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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Docket No. 13-ALJ-17-0104-CC

William J. Montgomery, ... Respondent,

v.

Spartanburg County Assessor, ... Appellant.

APPELLANT'S RESPONSE TO THE SOUTH CAROLINA FARM BUREAU FEDERATION'S AMICUS CURIAE BRIEF

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RESTATEMENT OF THE ISSUE ON APPEAL

WHAT IS THE MEANING OF "FAIR MARKET VALUE FOR AGRICULTURAL PURPOSES" IN SOUTH CAROLINA CODE ANNOTATED SECTION 12-43-220(D)?

ARGUMENT

The South Carolina Farm Bureau Federation ("Federation") as represented in its amicus curiae brief is no friend of the court.[1] It fails to comply with the requirements of Rule 213, SCACR, misstates the law, misstates the facts, and fails to comprehend the Assessor's[2] reliance on governing law.

I. THE FEDERATION VIOLATES RULE 213, SCACR BY ARGUING AN ISSUE NOT PRESENTED ON APPEAL BY THE PARTIES.

An amicus brief is "limited to argument of the issues on appeal as presented by the parties." Rule 213, SCACR. The rule's enforcement is routine. *James v. Anne's Inc.*, 390 S.C. 188, 194, 701 S.E.2d 730, 733 (2010) ("[T]he amici can argue only the issues that were raised by the parties."). Here, in defiance of Rule 213, the Federation raises a new issue not presented on appeal by the parties.

A. The Federation Seeks to Raise a New Issue

The Federation asserts "[t]he sole issue, . . . is *whether the county has the right* to exclude structures and specially value them as not being part of agricultural real property." (Federation Brief, at p. 5) (emphasis added). More explicitly, in its Statement of Issues the Federation raises the issue of "*[w]hether counties have the power* to segregate from the stipulated agricultural real property tax assessment and separately

[1] We take seriously our oath to act with civility "[t]o opposing parties and their counsel . . . not only in court, but also in all written and oral communications." Rule 402(k), SCACR. However, we take equally seriously our duties as officers of the Court. We believe the harm wrought by the Federation's Brief requires refutation in the strongest possible terms. Our response is not intended to diminish the highly respected standing of the Federation nor denigrate its exceptionally talented counsel.

[2] All capitalized terms used in this Response have the defined meaning established in the Appellant's Brief, unless otherwise defined herein.

value certain agricultural real property." (Federation Brief, at p. 1) (emphasis added). Thus, for the first time, the Federation raises the issue of *county* authority: "whether *the county* has the right . . . ." and "whether *counties* have the power . . . ."[3]

No party, not Montgomery and not the Assessor, argues on appeal that the powers of the county—whether limited or extensive—play any role in this case. Instead, Montgomery raises the following issues: (1) the benefit of the doubt should be given to the taxpayer with taxing statutes strictly construed; (2) when land and buildings are included in the definition of "agricultural real property," the value of the buildings are already included in the definition of "fair market value for agricultural purposes"; and (3) South Carolina Code Annotated section 12-43-220 denies adding the fair market value of buildings to arrive at the "fair market value for agricultural purposes." (*See* Respondent's Initial Brief, at p. 1.) Likewise, the Assessor never argues what powers or rights counties may or may not have. Instead of "county powers," the Assessor argues the question is the straight-forward issue of "the meaning of 'fair market value for agricultural purposes' in South Carolina Code Annotated section 12-43-220(d)." Thus, the Federation violates Rule 213's prohibition against raising new issues.

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[3] The Federation's desire to test the powers of counties appears insatiable. In one breathless paragraph, the Federation peppers the Court with multipart questions never heard by the trial court, never ruled on by the trial court, and never raised by any party at any time:

> What code section authorizes a county to value portions of agricultural real property outside of (or disregarding) the agricultural real property valuation statute, code section 12-43-220? And if the county has such right, what code section authorizes them to select buildings for the special FMV? Can a county also segregate, *e.g.*, wells and irrigation piping and separately assess?

