

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA
SWOPE CONSTRUCTION COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 16 – C – 87 -S

McDOWELL COUNTY BOARD OF
EDUCATION, MOUNTAINEER CONTRACTORS,
INC., E.T. BOGGESE, ARCHITECT, INC.,
ZMM, INC., POTESA & ASSOCIATES, INC.,
THE THRASHER GROUP, INC.,

Defendants.

**ANSWER AND CROSS-CLAIM OF
DEFENDANT MOUNTAINEER CONTRACTORS, INC.**

The Defendant, Mountaineer Contractors, Inc., (“Defendant Mountaineer”) by and through counsel, without waiving any defenses, responds to the Complaint in this case as follows:

GENERAL RESPONSE AND PREAMBLE

This responsive pleading has been prepared, served, and filed by counsel for Defendant Mountaineer under the West Virginia Rules of Civil Procedure.

As permitted by Rule 8(e)(2), defenses to the claims made in the Complaint are being asserted alternatively and, in some cases, hypothetically. Defenses are being asserted regardless of apparent consistency and are based both on legal and equitable grounds.

As the facts of this civil action are fully developed through the discovery process, certain defenses may be abandoned, modified, or amended as permitted by and consistent with the West Virginia Rules of Civil Procedure.

No discovery has been conducted to date in the above-captioned civil action. In order to preserve important legal rights and protections, the Defendant sets forth below certain affirmative defenses which, based upon the information set forth in the Complaint, it believes do or may apply to some or all of the claims raised therein. The Defendant reserves the right to withdraw, modify or amend some or all of the affirmative defenses set forth below, in whole or in part, depending on the outcome of discovery in this civil action.

ANSWER

1. Defendant Mountaineer is without knowledge or information sufficient to admit the allegations contained in Paragraph 1 of the Complaint as these allegations do not pertain to this Defendant.

2. Defendant Mountaineer is without knowledge or information sufficient to admit the allegations contained in Paragraph 2 of the Complaint as these allegations do not pertain to this Defendant.

3. As to the allegations contained in Paragraph 3 of the Complaint, Defendant Mountaineer admits that it is a West Virginia corporation and maintains offices at 15237 South Preston Highway, Kingwood, West Virginia 26537. The remaining allegations contained in Paragraph 3 of the Complaint are vague, and it is unclear what the terms "performed work and actions on and concerning the School" specifically implies as drafted within the Complaint. To the extent a response is required, Defendant Mountaineer admits that it performed work at the Iaeger/Panther Elementary School as it relates to road relocation and site preparation. Defendant Mountaineer denies any remaining allegations and demands strict proof thereof.

4. Defendant Mountaineer is without knowledge or information sufficient to admit the allegations contained in Paragraph 4 of the Complaint as these allegations do not pertain to this Defendant.

5. Defendant Mountaineer is without knowledge or information sufficient to admit the allegations contained in Paragraph 5 of the Complaint as these allegations do not pertain to this Defendant.

6. Defendant Mountaineer is without knowledge or information sufficient to admit the allegations contained in Paragraph 6 of the Complaint as these allegations do not pertain to this Defendant.

7. Defendant Mountaineer is without knowledge or information sufficient to admit the allegations contained in Paragraph 7 of the Complaint as these allegations do not pertain to this Defendant.

8. Defendant Mountaineer is without knowledge or information sufficient to admit the allegations contained in Paragraph 8 of the Complaint as these allegations do not pertain to this Defendant.

9. Paragraph 9 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 10 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

10. Paragraph 10 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 10 of the

Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

11. Paragraph 11 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 11 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

12. As to the allegations contained in Paragraph 12 of the Complaint, Defendant Mountaineer admits it performed contractually agreed upon work at the Jaeger/Panther Elementary School as it relates to road relocation and site preparation. Defendant denies the remaining allegations made in Paragraph 12 of the Complaint and demands strict proof thereof.

