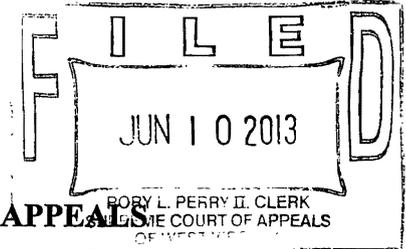


No. 13-0262



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**JOHN D. FLOWERS, DAVE FLOWERS, INC.,
D/B/A VENOM, INC.,**

Petitioner,

v.

**MAX SPECIALTY INSURANCE COMPANY, A VIRGINIA
CORPORATION,**

Respondent.

**PETITION FOR APPEAL ON BEHALF OF PETITIONER,
JOHN D. FLOWERS, DAVE FLOWERS, INC.,
D/B/A VENOM, INC.**

Date: June 10, 2013

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Petitioner,

v.

MAX SPECIALTY INSURANCE COMPANY, A VIRGINIA
CORPORATION,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF APPEAL

I. ASSIGNMENT OF ERROR

The Petitioner contends that the Trial Court erred in granting the Respondent, Max Specialty's, Motion for Summary Judgment when it found that the commercial general liability policy at issue permits Max Specialty to terminate its duty to defend at such time as the liability policy limit of \$25,000.00 is exhausted through the expenditure of attorney fees and costs related to the defense of the underlying tort actions.

II. STATEMENT OF THE CASE

The instant civil action was filed by Max Specialty in the form of a declaratory judgment action seeking, *inter alia*, a declaration from the trial court that liability insurance coverage arising from the discharge of a firearm at the insured premises apparently injuring three people is limited to \$25,000.00 in the aggregate and that this limit is diminishing as costs and attorney fees

for the defense of the pending tort actions are incurred.¹ In other words, Max Specialty's position is that the most it will pay for all of the three claims is \$25,000.00 whether this amount is spent to settle potential claims or on costs of defense. Flowers also has pending cross claims against Max Specialty and third party claims against John Young and Young Insurance Agency alleging potential damages based upon negligent procurement of insurance which depend largely upon facts arising out of the actual solicitation and purchase of the insurance in question. Importantly, Flowers did not consent to the trial court handling his cross claims and third party claims through summary judgment. Discovery is necessary on Flowers' claims and they cannot be disposed of based upon the facts established by the alleged tort victims' affidavits alone. By filing his brief in response to the declaratory judgment action, Flowers did not waive or concede any of his cross claims or third party claims as they involve questions of fact.

In an attempt to resolve the declaratory judgment claim of Max Specialty on an expedited basis, the parties agreed to rely on the facts established by affidavits signed by the alleged tort victims. The affidavits of Darin I. Drane, Robert Turbeville and Kaitlin Grace Marcum were all filed with the Cabell County Circuit Clerk's office and served upon all parties on or about August 15, 2012. (See Appendix at pgs. 255-266) For the purpose of Max Specialty's claim for declaratory relief, these affidavits constitute the undisputed material facts. The issues addressed in this brief concern the application of these facts to the language of the Max Specialty policy in force on February 20, 2010. Specifically, assuming the \$25,000.00 limit applies, does Max Specialty's duty to defend terminate when the \$25,000.00 is exhausted by attorney fees and costs incurred in the defense of the underlying tort actions?

¹ It is Flowers understanding that all tort actions are now consolidated in this action for purposes of judicial economy and without objection from any party.

The policy limits under the Max Specialty commercial general liability policy (hereinafter referred to as “the policy”) were \$1,000,000.00 per occurrence, a \$2,000,000.00 aggregate limit, and a \$5,000.00 medical expenses limit for any one person. Although the policy contained an Assault or Battery Exclusion, the policy also contained an endorsement for limited assault or battery coverage with a limit of \$25,000.00 per event and \$25,000.00 aggregate.

The Assault or Battery Exclusion states as follows:

ASSAULT OR BATTERY EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT THOROUGHLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART COMMERCIAL UMBRELLA LIABILITY COVERAGE PART

In consideration of the premium charged, it is understood and agreed that this insurance does not apply to liability for damages because of “bodily injury”, “property damage”, “personal and advertising injury”, “medical expense”, arising out of an “assault”, “battery”, or “physical altercation” that occurs in, on, near, or away from an insured’s premises:

1. Whether or not caused by, at the instigation of, or with the direct or indirect involvement of an insured, an insured’s employees, patrons or other persons in, on, near or away from an insured’s premises, or
2. Whether or not caused by or arising out of an insured’s failure to properly supervise or keep an insured’s premises in safe condition, or
3. Whether or not caused by or arising out of any insured’s act or omission in connection with the prevention, suppression, failure to warn of the “assault,” “battery,” or physical altercation,” including but not limited to, negligent hiring, training and/or supervision.