(Federation's Brief, p. 5.) The Parties, both of whom are sophisticated, found no basis for testing the powers of a county. This Court should not be drawn into such an undefined and wholly un-argued realm of law simply because an amicus is curious.

B. The Limited Exception to Rule 213's Prohibition is Not Present in the Instant Case

The lone exception to the new-issue prohibition of Rule 213 is an amicus raising an issue presenting a "matter of significant public interest." The Federation's Brief does not raise an issue constituting a "matter of significant public interest" in this case.

A matter of significant public interest has been held to include a constitutional challenge. *See Ex parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011) (the standard met by the "constitutional implications arising from the court appointment of attorneys to represent indigent clients."). The exception has been triggered by actions affecting criminal due process. *See State v. Langford*, 400 S.C. 421, 433, 735 S.E.2d 471, 477 (2012), *reh'g denied* (Dec. 20, 2012), *cert. denied* (Oct. 7, 2013), *cert. denied*, 134 S. Ct. 60, 187 L. Ed. 2d 51 (U.S.S.C. 2013) ("[W]ho decides when criminal defendants in this State should be tried is a matter of significant public interest.").

Whether a county has authority over property tax determinations is not an issue remotely similar to the public interest of a constitutional challenge or a criminal due process challenge. Instead, here, the Parties present to the Court numerous positions supporting their claims with none needing assistance from a new—and never before raised—amicus curiae issue. Moreover, the Court's application of the exception is limited and rare. *Id.* ("We stress that this exception to Rule 213 must be applied narrowly and only under the appropriate circumstances so as not to eviscerate the long-standing preservation requirements in our jurisprudence."). The Court should dismiss the Federation's new, unpreserved issue.[4]

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[4] The Federation further violates Rule 213 by failing to adhere to Rule 208(b)(1)(B), SCACR's requirement of listing "[a] statement of each of the issues presented for review." In its Statement of Issues, the Federation's amicus brief lists one issue (the issue of "county powers"). Notwithstanding the one-issue listing, the Federation argues additional issues: the Department's Purported "Long-Standing Administrative Policy" Directly Contravenes South Carolina Law (Federation's Brief, pp. 7–11), andAmbiguities in Tax

II. THE FEDERATION MISSTATES THE LAW.

A. The Federation Misstates the Law of South Carolina Code Annotated section 12-43-220(d)(2)

The Federation states "[12-43-220] Subsection (d)(2) provides the statutory fair market value for *agricultural real property*." (Federation Brief, at p. 2) (emphasis added). The statement is wholly incorrect.

Section 12-43-220(d)(2) does not provide the statutory fair market value for *agricultural real property*. On the contrary, *agricultural real property* is addressed in 12-43-220(d)(1), not in subsection (d)(2). In section 12-43-220(d)(1), the General Assembly finds *agricultural real property* must "be taxed on an assessment equal to: (A) Four percent of its fair market value for such agricultural purposes." Accordingly, *agricultural real property* (including land, structures, fixtures, etc.) must carry a four percent assessment ratio.

On the other hand, the General Assembly in section 12-43-220(d)(2) addresses fair market value *only for land—not for agricultural real property.* Section 12-43-220 (d)(2) sets a soil-capability method of valuation as the "[f]air market value for agricultural purposes, *when applicable to land* . . . ."

It is of no small moment that the General Assembly in section 12-43-220(d)(1) had just granted a 4% assessment ratio to *agricultural real property.* Having used the phrase in section 12-43-220(d)(1), had it wanted to, the General Assembly knew how to grant the soil-capability method to the *agricultural real property* in the valuation language of section 12-43-220(d)(2). But, it did not. For the soil capability method

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Statutes are Resolved against the Government. (Federation's Brief, at pp. 11–12.) Neither issue is listed in the Statement of Issues. Rule 208(b)(1)(B) warns "no point will be considered which is not set forth in the statement of the issues on appeal." Thus, not only should the Court decline to entertain the new issue, it should ignore all Federation arguments not listed in the Statement of Issues.

expressed in section 12-43-220(d)(2), the General Assembly specifically chose the words "*when applicable to land* . . . ."

