETERMINE THE NATURE AND REASONABLENESS OF ANY ATTORNEYS FEES AS A BASIS FOR IMPORSING MONETARY SANCTIONS, UNDER EITHER FCPSA OR RULE 11. MOREOVER, THE LOWER COURT USED FINDINGS FROM THE HAMMER CASE TO SUPPORT THE AWARD OF SANCTIONS AGAINST MR. HAMMER AND THE 1634 MAIN, L.P. CASE (SANCTIONS ORDER, P. 14).**

II
(A)

Respondent asserts in her Reply Brief that the Frivolous Proceedings Sanctions Act ("FCPSA") somehow allows for service prior to verdict. This contention is supported by neither the case law of this state, *Ex parte Beard,* 359 S.C. 351, 597 S.E. 2d, 835(S. C. App. 204); *Pitman vs. Republic Leasing Company, Inc.,* 351 S.C. 429, 570 S.E. 2d, 187 (S.C. App. 2002), nor the language of the Act.

The FCPSA is clear that a motion must be made as set forth in Section C (1), "At the

conclusion of a trial ***and after a verdict*** . . ." ". . . upon motion of the prevailing party." [emphasis added]

Although Respondent concedes that her motion was made after the ten (10) day limit for the making of such motion, she contends that the filing of the 59(e) by Appellants extended the jurisdiction of the trial judge and the time in which to file the motions for sanctions.

In so doing Respondent ignores the distinct dictate and plain language of Rule 59 (f) that:

> "The time within which to make the motions [59(e)] under this Rule shall not be affected by the ending of a term of court or departure of the judge from the Circuit, and the trial judge shall retain jurisdiction of the action ***for the purpose of hearing and disposing of such motion*** if not heard and disposed during the term."

It is manifestly clear from the quoted language that jurisdiction is retained for the sole purpose of hearing and disposing of the 59(e) motion and not for ruling on other matters not timely filed. If the legislature had intended for jurisdiction to be retained for purposes other than the hearing of the 59(e) motion it would not have stated the limitation of the quoted language as it did. Accordingly, Respondent's contention that the filing of the 59(e) motion extended the jurisdiction of the Court to allow for a greater time than ten (10) days after the verdict for the filing of its FCPSA motion is contrary to the clear language of Rule 59(f), SCRCP. Because of the explicit language of the Rule the holdings and rationales of *Pitman v. Republic Leasing Company, Inc.*, 351 S.C. 429, 570 S.E. 2d 187 (Ct. App. 2002), are still valid and applicable in the instant case. In addition, Respondent's reliance upon *Cox v. Fleetwood Homes of GA, Inc.*, 334 S.C. 55, 512 S.E. 2d 498 (1999), results from a

misinterpretation of that case. *Cox* is distinguished by the pertinent ruling of this Court that ". . . a Judge has jurisdiction to consider matters submitted to him by ***"timely post-trial motion . . . ." [emphasis added]*** *Cox* at page 500. In the instant case the FCPSA Motion was not timely made for the reasons above set forth nor was Appellant afforded his statutory right to respond to the purported bases for sanctions within thirty (30) days.

Accordingly, it is respectfully submitted that Respondent's contention that the lower court retained jurisdiction after ten (10) days because of the filing of the 59(e) motion is without merit and the sanctions imposed under the Act should, among other reasons, be reversed.

Moreover, even assuming arguendo that a timely filing was made, Appellant's motion to dismiss the Respondent's sanction motion was not decided until May 17, 2013. While Appellant has found no case directly on point on the subject, reason fair play and the principle of judicial economy would dictate that the thirty (30) days in which Appellant had under the Act to respond to the allegations should only have begun to run after a ruling by the lower court on the Appellant's motion to dismiss on account of timeliness. This suggested procedure allowing thirty (30) days after the hearing of the motion to dismiss, while a novel issue, is buttressed by the procedure under Rule 12 wherein the time to act is extended after the hearing on certain motions to dismiss enumerated in that Rule.

Respondent's position that no motion is required for the imposition of sanctions and that they may be imposed solely by the court upon its own motion, while correct, does not apply in the instant matter as the trial judge's order did not base sanctions on his own motion but rather on that of Respondent. Nowhere in the record is there any indication that the trial

judge undertook the issue of sanctions on his own motion, and to the contrary, it is clear that he acted only in response to Respondent's albeit untimely motion.

II
(B) and (C)

In her brief Respondent contends that the Court made a proper finding in considering attorney's fees and in the amount awarded. To the contrary, for two primary reasons there was no admissible evidence (or admitted evidence) on attorney's fees introduced at the sanctions hearing on May 17, 2013, from which the lower court could make a determination of sanctions based on the amounts of attorney's fees expended.

