THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

Case No. 2014-000847

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, ...Appellants,

v.

South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, ...Respondents.

Return to Petition for Rehearing

Appellants are not entitled to rehearing of Unpublished Opinion No. 2017-UP-403, because the Petition does not comport with the Court's standards for rehearing. Instead, all the points and issues argued in the Petition were raised and presented in the parties' briefs and the Record on Appeal. In order to prevail on a petition for rehearing, a party must state with particularity the points of its argument that the court is alleged to have

overlooked or misapprehended. Rule 221(a), SCACR. Because Appellants never identify anything the Court overlooked or misapprehended, and because their arguments do not in any even merit rehearing, the Court should deny the Petition.

I. Appellants have not shown any reason why rehearing should be granted regarding the standing determinations that have been decided against them by both this Court and the ALC.

This Court correctly held that Appellants cannot establish the elements of associational standing. *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). ("An organization has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."). For the reasons set forth below, rehearing on this issue is not warranted.

A. The first associational standing element is not present because the associations' individual members did not suffer any injury-in-fact.

The Court correctly held that the injuries alleged by Appellants, "even if actually suffered by individual complainants, are 'only generalized grievances suffered by the public as a whole which are insufficient to establish standing.'" Op. at 9 (quoting *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014)). Appellants incorrectly characterize the Opinion as holding that standing is not present

merely because alleged injuries are shared by "more than a handful of people." Pet. at 5. To the contrary, the Opinion correctly holds that Appellants failed to allege or identify any particularized injury and, instead, alleged or identified only speculative claims incident to living in Charleston's urban environment that do not amount to actual or imminent harm. Op. at 9. Appellants have repeatedly pointed to the affidavit of Tommy Robinson. Pet. at 3. However, her affidavit conveys nothing more than general grievances that allegedly exist today as a result of *current* cruise operations, but have no established connection to a future cruise terminal or cruise ships, or any activity licensed by DHEC.[1] *See* Op. at 3, Standing Order p. 10 **(R. p. 000086)**; Rule 56(e), SCRCP; see also *Beaufort Realty*, 346 S.C. at 303, 551 S.E.2d at 590; *Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001); *Bailey v. S.C. Department of Health & Environmental Control*, 388 S.C. 1, 693 S.E.2d 426 (Ct. App. 2010) (holding no causation because "potential of having boats mooring at the dock would still exist" regardless of the permitting decision). Ms. Robinson's affidavit was considered by the Court and discussed in the Opinion; therefore, it provides no basis for rehearing on the issue of standing.

Nor do any of Appellants' other affidavits establish standing. Stephen Gates' affidavit, *see* Pet. at 3-4, consists of inadmissible personal opinion, legal

[1] As the Court notes, the activity licensed by DHEC is limited to the installation of five additional pilings

conclusions, unsupported speculations, and hearsay repetition of purported medical opinions on which he is not qualified to testify. Standing Order at 7-8, 10 & n.13, **(R. pp. 000083-84; 000086)**. Christina Dodd, *see* Pet. at 4, complains that she is concerned about breathing pollution from cruise ships, but she is not qualified to opine as to any connection between her concerns about alleged present medical diagnoses and assumed injuries related to future cruise operations at Union Pier. *See* Christina Dodd Aff. at 2 (alleging current injuries with no admissible testimony connecting allegations to the license), **(R. p. 000399)**; *see also* Standing Order at 8 n.9 & 9 n.12. Marty Morganello's complaints, *see* Pet. at 4, about cruise ship practices regarding waste are inadmissible personal opinion and unfounded speculation because there is nothing to show he is qualified to testify on these issues. Standing Order at 10-11 & n.15, **(R. pp.000086-87)**. Virginia Lane's affidavit, *see* Pet. at 4-5, consists only of speculative harm to her and her business along with unfounded opinion testimony regarding traffic issues and property valuation. *See also* Standing Order at 8 n.9, 9 & n.11, **(R. pp. 000084-85)**. This Court and the ALC correctly held that these affidavits do not establish an injury-in-fact and rehearing on this issue is not warranted.[2] *See also Carnival Corp.*, 407 S.C. at 76–77, 753

[2] It also should be noted that, without a single expert affidavit, Cruise Opponents tried to connect existing and future operations at Union Pier to their alleged present-day health issues through the submission of generalized information concerning health issues that were wholly unconnected to the Cruise Terminal. Contrary to Appellants' assertions, *see* Pet. at 4 & n.1, this was insufficient to meet their burden and is not a ground for rehearing.

