IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D. Petitioner,

v.

East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

RESPONDENTS' MOTION TO DISMISS APPEAL

Lindsay K. Smith-Yancey
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Attorney for Appellant

Respondents East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc. (collectively "Respondents"), by and through their undersigned counsel, move this Court to dismiss Appellant's appeal. As shown fully in the attached Memoranda, Appellant's appeal and notice of appeal itself violates an order of the South Carolina Supreme Court Order, is not timely, was not served on Respondents, was not filed by Appellant's attorney of record, and remains procedurally deficient and improper despite subsequent "curative" filings. As such, Appellant's appeal should be DISMISSED and REMITTED to the circuit court.

Respectfully submitted,

March 4, 2015

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PROOF OF SERVICE

I certify that I have served *Respondents' Motion to Dismiss Appeal* on Appellant Cynthia Holmes, M.D., by depositing a copy of it in the United States Mail, postage prepaid, on March 4, 2015, addressed to her attorney of record, Chalmers C. Johnson, Esq., 1029 Bay Street, Apt. 11, Port Orchard, WA, 98366.

Dolores M. Catapano

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Paralegal to E. Douglas Pratt-Thomas,
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Respondents.

RESPONDENTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

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Facts and Procedural Background

Appellant Cynthia Collie Holmes is a medical doctor and attorney who has, over the last 16 years, filed multiple lawsuits arising out of her applications for medical staff privileges at East Cooper Medical Center. Her litigation activities have resulted in a number of reprimands and sanctions judgments issued against her, including the suspension of her license to practice law in South Carolina ("SC"), and an Order of the SC Supreme Court directing the clerks of court of this State to reject any filings by her unless signed by another attorney. **Ex. 1, December 2, 2009 Order of SC Supreme Court; November 26, 2014 Order of Definite Suspension of SC Supreme Court.**

The present notice of appeal arises out of Civil Action Case No.: 2010-CP-10-3410 filed in the Charleston County Court of Common Pleas. This action also relates to Appellant's application for medical staff privileges at East Cooper Medical Center. Appellant is represented by Chalmers Johnson, Esq., in this matter. The case was initiated on April 26, 2010, by a Summons and Complaint filed by Mr. Johnson. **Ex. 2, Complaint.** On July 29, 2011, the Honorable Kristi Lea Harrington granted summary judgment to Respondents, and on January 27, 2012, Judge Harrington issued an order levying sanctions against Appellant pursuant to the SC Frivolous Proceedings Act. **Ex. 3, Summary Judgment Order and Ex. 4, Order Awarding Sanctions.** Appellant was represented by Mr. Johnson throughout the entirety of the trial court proceedings in this matter.

Thereafter, Appellant appealed both the summary judgment order and the sanctions order to the SC Court of Appeals. **Ex. 5, Appellant's Notices of Appeal.** The appeals were assigned Appellate Case Numbers 2011-198092 and 2012-209666, were consolidated, and

then certified to the SC Supreme Court. Both orders were affirmed by the Supreme Court and on June 13, 2014, Remittitur was issued. **Ex. 6, SC Supreme Court Order March 26, 2014, and June 13, 2014, Remittitur.** Again, Mr. Johnson represented Appellant throughout the first appellate process involving this matter.

As demonstrated by the above, this case has already been fully and finally adjudicated by the trial and appellate courts of this State. Despite this, on July 7, 2014, Appellant filed a post-remittitur motion in the trial court seeking to withdraw a motion to dismiss counterclaims she had filed before entry of summary judgment and the aforementioned appellate process. **Ex. 7, Plaintiff's Motion to Withdraw Plaintiff's Motion to Dismiss Defendant's Counterclaims.** This motion was filed by Mr. Johnson who appeared and gave oral argument on behalf of Appellant at a hearing on October 27, 2014, presided over by The Honorable Markley Dennis, Jr. Judge Dennis ruled that the case, including the counterclaims, had been fully adjudicated by way of Judge Harrington's previous orders and the appeal of same. **Ex. 8, Transcript of October 27, 2014 hearing.** He further ruled that because there were no remaining issues Appellant's motion was moot and not viable, stating "there's no motion to dismiss because there's nothing to dismiss." **Id. at page 5.** On October 29, 2014, Judge Dennis signed a Form 4 order stating "Plaintiff's Motion to Withdraw the Motion to Dismiss, filed on 7/07/2014, is not a viable motion; No viable motions pending in this resolved case." **Ex. 9, October 29, 2014 Form 4 Order.** This order was filed on November 3, 2014.

