THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Civil Action No. 2015-CP-10-3220

Appellate Case No. 2016-002469

Shane Gould,

Respondent.

v.

Worldwide Apparel LLC, f/k/a
MusclePharm Sportswear, LLC and
Drew Ciccarelli

Appellants.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II. **Did the Circuit Court properly find that Appellants offered no adequate, admissible evidence showing that a genuine issue of material facts existed regarding the defenses of Disloyalty or of Gould's "Consent" to Employer's Violation of the Wage Payment Act, so as to preclude summary judgment?**

III. **Was the Circuit Court's Award of Attorney's Fees and Treble Damages - as authorized by the Wage Payment Act - precluded by an alleged "*bone fide* dispute?"**

STATEMENT OF THE CASE

Respondent-Plaintiff accepts the Appellants' Statement of the Case.

STATEMENT OF FACTS

It is undisputed that the Defendant-Appellant corporations, of which Defendant-Appellant Ciccarelli was sole owner[1], hired Respondent-Plaintiff Shane Gould ("Gould" or "Employee") in or around May of 2013 as a W2 employee, and his wages were set and agreed at $10,000 per month. [Def. Depo. 47, 64]. Plaintiff was in fact paid the $10,000 per month each month for his work until the first day of September 2014. [Def. Depo. 52]. Around that time, without any written notice as required by S.C. Code Ann. § 41-10-30 [Def. Depo. 61-64], Gould's pay was unlawfully reduced retroactively to $5000.00 for August 2014 [Def. Depo. 63]; and then, without the legally required written notice, Employer paid Gould nothing at all for his work in September, October, November and December of 2014. [Def. Depo. 67-68]. The Defendant-Appellant employer, a corporation, was sold in January 2015 [Def. Depo. 66-67] and was paid about $850,000 in cash and at least $850,000 in stock of the acquirer for the sale of the business. [Def. Depo. 106-109]. *Even so, Gould was never paid any of the past due salary and asserted that any change in his pay rate was specifically unlawful and void, as no written notice as required by law was ever given of such reduction.*[2]

At the summary judgment hearing, and on this appeal, Appellants are inconsistent about whether they argue that Gould was terminated at some point, or whether his salary was just

[1] Ciccarelli has, for unknown reason, only now disavowed sole ownership of his companies in the Appellants' Statement of Facts. [*Compare* Def. Depo. 15, 19, 23-24, 41].

[2] Appellants have argued Gould had orally agreed to accept reduced pay until the sale of the business was completed in or around January of 2015. Although any such agreement would not change the outcome, we show, Ciccarelli's company received about $850,000 in cash and about $850,000 in stock for the sale of the business, but even then, never paid Gould any of the past due sums. [Def. Depo. at 106, 108].

reduced (without the required written notice). This inconsistency, however, is immaterial, because in the binding 30(b)(6)deposition, the Appellants admitted that Gould was not terminated, did not resign, and continued working in September, October, November and December of 2014[3]. [Def. Depo. 65-69]. Indeed, Appellants admitted that they even intended to continue to pay Gould a reduced amount for September 2014 and the ensuing months [Def. Depo. 64] – but they never paid him anything for those months.[4] And they never gave written notice of any pay reduction at all.[5] [Def. Depo. 62].

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court." *Coastal Fed. Credit Union v. Brown,* 417 S.C. 544, 790 S.E.2d 417 (Ct. App. 2016)(quoting *Town of Summerville v. City of North Charleston,* 378 S.C. 107, 109, 662

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[3] [Def. Depo. 63, 65, 66. *See also* Def. Depo. 68:
Q. Did Shane perform any services for the company, your company, Worldwide Sportswear -- I'm sorry -- Worldwide Apparel and MusclePharm Sportswear LLC, during the month of September of 2014?
A. Yes.
Q. Did he do so in October of 2014?
A. Yes.
Q. Did he do so in November of 2014?
A. Yes, not per my request.
Q. And did he do so in December of 2014?
A. Yes.
Q. Did he do any work for the company in January of 2015?
A. I believe I saw e-mails from him still talking to our current suppliers in January, yes.]