Thus, all agricultural real property (including land, structures, fixtures, etc.) carries a four percent assessment ratio. But, the General Assembly chose the soil-capability method of valuation *only for land.* Farm structures (a part of agricultural real property) are not exempt from taxation. They must be valued. Since the valuation methodology of section 12-43-220(d)(2) covers only land, the common valuation method of South Carolina Code Annotated section 12-37-930 covers structures. For the Federation to assert "[12-43-220] Subsection (d)(2) provides the statutory fair market value for *agricultural real property*" is a gross error having the potential of misleading the Court.

B. The Federation Misstates the Law Valuing Cropland and Timberland

The Federation asserts South Carolina agricultural land values are based on USDA values. Again, the Federation's position is a gross misstatement of the law.

The Federation states on pages 2 and 3 of its Brief: "The percentage factor was derived from the USDA "publication 'AGRICULTURAL LAND VALUES AND MARKETS', specifically from Table 1 — Farm Real Estate Values: Indexes of the average value per acre of land and buildings." The Federation's Brief adds: "This fair market value was frozen for 1991 and subsequent years. *In essence the General Assembly took 1981 agricultural real property values, increased them by the USDA values for South Carolina farm lands and buildings, and froze them for 1991 through the current tax year*." (Emphasis added.) The assertion is wholly inaccurate.

The referenced USDA Table does not establish South Carolina's taxation values for cropland and timberland. Section 12-43-220(d)(2)(A) provides the method for

determining the value of agricultural lands. The values for different types of land are determined by the Department through regulations. Regulation 117-1840.2(c)(1) explains:

> Section 12-43-220(d)(2) of the [Code] provides that implementation of the use value procedures for timberland and cropland, as provided in Code Section 12-43-220 shall be the responsibility of the Department of Revenue. Under this authority, the values in this regulation must be used by county assessors for assessment of cropland and timberland.

S.C. Code Ann. Regs. 117-1840.2(c)(1). Regulation 117-1840.2 sets forth Tables showing—based on the different types of cropland and timberland—the values county assessors must apply to agricultural lands. *See id.* at 117-1840.2(c)(1)–(5). The Department's Regulations—not the USDA Table—establish cropland and timberland value. Even a cursory comparison of the USDA Table and the Department's soil values demonstrates drastically different per acre values established by each source. *Compare* (R. at 40), *with* S.C. Code Ann. Regs. 117-1840.2(c)(2)–(3).[5]

In 1997, Act 106 amended section 12-43-220(d)(2)(B)(i) to state that land values for tax year 1991—land values determined by Department regulations, not USDA tables—were effective for all subsequent years. *See* 1997 S.C. Act No. 106. The Department's Regulation 117-1840.2(c)(1) reflects this fact.[6]

Prior to Act 106's fixing cropland and timberland values at 1991 levels, the "percentage factor" referenced in section 12-43-220(d)(2)(B)(ii) was a reference to

[5] In fact, the USDA Table's values are so much higher than the Department's per acre values that had the Assessor applied the values contained in the USDA Table to the Parcels here in dispute, the Respondent's initial tax bill would have been substantially higher.

[6] The Regulation states: "Code Section 12-43-220(d)(2)(B)(i) provides that the fair market values for agricultural purposes determined for the 1991 tax year are effective for all subsequent years. Accordingly, the fair market values provided for in this regulation are the values per acre determined for the 1991 tax year and thereafter. These fair market values for cropland and timberland are contained in Sections 2 and 3 of this regulation, respectively." S.C. Code Ann. Regs. 117-1840.2(c)(1).

determine how much agricultural land values should change year-over-year. The sole purpose for the reference was to fix the percentage by which the land values could rise each year—not a wholesale adoption of USDA values.

Since Act 106 froze cropland and timberland levels at 1991 levels, the "percentage factor" derived from the USDA Table was not utilized for the years and the parcels now before this Court. The "percentage factor" is no longer utilized for any South Carolina property. Thus, the agricultural taxable values for South Carolina's cropland and farmland no longer have a percentage of change factor from year to year.