On December 3, 2014, Appellant attempted to file in the Court of Appeals a *pro se* notice of appeal of Judge Dennis' October 29, 2014 order. **Ex. 10, December 3, 2014, *Pro Se* Notice of Appeal.** The notice was not signed by Mr. Johnson or any other attorney.

Appellant's notice was rejected by The Honorable Jenny A. Kitchings pursuant to the aforementioned 2009 order of the SC Supreme Court requiring clerks of court to reject any filings attempted by Appellant regarding her medical staff privileges unless signed by another attorney. **Ex. 11, January 21, 2015 letter of Kitchings.**

Appellant also attempted a *pro se* Rule 59(e) motion in the trial court seeking reconsideration of Judge Dennis's October 29, 2014 order. **Ex. 12, *Pro Se* Notice of Motion and Rule 59(e) SCRCP Motion.** On December 3, 2014, Judge Dennis signed another Form 4 order rejecting Appellant's *pro se* motion, reiterating that the case was "closed" and that the *pro se* motion was "improper...in accordance with the Supreme Court's order dated 12/2/09." **Ex. 13, December 3, 2014 Form 4 Order.** This order was filed December 9, 2014.

On January 20, 2015, Appellant served Respondents with yet another *pro se* notice of appeal, this one purporting to appeal the December 3, 2014, order of Judge Dennis rejecting her *pro se* motion for reconsideration. **Ex. 14, *Pro Se* Notice of Appeal dated January 14, 2015.** Again, the notice was not signed or co-signed by another attorney and the undersigned is unaware of whether this particular notice was ever filed with the Court of Appeals. Importantly, this is the only notice with which Respondents have been served concerning Judge Dennis' December 3, 2009 order. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.**

On February 5, 2015, Respondents received copies of two correspondences sent to Charles Goldberg, Esq., from Court of Appeals Deputy Clerk V. Claire Allen. **Ex. 16, February 3, 2015, letters of Allen.** The correspondences indicated Mr. Goldberg had filed a notice of appeal on behalf of Appellant purporting to appeal both of the aforementioned

orders of Judge Dennis. **Id.** The correspondences also indicated a request for the transcript had been filed. **Id.** Ms. Allen's letters set forth a number of deficiencies in the filings, including that the notice of appeal did not indicate when notice of the entry of judgment was received and that the transcript request was not signed and did not indicate service on opposing counsel. **Id.**

Once made aware of the notice filed by Mr. Goldberg, the undersigned obtained copies of same and the accompanying documents from the Court of Appeals' online filing system. **Ex. 15, Affidavit of Smith-Yancey.** In addition to those deficiencies set forth by Ms. Allen, it was discovered that the proof of service accompanying the notice is only signed by Appellant herself. Mr. Goldberg's signature does not appear on the proof of service, nor does that of any other attorney other than Appellant. Further, the cover letter to the Court of Appeals enclosing the notice, proof of service, and transcript request is not dated, is not signed, and contains no letter head or signature line indicating from whom the letter was sent.

Again, Ms. Allen's correspondences were the first notice Respondents received of Mr. Goldberg's involvement in this matter, that he had filed a notice of appeal on behalf of Appellant, and that a request for transcript had been made. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.** Indeed, and as indicated above, Chalmers Johnson, Esq., has been Appellant's attorney of record throughout the trial and previous appellate court proceedings in this very matter. Respondents are not aware of any motion to withdraw filed by Mr. Johnson or order of substitution allowing Mr. Goldberg to take over as Appellant's attorney of record.