[4] [Def. Depo. 64, 67-68].

[5] [Def. Depo. 62:
Q. Anywhere did you ever document the amount of the reduction?
A. Only via phone.];
[Def. Depo. 63:
Q. Because documentation is important to me. I apologize to be picky about it, but it is. Did you give him at any time seven days' written notification of reduction in pay in a specific amount?
A. No.]

S.E.2d 40, 41 (2008)). "A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 109-10, 662 S.E.2d at 41.

ARGUMENT

I. The Circuit Court properly granted summary judgment in favor of Gould where the Appellants admitted in binding Rule 30(b)(6) testimony all material facts of the Gould's claims.

Appellants ("Employer") have admitted all material facts of the Gould's claim in sworn testimony. Ciccarelli testified on his own behalf and simultaneously on behalf of his wholly owned corporate defendants in a deposition under SCRCP 30(b)(6). [Def. Depo. at 142-143]. Under the circumstances such testimony binds the corporate parties.[6]

Employer hired Gould in or around May of 2013 as a W2 employee, and his wages were set and agreed at $10,000 per month. [Def. Depo. 47]. Gould was in fact paid the $10,000 per month each month until the first day of September 2014. Around that time, without any written notice that was required by law – S.C. Code Ann. § 41-10-30 – Gould's pay was unlawfully reduced retroactively to $5000.00 for August 2014. [Def. Depo. 63]. Gould was paid nothing at all for his work in September, October, November and December of 2014. [Def. Depo. 67-68]. *Gould claimed that such change in the pay rate is specifically unlawful and void, as no written notice as required by law was ever given of any such reduction.* [Def. Depo. 61-64].

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[6] *See Chapman v. Ourisman Chevrolet Co.*, 2011 U.S. Dist. LEXIS 73708 (S.D. Md. 2011)("As John Ourisman was the corporate designee pursuant to Rule 30(b)(6), he bound the corporation to the answers that he gave in his deposition testimony. Defendants have not indicated that the information regarding the DOL's investigation about which Ourisman was asked was inaccessible or unknown to the corporation at the time that Ourisman was deposed. Accordingly, Rule 30(b)(6) requires that the corporation be bound to the answers that Ourisman gave during his deposition testimony....")

Employer testified, admitting that Gould was not terminated, did not resign, and continued working in September, October, November and December of 2014. [Def. Depo. 65-69]. Indeed, Employer admitted that they even intended to continue to pay Gould a reduced amount for September 2014 and the ensuing months [Def. Depo. 64] – but they never paid him anything for those months. [Def. Depo. 67-68]. And they never gave written notice of any pay reduction at all. [Def. Depo. 62-63 ("Q: Anywhere did you ever document the amount of the reduction? A: Only via phone." and "Q: Did you give him at any time seven days' written notification of reduction in pay in a specific amount? A: No."]

As the Circuit Court held, these Rule 30(b)(6) admissions by the Employer leave no room for dispute. All elements of Gould's claims under the Wage Payment Act were established by Employer's own admission, and therefore summary judgment was appropriate.

a) Alleged Oral Discussions and Text Messages About a "Possible Change" in Employment Terms Were Not Sufficient to Create a Genuine Issue of Material Fact when the Wage Payment Act Required any Actual Changes to Employment Terms to Be Made Only with 7 Days' Written Notice, and Employer Admitted That No Such Written Notice Was Ever Given.

The Employer's statement of this issue appears to suggest that a vague, incomplete discussion of a possible, never implemented, temporary change in payment terms, is somehow "enough" to create a genuine issue of material fact about whether the actual terms of employment lawfully changed, even though Employer has admitted in Rule 30(b)(6) testimony there was never any written notice of any actual change in terms ever given to Gould as required by law. Employer's argument is meritless.

It is undisputed that Gould's wage was $10,000 per month. Employer admitted in sworn, binding Rule 30(b)(6) testimony that Gould was never given written notice of a change of those

terms at all. [Def. Depo. 61-64]. Employer also admitted in this sworn testimony that Gould was never terminated, fired, or that he ever resigned during the period in question. [Def. Depo. 65-69].