In conclusion, at no point has South Carolina's statutory law relied upon taxation values for cropland and timberland based on USDA Table valuations. However, the Federation claims otherwise. It argues "the General Assembly took 1981 agricultural real property values, increased them by the USDA values for South Carolina for lands and buildings, and froze them for 1991 through the current tax year." If the Federation's reading of the law were even remotely accurate, the results for the Federation's members would be disastrous. Agricultural real property previously valued in the low hundreds of dollars per acre would sky-rocket to nearly $1,000 per acre. If the Federation is "organized to further the common interests of farmers and the farming industry in South Carolina," one is hard pressed to understand why the Federation makes the argument it submits in its Brief. (Federation Brief, at p. 1.)

III. THE FEDERATION MISSTATES THE FACTS.

A. The Federation Wrongly Asserts the Assessor's Position Creates Irreparable Harm and Added Tax Burden

The Federation asserts the Court's adoption of the Assessor's position will cause "irreparable harm to members of the Federation, and could significantly affect the viability of members' business models in light of the added tax burden." (Federation

Brief, at p. 1.) Again, in what has become a repeating pattern, the Federation's claim is a gross misstatement. One cannot help but suspect an intentional attempt by the Federation to dismiss legal analysis in favor of imagined threats of injury.

The Record shows no irreparable harm and no added tax burden will be created from an adoption of the Assessor's position. The South Carolina Department of Revenue ("Department") adopted, applied, and promoted a consistent interpretation governing the valuation of agricultural real property since the 1970s. (*See* R. at 154–58.) The Department administers and enforces South Carolina's tax laws (*see* S.C. Code Ann. § 12-4-10), oversees county taxation matters (*see* S.C. Code Ann. § 12-4-520), and directs county assessors and other officials in the proper application of the tax laws (*see* § 12-4-535). Therefore, County officials are not free to disregard the Department.

Since the 1970s, the Federation's members have been taxed under the interpretation of section 12-43-220(d) as supported by the Department and by the Assessor. (*See* R. at 154–55.) Indeed, the Record to which this Court's factual review is confined[7] shows the Department communicated its interpretation and instruction to the counties for the past four decades. (*See id.* at 154–58).

For the Federation to argue its members' business models will now be eviscerated by an alleged "shift in the interpretation" of how agricultural property is taxed is palpably disingenuous. The taxation method employed here is the same as that employed everywhere in South Carolina: the value of structures is added to the value of the soil-capability land value in determining the "fair market value for agricultural purposes" of agricultural real property. Indeed, while the Administrative Law Court reached the wrong

[7] Rule 210(h), SCACR.

conclusion, the litigated cases demonstrate the universal application of the Assessor's valuation method. S*ee, e.g.*, *Dotsy, LLC v. Greenwood County Assessor*, No. 13-ALJ-17-0061-CC (S.C.A.L.J. 2014) (demonstrating Greenwood County follows the Department's instructions); *Smith v. Clarendon County Assessor*, No. 11-ALJ-17-0191-CC, 2011 WL 7119293 (S.C.A.L.J. 2011) (demonstrating Clarendon County follows the Department's instructions).

At bottom, the Federation seeks a back door exemption. By arguing only land values produce the tax owed, the Federation argues structures on agricultural real property are exempt. Exemptions exist only where a statute's plain and ordinary meaning ***mandates*** such a finding. *See Home Med. Sys., Inc. v. S.C. Dept. of Revenue*, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009) (citing *TNS Mills, Inc. v. S.C. Dept. of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998)). *See also Southeastern–Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) ("As a general rule, tax exemption statutes are strictly construed against the taxpayer."). The Federation's request for the Court to read section 12-43-220(d) as granting an exemption for structures on agricultural real property must be rejected.