4. Whether or not caused by or arising out of negligent, reckless, or wanton conduct by an insured, an insured's employees, patrons or other persons.

DEFINITIONS:

For purposes of this endorsement:

"Assault" means any attempt or threat to inflict injury to another including any conduct that would reasonably place another in apprehension of such injury.

"Battery" means the intentional or reckless physical contact with or any use of force against a person without his or her consent that entails some injury or offensive touching whether or not the actual injury inflicted is intended or expected. The use of force includes but is not limited to the use of a weapon.

"Physical altercation" means a dispute between individuals in which one or more persons sustain bodily injury arising out of the dispute.

All other term, conditions, definitions and exclusions apply.

The Limited Assault and Battery Coverage form provides as follows:

LIMITED ASSAULT OR BATTERY COVERAGE

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT THOROUGHLY.

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL PROFESSIONAL LIABILITY COVERAGE FORM
LIQUOR LIABILITY COVERAGE FORM
Schedule**

LIMITS OF INSURANCE	PREMIUM
\$ 25,000.00 Per Event	\$ 300.00
\$ 25,000.00 Aggregate	

For the above premium, the MXG108 – Assault or Battery Exclusion is inapplicable; the Limit of Insurance shown in the above schedule applies.

1. COVERAGE – LIMITED ASSAULT COVERAGE

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or medical expense, arising out of an “event,” of “assault,” “battery,” or “physical altercations” that occurs in, on, near, or away from an insured’s premises:

- a) Whether or not caused by, at the instigation of, or with the direct or indirect involvement of an insured, an insured’s employees, patrons or other persons in, on, near or away from an insured’s premises, or
- b) Whether or not caused by or arising out of an insured’s failure to properly supervise or keep an insured’s premises in safe condition, or
- c) Whether or not caused by or arising out of any insured’s act or omission in connection with the prevention, suppression, failure to warn of the “assault,” “battery,” or physical altercation,” including but not limited to, negligent hiring, training and/or supervision.
- d) Whether or not caused by or arising out of negligent, reckless, or wanton conduct by an insured, an insured’s employees, patrons or other persons.

LIMITS OF INSURANCE

The most we pay under the COMMERCIAL GENERAL LIABILITY COVERAGE PART, the COMMERCIAL PROFESSIONAL LIABILITY COVERAGE PART, and the LIQUOR LIABILITY COVERAGE PART for damages and for SUPPLEMENTARY PAYMENTS for any “assault,” “battery,” or “physical altercation” is the “per event” limit shown in the Schedule above.

The amount shown under the Schedule above as the aggregate is the most we will pay for damages and for SUPPLEMENTARY PAYMENTS under the COMMERCIAL GENERAL LIABILITY COVERAGE PART, the COMMERCIAL PROFESSIONAL LIABILITY COVERAGE PART, and the LIQUOR LIABILITY COVERAGE PART under paragraph 1 in any one policy period irrespective of the number of claimants or injuries.

The Limits of Insurance above shall not be in addition to any other Limits in the policy:

Any supplementary payments we make arising out of an “event” of “assault and battery” or “physical altercation” that occurs in, on, near or away from an insured’s premises, will reduce the Limits of Insurance shown above.

No other obligation or liability to pay sums or perform acts or services is covered.

DEFINITIONS:

(For purposes of this endorsement)

“**Assault**” means any attempt or threat to inflict injury to another including any conduct that would reasonably place another in apprehension of such injury.

“**Battery**” means the intentional or reckless physical contact with or any use of force against a person without his or her consent that entails some injury or offensive touching whether or not the actual injury inflicted is intended or expected. The use of force includes but is not limited to the use of a weapon.

“**Physical altercation**” means a dispute between individuals in which one or more persons sustain bodily injury arising out of the dispute.

“**Event**” may be comprised of one or more incidents of assault and battery taking place in one twenty-four (24) hour period.

No other obligation or liability to pay sums or perform acts or services is covered.

All other policy terms, exclusions and conditions remain the same.