The Court below found that the Wage Payment Act applies to this case. The Wage Payment Act provides that any downward change in the rate of pay of an employee is not effective without seven days' advance written notice. S.C. Code Ann. § 41-10-30. The Act also expressly – for the protection of employees – forbids any agreements to contravene or set aside any of the protections afforded by the Act. S.C. Code Ann. § 41-10-100. Thus, it is clear that at no time was Gould's lawful salary anything other than the undisputed originally agreed $10,000 per month.

Employer contends there was some evidence of "discussions" of what Employer describes as a "possibility of converting" Gould's pay in some indefinite way. Appellants' Brief at 4. This "evidence" refers to a vague text message sent well after Employer already stopped paying Gould altogether. As an initial matter, under the law, such evidence is inconsequential legally, as any actual downward pay change must be made in a written notice. S.C. Code Ann. § 41-10-30. But the Appellant points to evidence itself is also noteworthy in how otherwise immaterial it is, as well. In the message, Gould complains he was not being paid, sought to get paid some of what was past due ("let me know when I can expect payment please" [Ex. A to Defendants' Memorandum in Opposition to Motion for Summary Judgment] and even attempts to gain the late payments already earned by offering to defer some part of his pay going forward - until the business was acquired. However, Employer still never accepted – or lived by – any such proposal. *Id.* Instead, Employer made no further payments to Gould at all, even after Employer received a significant sum in early 2015 from the sale of the business. Employer,

implausibly from this text message vapor, extrapolates the text message as an agreement to "work for a reduced amount" or to "work for free," which in this context would be unenforceable and probably unlawful[7]. Notably, Employer itself did not treat this as an "agreement to work for less" since Employer never paid Gould another dime.

Regardless, Employer simply provided no evidence that any specific pay reduction was ever actually agreed. Indeed, the Wage Payment Act protects employees from an employer's effort to argue such an oral agreement to reduced pay by requiring all such changes to be made in writing with seven (7) days' notice in order to be effective. S.C. Code Ann. § 41-10-30. As mentioned above, the Appellants' "free labor" speculation would be unenforceable and would probably violate federal law.

The issue for the Court is simple. The Employer admitted that no written notice was given to reduce Gould's wage, at all, ever. Such admission is binding, and the Circuit Court was correct to rely on it in granting summary judgment.

b) The Wage Payment Act Forbids Covered Employers from Reducing Employee Pay Without 7 Days' Written Notice. Here, Employer Admitted that No Written Notice Was Ever Given to Gould.

Appellants also pose the issue: whether the Wage Payment Act voids any agreed change to employment terms if written notice of such changes is not given by the employer to the employee. The answer is, yes, at least when the change is a reduction in pay. That is the law under S.C. Code Ann. § 41-10-30. Here, while it is not material to the outcome, given the Appellants' admissions, there was never any agreement to a wage reduction, and no specific reduction agreement was ever written. What is important, and material, is that the Employer

[7] Surely it would be a violation of public policy, at the barest minimum, to allow an employee to "agree with his employer to work for no pay at all." Indeed, any "agreement" to work for no pay would be no contractual agreement at all, lacking in mutual consideration. Further, the Fair Labor Standards Act would forbid the "free work" arrangement Appellants now speculatively imagine. *See* US DOL Fact Sheet #71.

admits under oath that it never gave seven days' written notice of any reduced wage, and so no such change could be effective.

Employer's argument of a "false dilemma" is in error. A South Carolina employer governed by the Wage Payment Act must document wages as provided in the Act, and it must document any change to reduce the wages as required by the Act. S.C. Code Ann. § 41-10-30. While at common law, such circumstances required no writing at all, for employers in South Carolina governed by the Act (some employers are not governed by the Act) those days are gone.