S.E.2d at 851 (holding that identical generalized allegations as set forth by affiants are insufficient to establish standing).

Finally, the Petition incorrectly characterizes the Opinion as taking "the view that because some of these injuries are shared by more than a handful of people, they are non-justiciable 'generalized grievances.'" Pet. at 5 (quoting Op. at 9). But the Court did no more than recognize, as did the ALC, that Appellants never alleged or established any cognizable injury beyond generalized grievances that might be shared by the general public. The simple fact is that Appellants never established a cognizable injury-in-fact that was actual and concrete, not conjectural or hypothetical as it relates to a proposed, but un-built, cruise terminal. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (holding that an injury-in-fact is "an invasion of a legally protected interest [that] is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"). Rehearing certainly is not warranted based on Appellants' incorrect characterization of what the Opinion "implies." Pet. at 5-6.

B. Rehearing is not warranted regarding this Court's holdings concerning the showing required for "affected persons" because Appellants again misapprehend what the Opinion actually holds.

Contrary to what Appellants argue, the Court did not hold that it is necessary to "produce 'evidence of declining property values and business' attributable to the permit." Pet. at 6 (quoting Op. at 9). Rather, the Court correctly held that Appellants' assertions regarding alleged impacts to their

properties and businesses were nothing more than the expression of generalized concerns that were wholly unsupported by actual evidence supporting those concerns: "We agree with the ALC that Appellants presented only speculative claims that the proposed passenger terminal would adversely affect their property values and businesses." Op. at 9. *See* discussion *supra* Part I.A.; *see also Carnival Corp.*, 407 S.C. at 76–77, 753 S.E.2d at 851; *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. And this Court previously has held that unsubstantiated allegations of future harm are insufficient to meet the requirements for standing to maintain an action, even specifically rejecting application of the *Laidlaw* case now cited by Appellants. *Beaufort Realty*, 346 S.C.at 302–03, 551 S.E.2d at 590 (rejecting *Friends of the Earth v. Laidlaw Environmental Services,* 528 U.S. 167 (2000) when claimed harm allegedly will occur in the future).

Again, the Gates, Robertson, and Lane affidavits do not establish standing because, as referenced above, their claims are speculative, constitute inadmissible evidence, or both. Many of Appellants' assertions and arguments in fact reflect their continued misapprehension of the evidentiary insufficiency of their response to the summary judgment motion. *See* Rule 56(e), SCRCP ("Supporting and opposing affidavits ... shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Simply put, Appellants' arguments on this issue are nothing more than a recapitulation of their

argument for a lower threshold of standing based on use of the statutory term "affected persons." *See* Pet. at 8 ("This evidence is more than sufficient to show that these property-owning and business-operating South Carolinians [are] "affected persons' ...."). Rehearing on this issue should be denied because the Court fully considered and correctly rejected these arguments. *See* Op. at 8; *see also* discussion *infra* Part III.

C. Rehearing is not warranted with respect to the Court's holdings regarding the need for participation in the lawsuit of the individual affiants.

This Court also correctly affirmed the ALC's determination that Ms. Robertson's affidavit did not establish associational standing because her alleged injuries, even if accepted, would require her individual participation in the lawsuit. Op. at 9-10. Critically, the Petition misstates a key holding of the Opinion on this issue. Pet. at 9 (misquoting the Opinion to state that "the Opinion postulates ... that the Community Groups 'have not explained how the claims they have asserted or the relief they have requested can be adjudicated **with** the affiant's participation in the lawsuit.") (emphasis added). In fact, this Court held, "Appellants have not explained how the claims they have asserted or the relief they have requested can be adjudicated **without** the affiant's participation in the lawsuit." Op. at 10 (emphasis added). Appellants certainly cannot establish standing—which they alleged in their Contested Case Hearing request—without the direct participation of the individual members in the lawsuit. *See* Request for Contested Case Hearing, ¶2[7] **(R. p. 000132)**.

