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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stillwell, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2016-000548
Case No. 2013-CP-23-6522

Madel C. Rivero, as Personal Representative for the Estate of Lilia Lorena Blandin, ... Respondent,

v.

Sheriff Steve Loftis, in his capacity as Sheriff of Greenville County, ... Appellant.

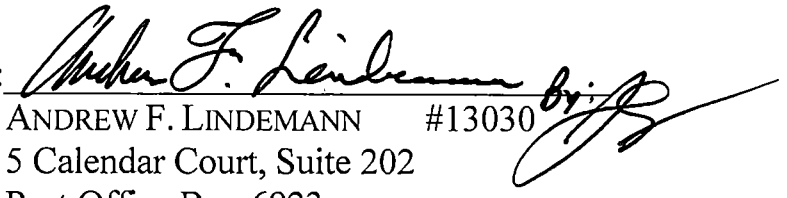
PETITION FOR REHEARING

The Appellant Steve Loftis petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Rivero v. Loftis*, Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *Rivero v. Loftis*, Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

LINDEMANN, DAVIS & HUGHES, P.A.

BY: 

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August 9, 2018

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant Sheriff Steve Loftis has petitioned this Court for a rehearing of the recent decision in *Rivero v. Loftis*, Op. No. 2018-UP-340 (S.C. Ct. App. filed July 25, 2018). Sheriff Loftis respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

The Appellant Sheriff Steve Loftis seeks a new trial absolute on the basis of intentional juror concealment during voir dire that was conducted prior to jury selection. In presenting the juror concealment issue, the Sheriff argued the necessity of an evidentiary hearing to determine whether Juror Robin Burns had intentionally concealed pertinent information in response to the voir dire question.

In adjudicating this issue on appeal, this Court actually *reversed* a critical finding of fact made by the trial judge. Judge Stilwell ruled that "[t]he question the court posed in *voir dire* was clear and unambiguous." (R. 6). Despite that unappealed ruling which was subject to an abuse of discretion standard like any other factual finding, this Court concluded that the voir dire question at issue was ambiguous, and as a result, "Burns' concealment was unintentional." (Slip Op. at 4). The Court then found it unnecessary to rule on any other issues and disposed of that argument by stating: "given the ambiguity of the question posed to the prospective jurors in the present case, the circumstances do not merit an evidentiary hearing." (Slip Op. at 5). The Court justified its *reversal* of that unappealed ruling by the trial judge under its Rule 220(c) authority which provides that "[t]he appellate court may *affirm* any ruling, order, decision or judgment upon

any ground(s) appearing in the Record on Appeal." *See*, Rule 220(c), SCACR. (Emphasis added).

The Court's adjudication of the juror misconduct issue raises several issues, all of which separately support the requested rehearing, but in tandem, should make a rehearing a prerogative.

A.

The critical finding of fact by Judge Stilwell that the voir dire question was "clear and unambiguous" was just that – a finding of fact. In the leading case of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the Supreme Court held that "whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." 550 S.E.2d at 284. The "fact intensive" nature of the inquiry has been restated many times by this Court and the Supreme Court. The Court in *Woods* explained that the question presented to the jury on voir dire must be "comprehensible to the average juror" and that "[u]nintentional concealment occurs where the question posed is ambiguous or incomprehensible to the average juror." *Id.* Despite being an objective standard given this language, the issue is still one for the factfinder such as other objective or reasonable man inquiries, including probable cause which is a question of fact to be decided by the factfinder. In this case, the factfinder – Judge Stilwell – made his finding that "[t]he question the court posed in *voir dire* was clear and

unambiguous." (R. 6). That finding of fact should be subjected to the proper standard of review. In an action at law, trial judge's findings will be upheld unless lacking in evidentiary support. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). However, in this case, this Court did not even address whether Judge Stilwell's finding was supported by any evidence. Instead, this Court improperly found facts in accordance with its own view of the evidence. In short, if the proper standard of review had been applied, Judge Stilwell's finding that the voir dire question was clear and unambiguous would not have been *reversed.* That finding is supported by the evidence.

B.

In addition, the Court improperly relied on Rule 220(c), SCACR, to provide the basis for *reversing* the unappealed ruling by Judge Stilwell. The Court suggests that it was simply affirming based on a ground appearing in the record; however, that it not the case. The Court actually *reversed* the ruling from the Court below. This is a misapplication of the Court's authority under Rule 220(c) which only allows appellate courts to *affirm* a lower court ruling on any alternative basis appearing in the Record on Appeal. There is absolutely no support in our jurisprudence for this Court to rely on its Rule 220(c) authority to actually reverse a ruling that was made *with finality* by a lower court.