On February 11, 2015, Appellant made more *pro se* filings with the Court of Appeals, these purportedly to address the deficiencies set forth by Ms. Allen. While the filings appear

to have been transmitted to the Court of Appeals via facsimile from Mr. Goldberg's office, the filings are signed by Appellant and not Mr. Goldberg. The first filing is an amended transcript request. The amended request now contains a signature but the signature is that of Appellant, not Mr. Goldberg. The transcript request remains undated. The second filing is an affidavit of Appellant purporting to address when notice of entry of the orders on appeal were received. Appellant's affidavit states notice was received "on or after December 15, 2014" and fails to set forth a finite date in this regard. The affidavit does not specify to which order on appeal this "on or after" date of notice applies. It is assumed that said language applies to notice of entry of the December 3, 2014 order of Judge Dennis. There is no statement indicating when entry of the November 3, 2014 order, also on appeal, was received.

On February 12, 2015, Mr. Goldberg filed a notice of substitution of counsel purporting to substitute Mr. Chalmers, Appellant's attorney of record, for himself. The accompanying consent signature page signed by Appellant and Messrs. Johnson and Goldberg is not dated. On February 26, 2105, the Court of Appeals issued an order allowing Mr. Goldberg to withdraw. **See February 26, 2015, Order of Court of Appeals.**

Standards governing notices of appeal and representation of appellants

The SC Appellate Court Rules (ACR) set forth several procedural requirements an appellant must follow when appealing an order or judgment from the trial court. Rule 203(a) requires a party intending to appeal to serve and file a notice of appeal and otherwise comply with the ACR. Rule 203(b)(1) requires a notice of appeal to be served on all respondents "within thirty (30) days after receipt of written notice of entry of the order or judgment."

Rule 203(d)(B) requires the notice to be accompanied by a proof of service showing service of the notice on all respondents. Rule 203(e)(1)(c) requires that the notice contain a statement of when the appealing party received notice of the order or judgment from which the appeal is taken. Rule 207 requires an appellant to order the transcript of the proceeding at issue within ten (10) days after the date of service of the notice of appeal. Lastly, Rule 203(d)(B) requires the appellant to file the notice with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served.

The ACR likewise set forth requirements for legal representation of litigants in the appellate courts. Rule 264(a) titled "Continued Representation" states "[t]he attorneys and/or guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties in the appellate court until withdrawal is approved and notice is given as provided in this Rule." Rule 264(b) states "[a]n attorney of record in a matter pending before an appellate court may not withdraw from representation of his client without justifiable cause, or the consent of his client; and then only after proper written notice to his client, on petition to and by written order of the appellate court, and with notice to the adverse party."

I. Appellant's appeal of the October 29, 2014 order is untimely.

As indicated above, Appellant originally attempted to appeal the October 29, 2014, order of Judge Dennis by way of a *pro se* notice of appeal dated December 3, 2014. **Ex. 10, December 3, 2014, *Pro Se* Notice of Appeal.** The notice was properly rejected by the Clerk of Court as in violation of the 2009 SC Supreme Court order because it was not signed by another attorney licensed to practice law in this state. **Ex. 1, December 2, 2009 Order of**

Supreme Court; Ex. 11, January 21, 2015 letter of Kitchings. Appellant's actions in this regard show she was in receipt of written notice of the entry of Judge Dennis' October 29, 2014 order by at least December 3, 2104, the date of her of *pro se* notice. As such, Appellant would have needed to serve Respondents with a proper notice of appeal, signed by another attorney, by January 2, 2015, and serve the clerks of the lower and appellate courts with it by January 12, 2015, to be in compliance with ACR Rules 203(b)(1) and 203(d)(B), respectively. The notice of appeal signed by Mr. Goldberg, however, was not served on the Court of Appeals until January 30, 2015, well beyond these deadlines. For this reason alone, regardless of the fact that Mr. Goldberg's notice was never served on Respondents, Appellant's appeal of the October 29, 2014, is untimely under the ACR and should be dismissed.