This does not change the fact that an employee may yet be an at-will employee. But the Wage Payment Act does constrain *how* an employer subject to the Act may deal with the at-will employee. The employer must document the wage at the outset. And the employer must give seven days' written notice documenting any downward change to that rate of pay before it is effective. Put simply, even if there were an agreed change here, it was never "effective" under the Act because Employer admits it never gave any required written notice of a change in terms to Gould, the employee.

Employer's assertion that the Wage Payment Act's written notice requirement does not apply to wage reductions directly contradicts the language of the statute, which states that "*Any changes in these terms* [i.e. hours, agreed wages, time and place of payment] must be made in writing at least seven calendar days before they become effective. This section does not apply to *wage increases*." S.C. Code Ann. § 41-10-30. The Court should reject Employer's arguments to vastly rewrite the Wage Payment Act.

Thus, in view of the Employer's own sworn testimony, the Circuit Court's Order granting summary judgment is proper. Appellants' contorted attempts to misconstrue the Act otherwise are unsupported and should be rejected.

II. The Circuit Court properly found that Appellants offered no adequate admissible evidence to support the defenses of Disloyalty or of Gould's "Consent" to Employer's Violation of the Wage Payment Act.

In this case, Employer asserted vaguely the defense of disloyalty and now also urges the defense of consent. Neither affirmative defense was supported or valid. As we show below, the "consent" defense was not pled [Answer], and is precluded by the Wage Payment Act itself. And the "disloyalty" defense was based only on speculation and inadmissible hearsay concerning remote and *de minimis* conduct not amounting to "disloyalty" at all, and is therefore insufficient to raise a genuine issue of material fact.

a) A Consent Defense is Unsupported and Recognition of a Consent Defense Violates the Wage Payment Act.

The "consent defense" was never pled in this case, and should therefore be disregarded. Regardless of that failure, it is clear that Gould never consented to allow Employer to violate the Wage Payment Act, and the Wage Payment Act forbids any agreement to permit a violation of the Wage Payment Act. S.C. Code Ann. § 41-10-100. It was undisputed that Gould was paid zero for his work in the months of September through December of 2014. There is simply no evidence of consent to complete nonpayment. Surely it would be a violation of public policy, at the barest minimum, to allow an employee to "agree with his employer to work for no pay at all." Indeed, any "agreement" to work for no pay would be no contractual agreement at all, unenforceable as lacking in mutual consideration. Further, the Fair Labor Standards Act would

forbid the "free work" arrangement Employer now speculatively imagines. *See* US DOL Fact Sheet #71.

Employer now absurdly, and without any support, claims Gould consented to an unspecified wage "reduction" to zero, or possibly other (never paid) reduced amounts, without written notice. Here, Gould's pay was not just "reduced" without written notice – instead, Employer quit paying Gould entirely, for months, without any written notice. Under S.C. Code Ann. § 41-10-100, no private agreement (or consent) is permitted to vary the protective requirements of the Wage Payment Act. Here, Employer merely continues to insist that the Court should recognize unwritten exceptions for it under this law, duly enacted by the General Assembly.

The law forbids consent to violations of – or private exceptions to - the requirements of the Wage Payment Act. *Id.* By statute applicable to the Employer here, the Act provides that no changes may be made to reduce the Gould's pay except in writing with 7 days' notice given. S.C. Code Ann. § 41-10-30. Here, Employer admitted under oath - and cannot now dispute - that it never made any changes to Gould's employment terms in writing, and that it never gave seven days' written notice of any such changes or pay reductions. Regardless of any argument Employer may make today, no pay change or reduction in pay was made or effective, by this statute.

b) Employer Offered No Material, Admissible or Relevant Evidence of Disloyalty

Employer had the burden to establish the elements of the defense of disloyalty. By offering only hearsay statements about temporally remote, *de minimis* activities, Employer did not provide adequate evidence to create a genuine issue of material fact precluding summary judgment.