First, SCRCP Rule 6 (d) requires that "When a motion is to be supported by **affidavit** the affidavit **shall** be served with the motion." In the instant matter no properly admissible attorney's fees affidavit was served on January 15, 2013, or on February 13, 2013, the dates on which Respondent contends she served her **motion** for FCPSA and Rule 11 sanctions. Although an amended affidavit was filed on April 2, 2013, it was never properly submitted into evidence in the form needed and required by the lower court. At the May 17, 2013, hearing the following colloquy occurred regarding the court's consideration of attorney's fees: (TR, May 17, 2013, P. 50, L. 12 – P. 51, L. 6)

> Ms. Ballard: . . . clearly the expenses she incurred on appeal when Mr. Hammer was trying to overturn Judge Manning's order are damages that can be considered by Your Honor in determining the appropriate amount of sanctions.
>
> The Court: "All right. Do you have the packets that are referred to? You refer to Packet One, Packet Two and Packet Three.

Ms. Ballard: No, sir, but I can certainly ***provide*** [emphasis added] those to you. Those are the breakdowns that show the individual time entries.

The Court: Well, how am I supposed to look at that if I have to determine the reasonableness of the fee? Let's say for some reason you put down ten hours for a letter. I think I need to look at those time entries.

Ms. Ballard: I'll be happy to provide them to Your Honor.

The Court: Don't you have to give them to them?. . .

The Court: But I have to be sure. I have to make the decision whether or not they're reasonable.

Everyone had not only a right but an obligation to accept the determination of the Court set out above. It was not for the Appellants to pursue the matter further after the judge's pronouncement; as reflected in the record it was the burden of the Respondent to provide to the court what the court insisted it needed to take cognizance of the claim for attorney's fees in order to assess sanctions under either FCPSA or Rule 11.

After the colloquy requesting submission of the referenced matter, the Respondent inexplicably did not produce and submit into the record at the hearing the additional necessary information the Court required, nor did she submit it as required, to the Appellants. After her failure to do so and later in the hearing the Court specifically pronounced that he would not receive any additional evidence on attorney's fees (i.e., the "Packets" that the Respondent promised to submit at the hearing but failed to do). In that regard the record reflects the following: (TR P.129, L.1 – L. 16)

Ms. Lipscomb: Your Honor, I just wanted to ask procedurally how to handle the amended – the attorney's fees. And what I would – she's going to hand you some specific entries, and she's going to serve us with those.

The Court: ***I'm not going to receive anything else.***

Ms. Ballard: Thank you, Your Honor.

The Court: ***I'm finished with receiving evidence*** because if I receive something from her ya'll are going to present affidavits and counter affidavits, and this and that and the other. ***And I'm just not going to do it.*** T[he] purpose of today's hearing was to get everything that there was. ***If there is not anything that's it.***

Mr. Hammer: So there is determination on attorney's fees today?

The Court: ***Mr. Hammer, I'm not going to receive anything else. That's it.***

It is inescapable that Respondent failed to provide evidence of attorney's fees with the requisite elements to constitute a basis for the court's award by failing to submit at the hearing that which the court stated it required in order to determine sanctions under FCPSA or Rule 11 based upon attorney's fees and costs. Moreover the lower court used findings from the Hammer v. Hammer case to support the award of sanctions in the 1634 Main, L.P. case (sanctions Order, P. 14).

Accordingly, the court's determination of the amount of the sanctions based upon the Packets which were not submitted into the record at the hearing as required by the court itself was error requiring reversal of all monetary sanctions.

ARGUMENT

III.

THE RECORD DOES NOT SUPPORT RESPONDENT'S ASSERTION THAT ADDITIONAL DEFENDANT ON COUNTERCLAIM/APPELLANT HAMMER'S *PRO SE* REPRESENTATION IS A FICTION.

A. APPELLANT'S COMMAND INFLUENCE ARGUMENT RESULTS FROM THE PERVASIVE NATURE AND EFFECT THE SUPREME COURT SEPTEMBER 2012 ORDER HAD ON THE LOWER COURT AS EVIDENCED BY THE COURT'S ATTITUDE TOWARD APPELLANT THROUGHOUT THE TRIAL WITH THE SAME BEING SO MANIFESTLY OBVIOUS AND PREJUDICIAL AS TO NOT REQUIRE A FORMAL MOTION BUT RATHER SHOULD IN THE INTEREST OF INSURING A FAIR TRIAL HAVE BEEN ADDRESS SUA SPONTA BY THE COURT.

Prior to taking opening statements in the *Hammer v. Hammer*, Case No.: 2009-CP-40-05911, the Court recognized that Mr. Aiken represented Appellant, Mr. Hammer, in that separate and distinct case. (TR P.30, L.13 – 25); (TR P. 34, L.9 – P. 35, L.13); (TR P. 45, L.12); (TR P. 51, L.1 – 5); (TR P. 53, L.12 – P. 55, L.23); (TR P. 61, L.24 – TR P. 62, L.2); (TR P. 732, L. 24 – TR P. 733, L. 5); (TR P. 736, L. 12 – 13) The record is clear that the Hammer v. Hammer case was tried separately and distinctly apart from the 1634 Main, L.P. case, Case No.: 2010-CP-40-2889. The record is also clear that the evidence presented in the separate cases was only to be used in the case in which such evidence was presented.