II. Appellant's appeal of Judge Dennis' December 3, 2014, is improper as it arises from a *pro se* motion in violation of the December 2009 order of the SC Supreme Court.

As indicated above, after the conclusion of the first appellate process in this very same case, Mr. Johnson filed a post-remittitur motion in the trial court on behalf of Appellant. This motion was denied by Judge Dennis in his order dated October 29, 2014, the first order on appeal herein. Thereafter, Appellant, in a *pro se* capacity, attempted to move the trial court for reconsideration of this order by way of a *pro se* Rule 59(e) motion. **Ex. 12, *Pro Se* Notice of Motion and Rule 59(e) SCRCP Motion.** The Rule 59(e) motion was signed by Appellant only. It was not signed by Mr. Johnson, her attorney of record, or any other attorney. **Id.** In response thereto, Judge Dennis issued another order, entered December 3, 2014, the second order on appeal herein. In his December 3, 2014 order Judge Dennis

rejected Appellant's *pro se* motion as improper under the 2009 Supreme Court order. **Ex. 13, December 3, 2014 Form 4 Order.**

Judge Dennis' December 3, 2014 order was in direct response to an improper *pro se* motion made by Appellant in violation of the 2009 Supreme Court order. As such, any attempted appeal of same is improper and should be dismissed.

III. The required filings accompanying Appellant's notice of appeal are contrary to the 2009 order of the SC Supreme Court.

While Appellant was ultimately successful in having Mr. Goldberg sign a notice appeal on her behalf, the attending documents required by the ACR are not signed by Mr. Goldberg and contain only the signature of Appellant. For instance, the proof of service required under Rule 203 (d)(B) is signed by Appellant only. **See Proof of Service received by SC Court of Appeals February 12, 2015.** Likewise, the transcript request required of ACR Rule 207 is signed by Appellant only. **See letter to Anderson received by SC Court of Appeals February 12, 2015.** Importantly, Respondents have no record of having ever been served with the notice of appeal or the transcript request, and there is no proof of service filed by an attorney other than Appellant indicating otherwise. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis**.

Rule 203 of the ACR requires a party intending an appeal to comply with the ACR and the ACR specifically require a proof of service and a transcript request to be filed with the Court of Appeals. As such, these documents constitute filings under the ACR and in this case, pursuant to the Supreme Court's 2009 order, they must be filed by another attorney. Because the proof of service and transcript request herein are signed by Appellant only, they are in contradiction of the Supreme Court order and should be rejected.

IV. Appellant's Notice of Appeal has not been served on Respondents.

Rule 203(b)(1) requires a notice of appeal to be served on all respondents "within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203 (d)(B) requires the notice to be accompanied by a proof of service showing service of the notice on all respondents.

Respondents have never been served with the instant notice of appeal and were only made aware of it through the deficiency notices of Deputy Clerk Allen. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.** The *pro se* proof of service signed only by Appellant is prohibited by the December 2009 order of the SC Supreme Court and, therefore, cannot be considered as credible evidence to the contrary. The deadline to serve the Respondents with the notice of appeal has long expired as to each order on appeal. Because the notice of appeal was never served on Respondents and because there is no proper proof of service to contrary, Appellant's notice of appeal should be dismissed.

V. Appellant's affidavit is improper and does not cure the deficiencies in the notice of appeal.

As noted by Deputy Clerk Allen in her February 3, 2015, letter to Mr. Goldberg, the notice of appeal fails to contain a statement of when notice of written entry of the judgments on appeal were received. **Ex. 16, February 3, 2015, letters of Allen.** Deputy Allen gave notice that the deficiency must be corrected within ten (10) days of the date of her letter. **Id.** Appellant's affidavit notarized on February 9, 2015, fails to cure this deficiency.