The Employer's contentions amounted to this:

(1) the Employer "heard" that Gould had given out a few pairs of socks to persons at one or two trade shows, well before Employer stopped paying Gould. Gould was asked to stop and there were no further reports of such conduct – [Def. Depo. 81-83,85-89,93], and

(2) early in the employment, Employer *speculated* that Gould *might have been* getting "kickbacks" from suppliers merely because he preferred certain suppliers; but such suspicions never led to any actual evidence or indications of kickbacks, and so the issue was dropped. [Def. Depo. 81-83].

In the end, Employer provided no admissible evidence to the Circuit Court of disloyalty during the relevant period[8] of non-payment – September through December of 2014. *Hall v. Fedor,* 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002)("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.")

First, on hearsay and speculation only, Employer surmised that Gould might have acted with disloyalty. Employer offered the Court below no admissible evidence that Gould attended any trade shows at all and acted with any disloyalty (only on hearsay and speculation, Employer supposed that Gould may have acted with disloyalty at some time) in the relevant period of non-payment - September through December of 2014. [Def. Depo. 83-89, 93]. Thus, because the purported trade show activities of Gould were the basis of the disloyalty asserted, there was simply no admissible evidence offered that Gould did anything at all disloyal in September through December of 2014, the periods of non-payment.

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8 Under *Futch v McAllister Towing,* 335 S.C. 598, 518 S.E. 2d 591 (1999) and similar, subsequent cases, the defense of employee disloyalty applies only to affect compensation during the asserted periods of disloyalty. *See Futch* at 607-608 (Claimant not entitled to compensation for services performed *during the periods of disloyalty*).

As shown above, the case law requires admissible evidence of disloyalty *during the relevant period of non-payment* for good reason. *See Hall v. Fedor, supra.* If it were otherwise, an employer could "mentally note" an asserted disloyalty early in the employment relation, and then "hold" that assertion until the last year or years (for example) of loyal service, only to then assert such early alleged disloyalty as a defense to payment for the later periods of unquestionably loyal service.

Second, the only asserted evidence of disloyalty is also inadmissible hearsay and conjecture, which cannot be offered to defeat summary judgment. *See Hall v. Fedor, supra.* Specifically, Employer's testimony about trade show disloyalty is all hearsay, addressing events about which the individual testifying had no firsthand knowledge at all, but only recited supposed reports that others conveyed to him orally. [Def. Depo. 83-89, 93]. Even then, all such hearsay testimony was about events predating the relevant period of non-payment, and there was no evidence presented to the Court that any disloyal acts took place in the relevant period of non-payment.[9] Hearsay evidence about events predating the relevant period cannot create a genuine issue of material fact to support the disloyalty defense that Employer asserts.

Further, even any admissible evidence that Gould passed out a few pairs of free socks for his other, longstanding business at a trade show, would certainly not rise to the level of material evidence of employee disloyalty in view of the decisions recognizing that defense. For example, in *Futch,* the allegedly disloyal employee actually secretly started a directly competing business to his employer, signed loans in support of that competitive business, obtained customer commitments from his employer's customers, and more, all while still working for the employer.

[9] Indeed, when asked about how he handled these earlier asserted disloyal acts Defendant testified that he mentioned them around the time and that was the end of it. [Def. Depo. 93].

By contrast, in this case Employer hired Gould for the very reason of his experience working for his known apparel business, Fuel, which was in the action sports field, not competitive to the MMA apparel market, and all parties had expressly agreed that Gould would continue that business of his own during the period of his employment with Employer. [Def. Depo. 45-46]. Such evidence, even if submitted by competent non-hearsay, and even if not temporally remote, would not be enough to create a genuine issue of material fact.

Likewise, the speculative assertions of supposed "kickbacks" are inadequate to raise a genuine issue of material fact. The following identifies the "evidence" on that issue:

> Q. So apart from -- I don't want to mischaracterize this. But it sounds like you're saying that you and others that didn't have any experience in the apparel business decided that [Gould's] preference for certain suppliers must have meant he might be having a kickback?
> A. It was certain suppliers and things purchased, watches. We were a clothing brand. Certain things he wanted to do.
> Q. Right. And those things led you to a suspicion --
> A. Correct.
> Q. -- that there might be a kickback?
> A. Correct.
> Q. And other than that, you never discerned that there was any fact to support that there was a kickback, ever?
> A. Correct.
> Q. Do you have any evidence of any kickbacks?
> A. No. I mean, that would be tough for me find out, wouldn't you think?