In view of Mr. Aiken's representation solely and exclusively in the Hammer v. Hammer case, the *pro se* representation in the 1634 Main, L. P. case was a separate and distinct representation from that made by Mr. Aiken. Since the cases were tried separately Respondent's statement that the *pro se* representation is a fiction is totally without merit and it is respectfully submitted should not be considered being unsupported and contrary to the record as set forth in the transcript portions above. Appellant contends that the argument should be dismissed as inappropriate.

Likewise Respondent's further argument that the proof of service is not dated is also lacking in merit as evidenced by the date appearing on the proof of service attached to the initial brief. Accordingly, it is respectfully submitted, that this contention should also be dismissed as inappropriate.

Respondent's request to strike Appellant's *pro se* brief for failure to include a Table of Authorities or Index is clearly a non-prejudicial ministerial error as the brief itself enumerates the authorities relied upon. It is respectfully submitted that it would be no more appropriate to strike Appellant's initial brief for this ministerial error than it would be to strike Respondent's initial brief on account of its failure to include references by page and line number of the transcript in not only its statement of the case but also throughout its brief (particularly TR P. 12, P. 17, and P. 22). At the very most, it is respectfully submitted, Respondent should only be required to amend his brief to include a Table of Cases which Respondent will do on submission of Final Brief unless instructed to do otherwise before submission of Final Brief, *Henning v. Kaye*, (1992) 415 S.E. 2d, 794.

III

A.

The influence of the Supreme Court Order reveals itself throughout the trial including but not limited to the attitude displayed by the lower court toward Appellant. Moreover the offending Order was referred to throughout the trial by opposing counsel. Ultimately, opposing counsel began reading the Order into the Court record at which time objection was made with the Court first saying, "No Sir, no Sir, no Sir" and finally saying, "Noted" (TR May 17, 2013, P.119, L. 13) at which the September 7, 2013, Supreme Court Ordered was urged upon the Court followed by the objection and above quoted language. (TR May 17, 2013 P.120, L. 1 – 4)

Moreover, the colloquy continued (TR May 17, 2013, P. 124) with the lower court failing to rule out the possibility of giving at least some weight to the September 2012 Order by stating as follows:

> "But I ***tend*** to agree with you that I'm not going to give ***much weight*** if you will to what the Supreme Court says when I make my decision on the merits." (TR May 17, 2013, P. 124, L. 5 – 8) [emphasis added]

Clearly the issue of the Supreme Court's Order was raised and, unfortunately, never definitively rejected by the lower court. Respondent has failed to submit any relevant response or cite any cases regarding the "command influence issue" other than reference to judicial notice, which is irrelevant to the issue. Accordingly, in view of the clarity of the record that the issue was preserved by a formal objection, through the colloquy cited above, and the lower court's clear error in not rejecting any consideration of the said Supreme Court Order, Respondent's position on issue preservation is totally without merit. In fact, the issue is a colossal factor in a case in which the Supreme Court in essence foretold the appropriate outcome of a pending abuse of process claim which most certainly could have prejudiced the Appellant's ability to receive a fair trial.

Pursuant to Rule 208 (b) (6) Appellant specifically reserves his rights to argue separately and to a dismissal of the sanctions award against Appellant because of the intermingling of factual findings drawn from Hammer v. Hammer to support the sanctions award in the 1634 Main, L.P., case and vice versa.

CONCLUSION

For all of the reasons set forth hereinabove and applying the law to the facts Appellant respectfully urges that the award of damages, both on the merits and for sanctions under the Act and Rule 11, should be reversed with judgment entered for Appellant or in the alternative reversed and remanded for a new trial by jury with specific instructions as set forth in connection with Argument III regarding command influence.

(Signature on next page.)

Respectfully submitted,

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12/23/13

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ADDITIONAL DEFENDANT ON COUNTERCLAIM/APPELLANT'S CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 209, SCACR

The undersigned, Howard Hammer, pro se, Additional Defendant on Counterclaim/Appellant certifies that the Reply Brief of Appellant complies with Rule 209, SCACR.

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PROOF OF SERVICE

I, Howard Hammer, Appellant, do hereby certify that on December 23, 2013 the Initial Reply Brief of Appellant, Howard Hammer, in 1634 Main, L. P. case to Respondent's brief and Certificate pursuant to Rule 209, SCACR was served on counsel of record by causing a copy to be placed in the U.S. Mail postage prepaid addressed as set forth below:

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