First and foremost, the filing purported to cure the deficiency is not signed by an attorney other than Appellant. While Appellant was represented by Mr. Johnson when both orders on appeal were entered, the only evidence Appellant has submitted on this issue is her

own affidavit. For the same reasons set forth in the proceeding Section III of this Memorandum, Respondents do not believe this affidavit complies with the Supreme Court's 2009 order requiring all filings made by Appellant to be filed by another attorney.

Further, the content of the affidavit itself does not cure the deficiency. Appellant's affidavit fails to set forth a finite date on which notice of entry of either order on appeal was received. Rather, Appellant states notice was received "on or after December 15, 2014." The affidavit does not identify which order on appeal was received on this "on or after date." While it is assumed this language applies to notice of entry of the December 3, 2014 order on appeal, this language is insufficient to constitute a statement of when the appealing party received notice of the order or judgment from which the appeal is taken as required under ACR 203(e)(1)(c). The "or after" portion of this statement is insufficient for the Court of Appeals and Respondents to determine appropriate filing and service deadlines under the ACR. Further, the affidavit fails to contain any statement at all as to when notice of entry of the December 3, 2014, order on appeal was received.

The *pro se* affidavit is improper under the 2009 Supreme Court order and its content testimony does not cure the deficiencies in the notice of appeal. As such Appellant's notice of appeal remains procedurally deficient and should be dismissed.

VI. The notice of appeal was not filed by Appellant's attorney of record.

Rule 264(a) of the ACR specifically states that the attorneys of the respective parties in the trial court proceedings shall be deemed the attorneys of record for the same parties in the appellate court until withdrawal is approved and notice is given. In order to withdraw as attorney of record for a party, an attorney must petition the appellate upon justifiable cause

after notice to the adverse party. Rule 264(b). This process was not followed in this case.

Chalmers Johnson, Esq., has always been attorney of record for Appellant in this matter. As indicated above, Mr. Johnson has represented Appellant not only in the trial court proceedings, but in the previous appellate proceedings in this very matter as well. Indeed, Mr. Johnson filed and argued the very post-remittitur motion from which the present appeal partially arises. At no time has Mr. Johnson ever petitioned the trial court or the Court of Appeals for withdrawal of representation of Appellant. And at no time prior to his filing of the notice of appeal did Mr. Goldberg move to be substituted as counsel for Appellant.

Because Mr. Goldberg was not Appellant's counsel of record at the time he filed the notice of appeal on her behalf, the notice is improper and should be dismissed.

VII. Appellant's appeal is the product of hybrid legal representation not recognized in S.C.

Hybrid representation is defined as representation which is partially *pro se* and partially by counsel. *See State v. Sanders,* 269 S.C. 215, 237 S.E. (2d) 53 (1977). There is no constitutional right to hybrid representation either at trial or on appeal. *Foster v. State,* 298 S.C. 306, 306-307, 1989. "At the appellate stage, particularly, succinct, relevant legal arguments are most likely to be persuasive. Counsel is best able to use professional judgment to determine which arguments are relevant and should be presented for appellate review. While counsel may choose to submit arguments urged by his client, counsel has an obligation to review those arguments for possible relevance and merit before submitting them. In other words, counsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client." *Foster, supra.* Courts should not accept *pro se* filings simply forwarded through counsel. *Jones v. State,*

348, S.C. 13, 558 S.E. 2d 517 (2002). Instead, counsel shall use professional judgment in reviewing documents and shall submit a client's arguments only if relevant and only after they have been edited by counsel for review by the Court. *Id.*