More to the point, even assuming Appellants could surmount their standing problems, testimony of the individual members would be required to establish the case that Appellants formulated in their Contested Case Hearing request. Specifically, Appellants stated that "[e]xamples of cumulative impacts on the general character area ***will be supported by testimony***, and include historic skyline obstruction, waterview obstructions, the gridlock on small neighborhood streets caused by massive cruise ship and harmful air emissions." Request, ¶23 (emphasis added) **(R. pp. 000127)**. They further stated that, with respect to their claims that DHEC did not comply with the Coastal Zone Management Act "[u]pon information and belief, ***to be supported [by] testimony***, increased cruise ship operations will adversely affect property values." Request, ¶24 (emphasis added) **(R. pp. 000130)**. Appellants assert in the Petition that landowners can testify as to property values, Pet. at 7-8, and thus acknowledge the need for their individual members' testimony and participation. Simply put, the nature of the claims as ***framed by Appellants*** will require participation of their individual members. *See Warth v. Seldin,* 422 U.S. 490 (1975) (denying associational standing because individualized proof was required)*; cf. Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977) ("Finally, neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.").

Finally, but significantly, none of the alleged injuries identified by Appellants have anything to do with or derive from the respective affiants' membership in the organizations. *See Warth*, 422 U.S. at 511 ("[T]he association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties."). Standing Order at 16-17. **(R. pp. 000092-93)**. Specifically, the allegations by Tommie Robertson, *see* Pet. at 9-10, even if accepted, involve personal injuries that do not assist Appellants in establishing standing for a matter germane to their organizational purposes. *See* Standing Order at 16-17 & nn.21-22. **(R. pp. 000092-93)**. Nor do her alleged injuries derive from her voluntary membership in either the Coastal Conservation League or the Charleston Communities for Cruise Control.

In essence, Appellants are critical of the Court's application of the associational standing standard to their alleged injuries despite the fact that Appellants chose to bring this action as associations, rather than individually. But application of these principles does not deprive the affiants or anyone else of their rights to challenge a DHEC permitting decision because the affiants had the option of bringing this case along with or in lieu of the associations, or seeking intervention at a later stage of the proceedings. They never sought to avail themselves of any of these options and, thus, have no one to blame but themselves.

Finally, the Petition blurs the line and confuses the issues of what constitutes a particularized or generalized injury, with the standard for associational standing. Associational standing looks at the question of who is the proper party to bring an action; if the allegations are specific to the individual, rather than germane to or deriving from the organization, then the individual is the proper party. Here, the alleged injuries relied upon for standing, and repeated once more in the Petition, are specific to the affiant, not the association. The standard advanced by Appellants renders meaningless the third prong of the *Beaufort Realty-Hunt* analysis for associational standing and was correctly rejected by both this Court and the ALC. *See Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589; *see Hunt*, 432 U.S. at 343 (focusing on benefit to membership in discussion of associational standing and relief sought).

In sum, this Court and the ALC correctly assessed and adjudicated the pertinent issues regarding associational standing and individual participation. The Petition should be denied.

II. There is no basis for rehearing on this Court's holding that Appellant's standing regarding the state court issues was neither actually litigated nor determined by the federal district court.

This Court correctly determined that the doctrine of collateral estoppel did not preclude consideration of Appellants' ability to challenge a permit issued by DHEC—a state, not federal, regulatory entity—in the ALC—a state, not federal, judicial body. Because the district court determined standing

under a different statutory scheme using a different scope of analysis than that addressed by the SPA, this Court correctly held that there was no actual litigation of the same standing issue in the federal proceeding as required to apply the doctrine of collateral estoppel. And in any event, as the Court held, the "doctrine of collateral estoppel should not be rigidly applied." Op. at 11; *see Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) ("The doctrine of collateral estoppel should not be rigidly or mechanically applied."). That determination is particularly applicable here because of the differing regulatory schemes and policies in place and the fact that, as this Court and the ALC both determined, Appellants fail to meet any of the standing requirements required by state law. *See* Op. at 11 (noting that collateral estoppel should not be applied if public policy requires otherwise). Moreover, as argued elsewhere, the Supreme Court already has rejected claims—brought by four of the same associations appearing in this case—of standing for generalized grievances lodged against the Cruise Terminal like those alleged in this matter. *Carnival Corp.*, 407 S.C. at 76–77, 753 S.E.2d at 851. Appellants are not entitled to rehearing on their collateral estoppel claims.