III. SUMMARY OF ARGUMENT

The Trial Court erred by ruling as a matter of law that the insurance policy clearly and unambiguously states that the insurer may terminate its duty to defend at such time as the limit of liability is exhausted through the payment of attorney fees and costs incurred to defend the

underlying tort actions when the policy contains unclear and contradictory language on this point. The ambiguity should be construed in favor of the insured.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner contends that this matter is appropriate for oral argument pursuant to *Rule 20* because the appeal involves an assignment of error regarding insurance coverage issues which have not been addressed by this Court.

V. ARGUMENT

A. Standard of Review

In reference to the specific issues addressed herein, the standard of review is *de novo*. See *Gibson v. Northfield Ins.*, 219 W.Va. 40, 44-45, 631 S.E.2d 598, ___ (2005). At this point, the Trial Court's interpretation of the policy language involved a strictly legal question.

B. Assuming *arguendo*, that the Assault or Battery Exclusion and the Limited Assault or Battery Coverage endorsement apply, Max Specialty has a duty to defend beyond the \$25,000.00 Limits of Insurance.

In *Liberty Insurance Underwriters, Inc. v. Camden Clark Memorial Hosp. Corp.* (S.D.W.Va. 12-8-2009), Judge Goodwin set forth the following as he began his analysis of an insurer's duty defend in a case where the insurer argued that the policy limits were diminished by attorney fees and that the duty to defend ended when the limits of the policy were reached:

The language of the insurance policy delineates an insurer's duty to defend. See, e.g., *Tackett v. Am. Motorists Ins. Co.*, 584 S.E.2d 158, 162 (W. Va. 2003); *Horace Mann Ins. Co. v. Leeber*, 376 S.E.2d 581, 584 (W. Va. 1988). Crucially, "any ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer." *Horace Mann*, 376 S.E.2d at 584; see also *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986) ("[A]ny question concerning an insurer's duty to

defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations.").

The purported monetary limitation on Liberty's duty to defend is not set out in clear, direct, unambiguous language. Limitations on an insurer's duty to defend must be so expressed. *See, e.g., Chicago Title Ins. Co. v. Kent School Corp.*, 361 F. Supp. 2d 4, 10 (D. Conn. 2005)

See Appendix at Page 287 for copy of *Liberty v. Camden* opinion.

In the case *sub judice*, the purported monetary limitation on Max Specialty's duty to defend is not set out in clear, direct, and unambiguous language. The pertinent portions of the policy are set forth below.

Coverage for the event is established by the Commercial General Liability Coverage Form which provides as follows:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. **We will have the right and duty to defend the insured against any "suit" seeking those damages.** (Emphasis added.) However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) **Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.** (Emphasis added.)

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments Coverages A and B.

* * * * *

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend:

a. All expenses we incur.

b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or “suit,” including actual loss of earnings up to \$250 a day because of time off from work.

e. All court costs taxed against the insured in the “suit”. However, these payments do not include attorneys’ fees or attorneys’ expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit on insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance. (Emphasis added).

The Limited Assault and Battery Coverage Form further provides:

LIMITS OF INSURANCE

The most we pay under the COMMERCIAL GENERAL LIABILITY COVERAGE PART, the COMMERCIAL PROFESSIONAL LIABILITY COVERAGE PART, and the LIQUOR LIABILITY COVERAGE PART for damages and for SUPPLEMENTARY PAYMENTS for any “assault,” “battery,” or “physical altercation” is the “per event” limit shown in the Schedule above.

The amount shown under the Schedule above as the aggregate is the most we will pay for damages and for SUPPLEMENTARY PAYMENTS under the COMMERCIAL GENERAL LIABILITY COVERAGE PART, the COMMERCIAL PROFESSIONAL LIABILITY COVERAGE PART, and the LIQUOR LIABILITY COVERAGE PART under paragraph 1 in any one policy period irrespective of the number of claimants or injuries.

The Limits of Insurance above shall not be in addition to any other Limits in the policy.

Any supplementary payments we make arising out of an “event” of “assault and battery” or “physical altercation” that occurs in, on, near or away from an insured’s premises, will reduce the Limits of Insurance shown above.

No other obligation or liability to pay sums or perform acts or services is covered.

In *Liberty v. Camden*, the insurer’s policy contained language which stated “**Claim expenses** reduce this policy’s limits of liability The most **we** will pay for **damages** and **claim expenses** for each **claim** is specified as ‘each claim’ in the limits of liability section of the Declarations The term ‘claim expenses’ is defined to include ‘reasonable and necessary fees’ charged by any lawyer designated by **us**.” The insurer argued that this language was sufficient to relieve it of an obligation to defend when the claim expenses reached the \$100,000.00 per claim limit. Judge Goodwin disagreed. The Court found that this language was not clear and direct as to the termination of the duty to defend. Judge Goodwin noted that “other policy provisions seem to conflict with this purported limitation, and even discerning the limitation requires reading different sections of the policy together.”