In *Sims v. Amisub of South Carolina, Inc.*, 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014), this Court used its Rule 220(c) authority to enter judgment based on a statute of limitations defense even though the lower court had denied the motion for summary judgment on that defense. But, this Court in its analysis was quick to point out that the denial of summary judgment was not a final decision by the lower court because "the denial of summary judgment does not *finally* determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." 758 S.E.2d at 194. (Emphasis in original). The Appellant's counsel is unaware of any case where an appellate court has used its Rule 220(c) authority to actually reverse a *final* ruling by the lower court. This case appears to be establishing a new precedent and one that this Court should be guarded to make.

C.

The Court's reliance on Rule 220(c) in this instance to *reverse* a ruling by Judge Stilwell is further problematic in that, unlike in such cases like *Sims*, this Court was not presented with an additional sustaining ground by Rivero to rule as it has. When an issue is at least raised as an additional sustaining ground, the opposing litigant is on notice of the issue and can present arguments and authority to contest the issue. That, at the very least, satisfies the basic tenets of due process including notice and the opportunity to be heard. Rule 220(c), when applied as it

has been by this Court, is fundamentally unfair and denies due process. Sheriff Loftis never had a fair and meaningful opportunity to argue that Judge Stilwell's ruling was correct, is supported by an evidentiary basis, and should be affirmed. Having the issue raised for the first time *sua sponte* in a ten-minute oral argument does not constitute proper or adequate notice or a meaningful opportunity to be heard. The due process concerns that are implicated by this Court's unprecedented reliance on Rule 220(c) to *reverse* an unappealed ruling by the lower court militates the need for a rehearing in this case.

D.

Last, but certainly not least, this Court's application of its Rule 220(c) authority is entirely at odds with years of precedent in this State applying the law of the case doctrine. In footnote two, this Court rejects the law of the case argument made by Sheriff Loftis' counsel when this new issue was first raised *sua sponte* during oral argument. Sheriff Loftis argued that the issue of ambiguity of the voir dire question was not properly before this Court because Rivero did that appeal Judge Stilwell's factual finding that the voir dire question was "clear and unambiguous."

This Court applied a very limited and incorrect interpretation of the law of the case doctrine, and one that is inconsistent with literally dozens of prior cases. The Court appears to rule that the law of the case doctrine applies *only* to matters

decided in a *prior appeal.* The case cited, *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009), did involve the application to the law of the case doctrine to a prior appeal (an appeal to circuit court from magistrate's court), but the Supreme Court did not limit the doctrine's application to issues or claims decided on a prior appeal. Indeed, the Supreme Court reiterated that "an unappealed ruling is the law of the case." 674 S.E.2d at 458. There are, as this Court well knows, literally dozens of cases where the law of the case doctrine is applied to an unappealed ruling regardless of whether there was a prior appeal or not. *See e.g., Normandy Corp. v. South Carolina Dept. of Transportation,* 386 S.C. 393, 688 S.E.2d 136, 149 (Ct. App. 2009) (unappealed ruling "is the law of the case regardless of its correctness"); *Campbell v. Jordan,* 382 S.C. 445, 675 S.E.2d 801 (Ct. App. 2009); *Floyd v. CB. Askins & Co. Contractors,* 382 S.C. 84, 675 S.E.2d 450 (Ct. App. 2009); *King v. James,* 388 S.C. 16, 694 S.E.2d 35 (Ct. App. 2010); *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, 285 (2012) ("[w]hile [the master's] calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case"). That has been the proper interpretation for decades. *See, Buckner v. Preferred Mut. Inc. Co.*, 255 S.C. 159, 177 S.E.2d 544 (1970). In short, contrary to the Court's footnote in its opinion, to become the law of the case, a ruling need not have been the subject of a prior appeal.

To the contrary, the Supreme Court has spoken to this precise issue, and in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238,489 S.E.2d 470 (1997), the Supreme Court explained that an "unappealed ruling is the law of the case," and the unappealed ruling "should not have been reconsidered by the Court of Appeals." 489 S.E.2d at 472.