Hybrid representation is clearly present in this case. Appellant has attempted multiple *pro se* filings outright, including her *pro se* notice of appeal of the October 29, 2014 order on appeal, her *pro se* motion to reconsider this order, and her *pro se* notice of appeal of the December 3, 2009 order rejecting her *pro se* motion to reconsider. **Ex. 10, December 3, 2014, *Pro Se* Notice of Appeal; Ex. 12, *Pro Se* Notice of Motion and Rule 59(e) SCRCP Motion; and Ex. 14, *Pro Se* Notice of Appeal dated January 14, 2015.** These *pro se* filings should not now be allowed to be prosecuted by Mr. Johnson who was Appellant's attorney of record when these very *pro se* filings were made. Mr. Johnson's agreement to prosecute these *pro se* filings after the fact show he is serving as a mere conduit for Appellant's *pro se* practice and that his representation of Appellant in this appeal is hybrid in nature.

Mr. Goldberg's previous involvement in this appeal appears to have been hybrid in nature as well. While Mr. Goldberg did sign the instant notice of appeal itself, he did not sign the attending proof of service or the transcript request. **See Proof of Service and letter to Anderson received by Court of Appeals January 30, 2015.** Significantly, Mr. Goldberg did not even sign the cover letter to the Court of Appeals enclosing the notice of appeal, proof of service and transcript request, nor is this letter on Mr. Goldberg's business letterhead. Further, the filings made in response to Deputy Clerk Allen's deficiency notices are all signed by Appellant, rather than Mr. Goldberg. **See Affidavit of Appellant and Letter to Anderson received by Court of Appeals February 11, 2015.** While the filings in

response to the deficiency notices are accompanied by a facsimile cover sheet from Mr. Goldberg's office, the handwritten notes thereon are unidentified and do not contain Mr. Goldberg's signature. **See Fax Cover Sheets of The Steinberg Law Firm received by Court of Appeals February 11, 2015.** Lastly, communications made by Mr. Goldberg to the Court of Appeals and to the undersigned indicate he had no intention of prosecuting this appeal and was merely serving as a conduit for Appellant's *pro se* filings until she could reach her attorney of record, Mr. Johnson, to do so. **Ex. 17, February 6, 2015, correspondence from Goldberg received by Court of Appeals February 9, 2015 and electronic communications between Goldberg and undersigned.**

As indicated above, the present notice of appeal is a product of hybrid representation and should be dismissed.

Conclusion

Based on the foregoing, Appellant's appeal should be DISMISSED and REMITTED to the circuit court.

Respectfully submitted,

March 4, 2015

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E. Douglas Pratt-Thomas
Pratt-Thomas Walker, P.A.
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PROOF OF SERVICE

I certify that I have served *Respondents' Memorandum in Support of Motion to Dismiss Appeal* on Appellant Cynthia Holmes, M.D., by depositing a copy of it in the United States Mail, postage prepaid, on March 4, 2015, addressed to her attorney of record, Chalmers C. Johnson, Esq., 1029 Bay Street, Apt. 11, Port Orchard, WA, 98366.

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March 4, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: C.Holmes, M.D. v. East Cooper Community Hospital, Inc. and Tenet HealthSystem Medical, Inc.
Case No. 2010-CP-10-3410
Appeal Tracking No.: 2015-000187

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven (7) copies of Respondents' Motion to Dismiss Appeal and Respondents' Memorandum in Support of Motion to Dismiss Appeal with Table of Contents and Exhibits in connection with the above-referenced matter, as well as a check in the amount of $25.00 for the filing fee. I would appreciate it if you could return a filed copy of the Motion and Memorandum to me in the self-addressed, stamped envelope enclosed herewith.

As evidenced by the enclosed Proofs of Service, and by copy of this letter to Appellant's counsel, I am serving Appellant with a copy of the Motion to Dismiss Appeal, Memorandum in Support of the Motion to Dismiss Appeal and Table of Contents.

Thank you for your assistance in this regard.

With kindest regards, I remain,

PRATT-THOMAS WALKER, P.A.

Lindsay K. Smith-Yancey

LKS-Y:dmc
Enclosures (as stated above)
cc (w/encl): Chalmers C. Johnson, Esquire