B. The Federation Wrongly Attacks Houck's Affidavit on the Grounds the Department's Position is not in "Writing"

The Federation acknowledges the Department's "position has been the Department's consistent interpretation since . . . 1975 . . . ." (Federation's Brief, p. 6.) Then, in a twist of logic, after acknowledging that the Department has applied the position for 40 years—a span of four decades—the Federation responds with the equivalent of: "Well sure, but where's it written down?"[8] The Federation seeks to answer

[8] The Federation complains "[a]nd where is this interpretation found? Houck's affidavit attached no DOR documents in support of this position. Not one!" (Federation Brief, p. 6.) Further, the Federation assails the

its own question and seeks to mislead the Court by identifying the places the policy—the 40 year, uninterrupted, continuously applied, noticed to every County Assessor in the State policy—is not in writing.[9] Apparently, according to the Federation's logic, an agency position lacks correctness unless it is expressly written. This is not the law in South Carolina.

The lack of a written position does not negate the correctness of the agency's interpretation. In *Emerson Elec. Co. v. Wasson*, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986), the Court upheld the Department's position after relying on two employees "who testified that the method used by the [Department] to figure taxes owed by the taxpayers, Emerson and TOD, was consistent with their established procedures." That testimony—reliable evidence of the agency's position—was all the *Emerson* Court needed.

Here, all this Court needs to establish the Department's longstanding interpretive position is Mr. Sandy Houck's Affidavit, the equivalent of the "testimony" in *Emerson*. Mr. Houck, a 35 year employee of the Department, unequivocally states:

> 8. The Department has interpreted the constitutional provisions and statutes governing agricultural real property valuation as requiring county assessors to determine the fair market value of any structures located on the agricultural real property, utilizing valuation methods applicable to structures located on all real property, including but limited to § 12-37-930. The fair market value of any structures comprises the second component of the total taxable value.

Department's position as an "unwritten, 'long-standing administrative policy'." (Federation Brief, at p. 11.)

[9] (*See* Federation Brief, p. 7 ("This interpretation is not stated in the DOR's expansive Regulation except for residences. It is nowhere found in the DOR's South Carolina Property Tax (2014) which devotes 2.5 pages to agricultural real property, *see* pp. 13-16, attached as Exhibit A. It is not found in any DOR Policy Document, and the DOR has issued some 95 Property Tax Revenue Procedures, Information Letters and the like, *see* Exhibit B. Neither Appellant nor the DOR's Amicus Brief cites a single DOR pronouncement to support Houck's affidavit. Not one!").)

9. Thus, under the Department's interpretation, the taxable value of agricultural real property is to be determined by valuing both the agricultural land, pursuant to the methods outlined in § 12-43-220(d)(2)(A), and any structures located on the agricultural land. Under the Department's interpretation, the value of any structures located on the agricultural land is added to the value of the agricultural land in order to determine the total taxable value of the agricultural real property.

10. Further, this position has been the Department's consistent interpretation since the statutory enactment of agricultural use values by Act 208 in 1975, as expanded by Act 618 in 1976.

(R. at 150–54.)

Finally, in what is surely the most unusual question in the Federation's brief, the Federation asks if the Department's position is "a classic agency 'secret rule?'" (Federation Brief, p. 7.) Mr. Houck's Affidavit, at Paragraph 4, removes any secrecy suspicions relative to the Department's policy:

> [T]he Department oversees county taxation matters. [*Id.* at § 12-4-520.] The Department is required to call meetings of all county assessors to provide instruction as to the law governing the assessment and taxation of all classes of property and must formulate and prescribe rules to given assessors and county boards of tax appeals in the discharge of their duties. The Department must advise and direct assessors and county boards of tax appeals regarding their duties. [*Id.*]

In other words, given the duty to "oversee county taxation matters," the duty "to provide instruction as to the law governing the assessment and taxation of all classes of property," and the duty to "direct assessors . . . regarding their duties," the Department's position has no secrecy elements—it is disseminated to all 46 counties and has been for 40 years.

IV. EXPRESS STATUTORY AUTHORITY SUPPORTS THE ASSESSOR'S INTERPRETATION OF THE TERM "FAIR MARKET VALUE FOR AGRICULTURAL PURPOSES."