The same is true in this case. The ruling by Judge Stilwell that the voir dire question was "clear and unambiguous" – which was a final ruling on which a final judgment was entered – was unappealed. As a result, right or wrong, it establishes the law of the case and should not been reconsidered and *reversed* by this Court. Rule 220(c) simply does not give and cannot be construed to give this Court the power to override or disregard the law of the case doctrine – just as it does not give this Court the authority to *reverse* an unappealed ruling. Contrary to footnote two, the unappealed ruling *is binding* on this Court.

In short, the law of the case doctrine is applicable to issues decided or raised in a prior appeal, but that is not its *only* application. The doctrine is also applicable where, as in this case, there is a final ruling that is unappealed. *See also, Shirley's Iron Works v. City of Union*, 402 S.C. 560, 743 S.E.2d 778 (2013) ("[t]he doctrine of law of the case applies to an order or ruling which finally determines a substantial right"). The Court is respectfully requested to rehear this case and to

give full effect to the unappealed ruling by Judge Stilwell that the voir dire question was "clear and unambiguous." (R. 6).

II.

As discussed above, the Court ultimately decided the issue regarding Juror Burns' concealment during voir dire by reversing Judge Stilwell's unappealed ruling and substituting its own view of the evidence. Because that should not have been a basis for the Court to decide this issue, the Court is respectfully requested to fully consider and rule upon the actual issues briefed and argued by the parties. On Judge Stilwell's error in requiring Sheriff Loftis to prove the "fact of disqualification" which is not a required showing under the *Woods* test, this Court "acknowledge[d] the merit of this argument." (Slip Op. at 3). Instead of acknowledging the merit, the Court is requested to rule for the Sheriff on this issue and find reversible error.

To reiterate, the "fact of disqualification" is an element of the test where a party seeks a new trial because the trial court failed to disqualify a juror for cause. That is not the issue here; no request was made to strike Juror Burns for cause. The "fact of disqualification" inquiry is therefore not a necessary element under the test for juror concealment, which is the issue in this case. In other words, juror disqualification is not an absolute requirement under the *Woods* test. To the contrary, using the word "or," the Supreme Court requires a showing "that the information concealed would have supported a challenge for cause *or would have*

been a material factor in the use of the party's peremptory challenges." *Woods*, 550 S.E.2d at 284. (Emphasis added). And in this case, that prong of the *Woods* test was clearly satisfied. Indeed, Judge Stilwell has readily "agree[d] that had the Defendant known of Juror Burns' experience with the police concerning an argument with her husband, the Defendant would surely have used a peremptory challenge to strike Ms. Burns." (R. 7).

III.

The Court is also respectfully requested to rehear the core issue on appeal – that Judge Stilwell should have conducted an evidentiary hearing to determine whether Juror Burns had intentionally concealed pertinent information in response to the voir dire question. Judge Stilwell ruled that "Defendant has failed to show Juror Burns' failure to respond during *voir dire* was untruthful or deceitful so as to rise to the level of an intentional concealment of information." (R. 7). He further ruled that "there is no evidence that Ms. Burns, either objectively or subjectively, concealed information." (R. 6). Yet, the absence of this evidence is the result of the judge's refusal to hold an evidentiary hearing. By denying the means to develop the evidence to meet the burden of proof, Judge Stilwell deprived Sheriff Loftis of due process.

To reiterate, in *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the Supreme Court emphasized that "[n]ecessarily, whether a juror's failure to respond

is intentional is a fact intensive determination which must be made on a case by case basis." 550 S.E.2d at 284. Later, in *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013), the Supreme Court further elaborated that "such case-by-case determinations *are most appropriately made after a hearing, which allows the factual circumstances to be more fully developed.*" 737 S.E.2d at 371. (Emphasis added). If that language does not "mandate" an evidentiary hearing, as Rivero insists it does not and this Court seems to agree, it nonetheless strongly urges courts to hold an evidentiary hearing in such circumstances. At the very least, common sense dictates no less. Whether conduct by a juror is intentional or unintentional is inherently subjective. Hence, a "fact intensive determination" of the juror's subjective intent in failing to respond to a voir dire inquiry necessarily requires the questioning of that juror.

The fallacy of Rivero's position on this issue is demonstrated by Judge Stilwell's rulings. He deprived Sheriff Loftis of the ability to obtain testimony from Juror Burns, but he then finds that the Sheriff failed to show her conduct was "untruthful or deceitful" or that she deliberately concealed information. Such a conclusion about Juror Burns' subjective intent to conceal cannot be determined with any fairness or certainty in the absence of taking the juror's testimony.