The Max Specialty policy also requires reading of different sections of the policy in an attempt to determine the limitations on the duty to defend. First, the Limits of Insurance section of the Limited Assault and Battery Coverage endorsement does not define “Supplementary Payments”, but, instead, simply refers to a separate portion of the commercial general liability policy which addresses supplementary payments. This section does not address defense costs and attorney fees directly, but does state that supplementary payments “will not reduce the limits of insurance.” The Supplementary Payments portion of the policy does not expressly reference attorney fees incurred as a result of Max Specialty’s duty to defend and does not contain any language regarding the termination of its duty to defend. The Supplementary Payments language does state that Max Specialty will pay “All expenses we incur.”, but it does not define expenses to include the attorney fees paid to an attorney pursuant to its duty to defend a suit as established in **SECTION I - COVERAGES**.

The only policy language which references the duty to defend is set forth in Section I, Coverage A. Importantly, the policy clearly states that Max Specialty has a duty to defend Flowers against any suit seeking bodily injury damages. In regard to the termination of the duty to defend, the only policy language specifically addressing this issue states “Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements[.]” It is uncontested that Max Specialty has not paid the policy limits toward settlements or judgments. The only manner in which this could occur by virtue of judgments is following a trial by jury. The only manner in which this could occur by virtue of settlements is for the alleged tort victims to accept the policy limits in exchange for a release of Flowers from further liability. Neither of these situations has occurred in this case.

The language of the Limited Assault or Battery Coverage is also instructive to the extent it provides that the policy language of the General Liability Coverage Form remains applicable and is simply modified by the endorsement. The Limited Assault or Battery Coverage endorsement is not a policy standing alone. This endorsement simply nullifies the alleged Assault or Battery Exclusion and provides a lower policy limit for damages resulting from an “assault” or “battery.” This is evident from a plain reading of the endorsement which states that coverage is provided under the COMMERCIAL GENERAL LIABILITY COVERAGE PART. (Emphasis in original.)

The commercial general liability coverage part does not contain any provision that reduces policy limits by attorney fees and costs incurred for the defense of the subject tort actions. Further, the endorsement, even when read in *pari materia* with the Supplementary Payments provision, does not clearly, directly or unambiguously state that the policy limits are reduced by attorney fees and costs incurred for the defense of the subject tort actions. There is only one clause in the entire policy, including endorsements, which has any bearing on Max Specialty’s right to terminate its duty to defend Flowers. The two alternate conditions by which it may terminate its duty to defend have clearly not been met at this time.

Max Specialty’s position is that the policy is what is commonly referred to as a “Defense Within Limits” policy. These types of policies are fraught with ethical problems. This Court has declared this type of policy void and ineffective as against public policy in the realm of automobile liability insurance. *Gibson v. Northfield Ins.*, 219 W.Va. 40, 631 S.E.2d 598 (2005). One commentator has stated that the “real problem with “Defense Within Limits” policies is not that they attempt to contain defense expenditures, but that conflicts result when the policy gives the insurer the potential ability to completely deplete the available indemnity limit coupled with

the insurer's right to exercise sole discretion in settling, defending and selecting counsel." Gregory S. Munro, *Defense Within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies*, 62 Mont. L. Rev. 131 (2001).² Although counsel could not locate any West Virginia statute or Insurance Commissioner rule addressing these policies, the Court should err on the side of the insured when interpreting these policies because of the ethical problems which arise therefrom.

If Max Specialty wished to enforce an alleged Defense Within Limits policy it could have used clear, conspicuous and unambiguous language to do so. The following examples are clearer than the policy at issue and unambiguous if not contradicted by other provisions in the policy:

The company shall not be obligated to pay any claim or judgment or to defend or continue to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgment, settlement or CLAIMS EXPENSES. CLAIM EXPENSES include attorney fees and costs necessary to defend any suit.

See Gregory S. Munro, *Defense Within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies*, 62 Mont. L. Rev. 131, 158 (2001).

Our payment of the LIABILITY INSURANCE limit ends our duty to defend or settle the claim.

See *Gunn v. Whichard*, 707 F. Supp. 196 (E.D.N.C. 1988).

We are not obligated to: . . . defend any claim or lawsuit; when our payments have reached your Limit of Coverage.