There is nothing secret about the Assessor's interpretation. The Assessor has always made plain the statutes and the analysis on which it relies:

(1) all real property, including agricultural real property, is taxable (S.C. Code Ann. § 12-37-210);

(2) land is a component of agricultural real property (*See* S.C Code Ann. § 12-37-10(1));

(3) structures are a component of agricultural real property (*See* S.C. Code Ann. § 12-37-10(1));

(4) structures on agricultural land are not exempt from taxation and, therefore, must be taxed (S.C. Code Ann. § 12-37-220(B)(13), (14), & (15));

(5) the land component of agricultural real property is valued under the soil capability valuation method, applicable only to ***land*** as required by S.C. Code Ann. § 12-43-220(d)(2)(A);

(6) structures on agricultural real property, not being subjected to a specified valuation method (as land is) and not being exempt, must be valued (S.C. Code Ann. § 12-37-210); and

(7) because no specific valuation method is prescribed for valuing structures on agricultural land, the structures are valued under the willing buyer and willing seller method in S.C. Code Ann. § 12-37-930.

Rather than relying on a "secret rule" as the Federation argues (Federation Brief, at pp. 5–7.), the Assessor and the Department base their interpretation on the statutes and analysis set forth above. The Assessor is not sure what more the Federation needs to be convinced that the Assessor's argument is supported by specific provisions of the law.

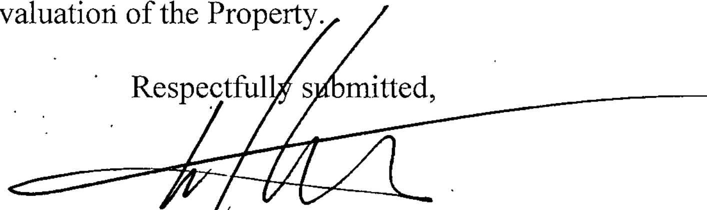
Further, the Department should not have to produce a manual telling assessors how to read a plainly worded statute, but should focus its attention on clarifying matters that are disputed. In a situation where, as is the case here, there was no controversy over the agricultural real property valuation method for over three decades, the Federation and this Court should not be surprised that there is no lengthy explanation of the agricultural real property valuation process in continuing education publications and informal Department guidance. The Federation's feigned incredulity at the absence of express

discussion of agricultural real property valuation methods in unofficial Department publications should not be a convincing argument to the Court.

CONCLUSION

The Assessor respectfully asks this Court to dismiss from its consideration the improper issues and arguments presented to it by the Federation's Amicus Curiae Brief and also asks this Court ultimately to reverse the decision of the Administrative Law Court and reinstate the Assessor's valuation of the Property.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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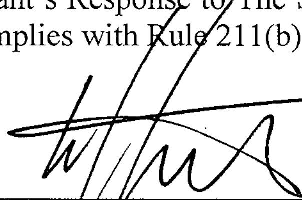
CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Response to The South Carolina Farm Bureau Federation's Amicus Curiae Brief complies with Rule 211(b), SCACR.



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December 31, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

Docket No. 13-ALJ-17-0104-CC

William J. Montgomery, ...Respondent,

v.

Spartanburg County Assessor, ...Appellant.

PROOF OF SERVICE

The undersigned certifies that on December 31, 2014 s/he has caused a copy of Appellant's Response to The South Carolina Farm Bureau Federation's Amicus Curiae Brief to be served upon all parties of record by hand delivering a copy of the same, addressed as follows:

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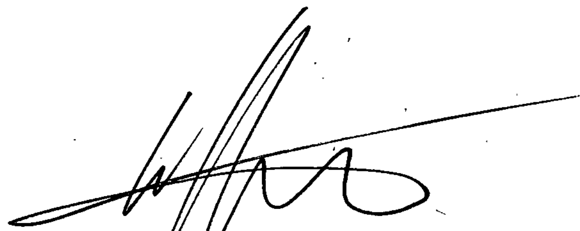

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