The existing case law also makes this very point. Appellate case law in South Carolina includes numerous cases where juror concealment during voir dire

was alleged. In each of those cases, an evidentiary hearing was held where the juror at issue was questioned by the court to ascertain whether pertinent information was concealed during voir dire and whether that concealment was deliberate or intentional. *See e.g.*, *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001); *State v. Sparkman*, 358 S.C. 491, 595 S.E.2d 375 (2004); *State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004); *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007). Regardless of whether the Supreme Court "mandates" the holding of an evidentiary hearing, the necessity in cases such as this one should be patently clear.

As discussed, Sheriff Loftis was denied access to the critical and dispositive evidence needed to fully flesh out the proper application of the *Woods* test in this case. Despite initially indicating that an evidentiary hearing would be scheduled, Judge Stilwell ultimately denied the opportunity for Sheriff Loftis to "more fully develop" the factual circumstances by the very means that the Supreme Court termed the "most appropriate" method of determining the truth. Then, he ruled against Sheriff Loftis for failing to show an intentional concealment. That is a classic denial of due process – such a denial that warrants a reversal and a new trial absolute or, at a minimum, a remand for such an evidentiary hearing to be held. This is an issue that the Court needs to address on rehearing.

It bears repeating that the evidence did not include the testimony of Juror Burns, and "willful concealment" under these circumstances cannot be determined without the testimony of the juror. More specifically, it may not be determined what Juror Burns may or may not have understood during voir dire when she has not been asked such questions. Similarly, it may not be determined why Juror Burns did not respond to a voir dire inquiry when she has not been asked that question.

In *State v. Coaxum*, 410 S.C. 320, 764 S.E.2d 242 (2014), the Supreme Court recognized that "trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." 764 S.E.2d at 245. That duty cannot likewise be fulfilled post-trial in light of an allegation of juror concealment where the court and litigants lack accurate information or the ability to obtain such information. Such information must be obtained by way of an evidentiary hearing.

In sum, Sheriff Loftis is entitled, at the very least, to a remand for an evidentiary hearing to be held. However, given the passage of time since the September 2015 trial, the proper result is most likely to grant a new trial. *See*, *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811, 815 (1999) (if the court "finds it impossible to conduct an adequate post-trial inquiry due to the passage of time, a new trial may be ordered").

IV.

This Court is also respectfully requested to rehear Sheriff Loftis' lack of causation in fact argument. This Court concluded that there was sufficient evidence to make the issue of causation in fact a jury question. With all due respect, the Court is mistaken.

In so ruling, the Court focused on evidence that suggested – albeit in a speculative way – that Avery Rivero, if arrested on December 9, 2011, would not have bonded out of jail by December 10, 2011 and could not have killed the decedent *on that date*. The speculative nature of this "evidence" is inherent in the Court's own language: "the second bond would likely have been set at a higher amount and he would have had to wait longer for his release." (Slip Op. at 8). The financial status of Avery and his ability to make even a higher bail is purely a guess. No evidence was presented as to Avery's financial ability.

In addition, in footnote three, the Court notes that "[t]he record does not indicate the ultimate outcome of the CDV charge or whether the December 5 hearing on the charge occurred as scheduled. Therefore, there is a question as to the continuing viability of the bond conditions after December 5." (Slip Op. at 8). That is a valid point, and Rivero has the burden of proof. Yet, after making that observation, the Court inexplicably "assum[es] the no-contact condition of the October 31 bond was still in place." (Slip Op. at 8). In the absence of evidence,

however, the Court (or the jury) simply cannot make such an assumption. An assumption is not substitute for evidence.

Yet, the most glaring error in the Court's analysis is this focus on December 10, 2011. There is this suggestion that Avery could only have murdered his wife on the 10th, and if he was released after that date, the murder would never have happened. Of course, that is a complete fallacy. As Sheriff Loftis argued and this Court did not consider or address, Rivero needed to present evidence that Avery Blandin would never have been released on bond or otherwise would no longer have had the motive and opportunity to murder his wife. There is no such evidence presented. It is very likely that Avery would have been released on bond – if not on December 10th, then some time shortly thereafter. He would have then had the same motive and capacity to kill his wife. As Sheriff Loftis explained, this is why failure to arrest claims are inherently flawed. Unless it can be shown within a reasonable level of probability that the arrest would prohibit any further opportunity to commit the crime, then there is not sufficient evidence of causation in fact. *See, Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993) (causation based upon a possibility rather than a probability is not sufficient for a plaintiff to recover in tort).