III. Rehearing is not warranted with respect to this Court's holding that the term "affected persons" in S.C. Code Ann. § 44-1-60 is determined by applying the principles set forth in *Lujan v. Defenders of Wildlife.*

The Supreme Court already has applied the factors set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), to determine whether a

petitioner was "adversely affected" for purposes of an environmental permitting statute. *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (2007). The only basis for distinguishing *Smiley* that Appellants can muster is that the case dealt with a different statute. Pet. at 17. But the pertinent phrase—found in another permitting statute—is the same and, thus, establishes the appropriate interpretive framework that this Court correctly applied. Appellants' citation to S.C. Code Ann. Regs. 30-6A does not help them because addition of the language "with standing" simply clarifies the application of the statute. *See Young v. S.C. Dep't of Highways & Pub. Transp.*, 287 S.C. 108, 112, 336 S.E.2d 879, 882 (Ct. App. 1985). Although they never say so clearly, Appellants argue for an interpretation of "affected person" that would include anyone who requests to be notified and to participate in the review process. *See* Pet. at 16-18; Br. of Appellant at 22. That interpretation would render the term "affected" meaningless and would determine standing based on a person's simple interest in a matter, not his personal stake in a permit.[3] *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[W]e must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.'") (quoting *State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008)).

[3] Moreover, the term "affected person" appears in the statute as a recognition of DHEC's regulatory authority in the certificate of need program, in which an "affected person" is defined by statute. *See* S.C. Code Ann. § 44-7-130(1).

Viewed in this light, the Court correctly held that an "adversely affected" person must be ascertained by reference to the *Lujan* factors and rehearing on this issue should be denied.

IV. Rehearing is not warranted for this Court's holding that Appellants did not establish a reason to afford them public importance standing.

This Court correctly held that Appellants never met their burden to show why a resolution of their challenges to a DHEC permit is required for future guidance "so as to justify the invocation of a sparingly applied exception." Op. at 10;[4] *see Carnival Corp.*, 407 S.C. at 79-81, 753 S.E.2d at 852-53. Because the only issue in this case is whether DHEC properly granted the permit based on the existing legal and regulatory framework, there is nothing that requires resolution for future guidance. Although Appellants point to the expenditure of public monies and the need to clarify "the extent of environmental review and analysis that DHEC is required to undertake," Pet. at 18, as requiring future guidance, allowing public importance standing based on these contentions would allow the exception to swallow the rule. *See S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013) ("[W]e are mindful that we must be cautious with this exception, lest it swallow the rule ...."). And the Supreme Court already

[4] Appellants never address the budget proviso argument advanced in their briefs and actually addressed in the Opinion and, thus, never explain what this Court overlooked and misapprehended regarding the Public Interest issue. Rule 221(a), SCACR; *see* Op. at 10; *see also* Br. of Appellant at 39-40. Rehearing for this issue should be denied on that basis alone.

has rejected the claim that broadly generalized grievances support public interest standing with respect to the Cruise Terminal itself. *Carnival Corp.*, 407 S.C. at 77, 753 S.E.2d at 851.

In sum, this Court correctly recognized that, at bottom, Appellants challenge only whether the license was properly granted and, thus, there is no matter requiring resolution for future guidance. *See ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2nd 337, 341 (2008) ("For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance."). Rehearing on this issue is not warranted.

V. Rehearing is not warranted for this Court's affirmance of the ALC's imposition of sanctions against Appellants for filing a frivolous motion.

Try as they might, Appellants cannot satisfactorily explain their frivolous argument that the ALC was obligated to remand the case to DHEC because S.C. Code Ann. § 44-1-60(F) requires the DHEC Board to conduct a final review conference. As this Court recognized, even a cursory review of § 44-1-60(F) shows that DHEC is not required to hold a final review conference. Appellants' attempt to escape this self-evident interpretation by reliance on a single word in a single sentence, taken wholly out of context, was frivolous, just as this Court and the ALC recognized. Appellants' argument that the second sentence of § 44-1-60(F) "provide[s] an avenue for redress" is wholly at odds

with the statutory language.[5] Either the statute is mandatory or it is not; Appellants would have it both ways, even though they previously had affirmatively represented in another case that the final review conference was discretionary.[6]

Appellants do not identify any credible reason for reconsideration of this Court's holding that the award of sanctions was not an abuse of discretion. The Petition should be denied.