[Def. Depo. 82-83].

The burden to show facts to support an affirmative defense such as employee disloyalty falls on the party asserting it, and here, Employer simply offered no such evidence. Therefore, Employer has failed to offer evidence giving rise to a genuine issue of material fact precluding summary judgment.

III. The Circuit Court's Award of Attorney's Fees and Treble Damages was permitted by the Wage Payment Act and was not precluded by an alleged "*bone fide* dispute."

Appellants contend that a *bona fide* dispute existed as to "a portion" of the wages owed and unpaid. This argument appears to accept that another "portion" of the wages owed and unpaid were not disputed in good faith. Under such circumstances, the award of attorney's fees, as well as treble damages at least for the unpaid portions that were undisputed, would be proper. But the Court need not slice and dice the claims and issues so narrowly, because Appellants did not present the Circuit Court any adequate evidence to place any portion of the unpaid wages into *bona fide* dispute.

The Appellants only arguments to suggest a *bona fide* dispute simply repeat the arguments already addressed above: 1) the purported oral "implied consent for Gould to be paid zero" or the purported "oral agreement" to reduce Gould's wage without a written notice, (each of which would violate the Wage Payment Act, as shown above); 2) the irrelevant, inadequate and inadmissible hearsay speculation "evidence" about some vague breach of a duty of loyalty, as addressed above; and 3) the flawed legal argument that the Wage Payment Act does not really mean it when it says that the employee's wage cannot be lowered unless seven days' written notice is first given. None of these matters can establish a *bona fide* dispute for any "portion" of the unpaid wages due to Gould. In fact, the Circuit Court was also cognizant of the fact that, far being an employer with a *bona fide* dispute, here the Employer was a company with a notable history of not paying its bills, including its own attorneys' bills in this case and other cases. [Def. Depo. 59-60, 122]. The Circuit Court's award of attorney's fees and treble damages was well-reasoned and was allowed by the Wage Payment Act. As for the issue raised on appeal, that award was not precluded by any "*bone fide* dispute."

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's Order granting summary judgment.

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May 31, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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PROOF OF SERVICE

I certify that I have served a copy of the **Initial Brief of Respondent** and **Respondent's Designations to be Included in Record on Appeal** on Appellants by depositing copies of the same in the U.S. Mail, postage prepaid, and addressed to Appellants' attorneys of record, as follows:

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May 31, 2017

The Honorable Jenny Abbott Kitchings
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Re: **Shane *Gould v. Worldwide Apparel LLC, f/k/a MusclePharm Sportswear LLC and Drew Ciccarelli*; Appellate Case No. 2016-002469**

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the **Initial Brief of Respondent**, **Respondent's Designations to be Included in Record on Appeal**, and **Proof of Service** in the above-referenced matter. Once these documents have been filed, please return a filed-stamped copy of each document using the enclosed self-addressed, postage prepaid envelope.

By copy of this letter and Proof of Service, I am hereby serving copies of the same on Appellants' attorneys of record.

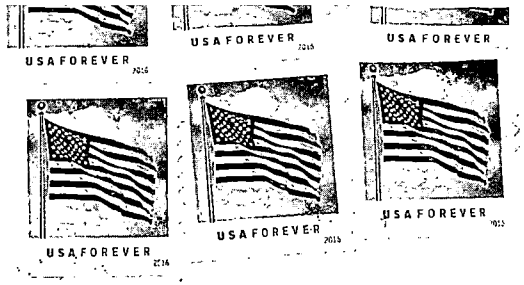
Thank you for your assistance in this matter.

Sincerely,

John E. Schmidt, III

Enclosures

cc: Via U.S. Mail with Enclosures:
Desa Ballard
Harvey M. Watson, III
W. Stephen Harris
Theodore Huge



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