On rehearing, this Court is requested to give full consideration to the Court's decision in *Thomas v. South Carolina Department of Highways and Public*

Transportation, 320 S.C. 400, 465 S.E.2d 578 (Ct. App. 1995). The Court found that decision to be "persuasive" but "distinguishable." (Slip Op. at 6). Sheriff Loftis submits that it is actually *controlling.* In *Thomas*, this Court held that speculation about the criminal actions of a third-party tortfeasor in relation to the enforcement of a statute was insufficient to establish causation for a plaintiff's injuries. The same issue is present in this case. It is entirely impossible to know what would have occurred if Avery Blandin had been arrested on December 9, 2011. There is certainly no evidence that, had he been arrested on that date, Avery would have been precluded from having any further opportunity to commit the murder of his wife. He would clearly have been bonded out of jail, if not by December 10th, then on some later date and would have had the same motive and opportunity to murder Lilia. As a result, the question as to whether Lilia's death could have and/or would have been prevented by his arrest on December 9th is simply a matter of speculation. Like this Court ruled in *Thomas*, there was no jury question presented by the evidence on causation in fact. Rivero was unable to establish at any requisite level of probability that Avery Blandin would not have committed the murder of his wife had he been arrested for criminal domestic violence on December 9th. In fact, he had previously been arrested, and that certainly had not prevented him from committing further offenses against his wife. This situation was no different based on the evidence (or lack thereof) presented.

In short, the Court has erred in focusing on whether Avery could have killed his wife on the 10th, and that is not the issue.[1]

To reiterate, Rivero was required to prove that Avery Blundin's arrest on December 9, 2011 would have resulted in his long-term detention and separation from his wife, thereby eliminating the threat. Plain and simple, an arrest for criminal domestic violence does not satisfy that burden of proof. Sheriff Loftis is entitled to a directed verdict and JNOV on the causation in fact issue.

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[1] The Court's citation to *Alexander v. Town of Vernon*, 101 Conn. App. 477, 923 A.2d 748 (2007), is helpful to a degree in that the court in that case makes many of the same points Sheriff Loftis has asserted about the sheer speculation that arises in failure to arrest cases. The court, however, made the same error as this Court in focusing only on the husband's ability to commit murder on one particular day which fails to account for the obvious ability of the husband to commit murder whenever he bonded out of jail, even if it was two or more days later.

CONCLUSION

Based on the foregoing discussion, the Appellant Steve Loftis, in his official capacity as Greenville County Sheriff, respectfully requests that the Court rehear its decision in this case. Sheriff Loftis respectfully renews his request that this Court reverse the Orders of the trial court and remand for entry of a directed verdict and/or judgment as a matter of law in favor of Sheriff Loftis. In the alternative, Sheriff Loftis respectfully requests that the Court remand for a new trial absolute or, at a minimum, remand for an evidentiary hearing to be held on the issue of juror concealment by Juror Burns.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant Sheriff Steve Loftis, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 9th day of August 2018:

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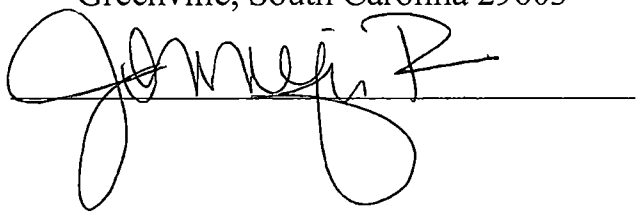

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August 9, 2018

Hand Delivered
The Honorable Jenny Abbott Kitchings
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RE: Madel C. Rivero, as Personal Representative for the Estate of Lilia Lorena Blandin v. Sheriff Steve Loftis, in his capacity as Sheriff of Greenville County
Appellate Case Number: 2016-000548
Civil Action Number: 2013-CP-23-6522
Claim Number: 03841
Our File Number: 104.9842

Dear Ms. Kitchings:

Please find enclosed for filing the originals and seven copies each of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me by way of my paralegal. I have also enclosed my firm's $25.00 check for the filing fee.

By copy of this letter, I am serving copies on all counsel of record. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosures)

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