VI. Rehearing is not warranted for this Court's holding that the ALC did not abuse its discretion in declining to expand discovery.

Appellants do not and cannot dispute that, as this Court held, they never filed a motion to extend the deadline for discovery before the standard 90-day deadline expired and that neither SPA nor DHEC ever expressly stated that they would consent to discovery after the deadline expired. There were many

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[5] Appellants incorrectly contend that they "did not disregard, and have never disregarded, the additional language" of § 44-1-60(F). Pet. at 19. However, a cursory review of Appellants motion to remand reveals this assertion to be wrong: Appellants' motion only cited the first sentence of § 44-1-60(F), while completely ignoring and purposefully omitting the remaining portion of statute which contains the operative discretionary language. *See* Appellants' Mot. to Remand, **(R. pp. 000157-62)**.

[6] Specifically, the League stated that the "***Board has the option of conducting a conference or not after a request for review is made.*** If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision'... S.C. Code Ann. § 44-1-60(F)." *See* SPA Resp. to Motion to Remand, Exh. C, League Pet. for Writ of Certiorari at 5 n.3, Case Nos. 07-ALJ-07-0107-CC, -0108-CC, dated Jan. 20, 2009 (emphasis added). **(R. p. 000218).**

months in which Appellants could have but did not file a motion to expand or otherwise seek additional discovery even after the 90-day discovery period expired. *See* Discovery Order at 2. **(R. p. 000065)**. Instead, they only sought additional discovery about one month before the original trial date and only after the SPA stated that a motion for summary judgment would be forthcoming.[7] At bottom, the ALC's denial of Appellants' motion to expand discovery resulted from their failure to timely comply with the rules of procedure. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 253, 734 S.E.2d 161, 165 (2012) (holding that lower court properly denied motion for additional discovery filed two months after the deadline for discovery expired). Characterizing the ALC's rules of procedure as "rarely observed," Pet. at 21 n.4, and failing to act diligently under those rules does not constitute good cause, let alone excusable neglect for failing to comply with those rules. *See Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (a layperson's "failure to understand the legal process is not excusable neglect under Rule 60(b)"). The Court correctly held that the ALC did not abuse its discretion in denying Appellants' eve-of-trial motion and rehearing is not warranted on this issue.

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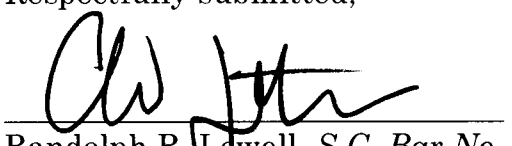
[7] Appellants incorrectly assert that the "SPA abruptly and retroactively changes its position in response to the Community Groups' request for depositions," Petition at 21, but this assertion is unsupported by the record. Specifically, Appellants did not serve deposition notices until after the SPA filed its motion for summary judgment and Appellants did so while their motion to re-open discovery was pending before the ALC. **(R. pp. 02274, 2972)**.

Conclusion

The Petition for Rehearing should be denied for all issues.

Respectfully submitted,



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November 13, 2017
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISRATIVE LAW COURT

Ralph K. Anderson, III, Chief Administrative Law Judge

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Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control,.....Appellants,

v.

South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority,.....Respondents.

Return to Petition for Rehearing

This is to certify that I, Emma Coss, a Legal Assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the Return to Petition for Rehearing by placing the same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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November 13, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
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Re: *Preservation Society of Charleston v. S.C. State Ports Authority & SCDHEC*;
Appellate Case No. 2014-000847

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the **Return to Appellants' Petition for Rehearing**, of Respondent South Carolina Ports Authority, along with a Certificate of Service. Please file-stamp the extra copy and return it via my courier.

If you have any questions or if you need any additional information, please do not hesitate to contact me.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

Chad Johnston

Enclosures
cc: Amy E. Armstrong, Esquire
Bradley D. Churdar, Esquire
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