See *Johnson v. Continental Insurance Companies*, 248 Cal.Rptr. 412, 414 (Cal. Ct. App. 1988).

In the case at hand, the insured is required to refer to the SUPPLEMENTARY PAYMENTS section which states that the SUPPLEMENTARY PAYMENTS will not reduce

² In the case at hand, defense counsel filed a motion to withdraw claiming that the \$25,000.00 was exhausted on defense costs and fees. In contrast, the insurer also filed a motion for interpleader claiming additional funds remain. These motions were filed after the Court's ruling on summary judgment and were not ruled upon by the trial court. The insured is unsure of his coverage status because of these conflicting motions.

the limits of insurance and makes no reference whatsoever to the termination of the duty to defend. The Limited Assault and Battery endorsement specifically states that the payments covered by the endorsement are “under the COMMERCIAL GENERAL LIABILITY COVERAGE PART[.]” Therefore, the insured is required to refer back to both the commercial general liability coverage and the supplementary payments parts of the policy. The provisions in these parts regarding the duty to defend are contradictory to the endorsement. These contradictory and confusing provisions create significant ambiguity within the entire policy. Again, this ambiguity must be liberally construed in favor of Flowers.

The United States First Circuit Court of Appeals addressed a similar policy in *Nat'l Union v. Lake Acad.*, 548 F.3d 8 (1st Cir. 2008). In *National Union*, the general liability policy contained an exclusion for sexual abuse or molestation, but also contained a sexual abuse endorsement. This is synonymous to the assault and battery endorsement in the case at hand. The *National Union* Court did find that the endorsement was a “wasting” or Defense Within Limits coverage. *Id.* at 17. However, the language within the endorsement was more clear and direct than the language of the endorsement at issue in this case.

The National Union policy contained a supplementary payments section which is almost identical to the supplementary payments section of the Max Specialty policy. The sexual abuse endorsement states that “the aggregate limits shall include all supplementary payments as described in the section of this policy SUPPLEMENTARY PAYMENTS COVERAGES A AND B in addition to all damages paid for ‘bodily injury’ or ‘personal injury’ under this endorsement.” *Id.* Importantly, the *National Union* Court noted the endorsement language clarified the wasting nature of the policy as follows:

While the Supplementary Payments provision of the commercial general liability policy states that such supplemental “payments will not reduce the limits of

insurance," J.A. at 3814, this provision is "overridden by [the] endorsement." J.A. at 3831. The second provision of paragraph (B) of the Endorsement states that "*Notwithstanding the statement in [the Supplementary Payments] section that payments will not reduce the[commercial general liability policy] limits of insurance now overridden by this endorsement*, the per occurrence and Aggregate limits expressed are the only limits. . . ." *Id.* (emphasis added). This language makes clear that "payments" under the Supplementary Payments provision will reduce available coverage under the Endorsement, even though such "payments will not reduce the limits" under the general policy. And paragraph (C) further underscores the wasting nature of the Endorsement, stating that National Union's "right and duty to defend end when [National Union] ha[s] *used up* the applicable limit of insurance as described above." J.A. at 3832 (emphasis added). We conclude that the district court correctly interpreted the Sexual Abuse Endorsement as a wasting policy.

The Max Specialty policy does not state that the endorsement overrides the supplementary payments provision of the policy. In fact, it does the opposite by referring the insured to that section. Further, the Max Specialty endorsement does not address the termination of its duty to defend. Although the National Union and Max Specialty policies are similar, a comparison of the policy language leads to the conclusion that the Max Specialty policy could be clearer and is, in fact, ambiguous.

VI. CONCLUSION

The Petitioner requests that this Court find that the policy requires the insurer to defend Flowers in the underlying tort actions despite attorney fees and costs of defense exceeding \$25,000.00.

JOHN D. FLOWERS, DAVE FLOWERS, INC.,
D/B/A VENOM, INC.
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No. 13-0262

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**JOHN D. FLOWERS, DAVE FLOWERS, INC.,
D/B/A VENOM, INC., THIRD-PARTY PLAINTIFFS,**

Petitioner,

v.

**MAX SPECIALTY INSURANCE COMPANY, A VIRGINIA
CORPORATION, PLAINTIFF,**

Respondent.

CERTIFICATE OF SERVICE

I, Thomas H. Peyton, counsel for Petitioner, hereby certify that on the 10th day of June, 2013, I served a true and exact copy of the foregoing "APPENDIX" and "PETITION FOR APPEAL" upon all interested parties by mailing the same to them first class United States mail, postage prepaid, properly addressed, as follows:

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