13. Paragraph 13 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 13 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

14. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 14 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

15. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 15 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

16. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 16 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

17. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 17 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

18. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 18 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the

part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

19. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 19 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

20. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 20 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

21. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 21 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

22. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 22 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to

and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

COUNT ONE

(Breach of Contract against McDowell BOE)

23. As to the allegations contained in Paragraph 23 of the Complaint, Defendant Mountaineer reasserts and re-alleges each and every defense hereinabove set forth and incorporates each by reference as though fully set forth herein.

24. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 24 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

25. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 25 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

26. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 26 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to

and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

27. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 27 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

28. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 28 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

29. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 29 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

30. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 30 of the Complaint, as these allegations do not pertain to this

Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

31. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 31 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

To the extent the WHEREFORE provision following Paragraph 31 of the Complaint requires a response, Defendant Mountaineer denies that the Plaintiff is entitled to the relief set forth therein subsections (a) through (d), or to any other relief from Defendant Mountaineer.

COUNT TWO

(Negligence claim against Defendants Mountaineer, Boggess, ZMM,
Potesta and Thrasher)

32. As to the allegations contained in Paragraph 32 of the Complaint, Defendant Mountaineer reasserts and re-alleges each and every defense hereinabove set forth and incorporates each by reference as though fully set forth herein

33. Paragraph 33 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 33 of the

Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

34. Paragraph 34 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 34 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

35. Paragraph 35 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 35 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

36. Paragraph 36 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 36 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

37. Paragraph 37 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 37 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

38. Paragraph 38 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 38 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

39. Paragraph 39 of the Complaint calls for a legal conclusion which does not require an admission or denial from Defendant Mountaineer. To the extent a response is required, Defendant Mountaineer denies the allegations contained in Paragraph 39 of the Complaint that impute any liability or wrongdoing to Mountaineer and demands strict proof thereof.

To the extent the WHEREFORE provision following Paragraph 39 of the Complaint requires a response, Defendant Mountaineer denies that the Plaintiff is entitled to the relief set forth therein subsections (a) through (d), or to any other relief from Defendant Mountaineer.

COUNT THREE

(Negligence and/or intentional misrepresentation against Boggess and McDowell BOE)

40. As to the allegations contained in Paragraph 40 of the Complaint, Defendant Mountaineer reasserts and re-alleges each and every defense hereinabove set forth and incorporates each by reference as though fully set forth herein

41. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 41 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the

part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

42. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 42 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

43. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 43 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

44. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 44 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

45. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 45 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to

and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

46. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 46 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

47. Defendant Mountaineer is not advised relative to the truth of the allegations contained in Paragraph 47 of the Complaint, as these allegations do not pertain to this Defendant. To the extent, however, that any of these allegations are deemed to apply to and/or are directed to and/or are intended to suggest wrongful conduct of any sort on the part of Defendant Mountaineer, then Mountaineer denies said allegations and demands strict proof thereof.

To the extent the WHEREFORE provision following Paragraph 47 of the Complaint requires a response, Defendant Mountaineer denies that the Plaintiff is entitled to the relief set forth therein subsections (a) – (d), or to any other relief from Defendant Mountaineer.

WHEREFORE, the Defendant Mountaineer demands that the Complaint filed against it be dismissed with prejudiced and that it recover its costs expended in the defense of this civil action.

AFFIRMATIVE AND OTHER DEFENSES

Having responded to the Complaint, Defendant Mountaineer asserts the following affirmative and other defenses.

1. The Complaint as filed fails to state a claim against the Defendant upon which relief can be granted.
2. Defendant Mountaineer was not guilty of any negligence proximately causing or contributing to the damages allegedly sustained by the Plaintiff.
3. If Defendant Mountaineer were guilty of any negligence, which is denied, such negligence was not the proximate or contributing cause of the damages allegedly sustained by the Plaintiff.
4. All injuries and damages alleged by the Plaintiff were due solely to the negligence of the Plaintiff, and said Plaintiff is not entitled to indemnification and/or contribution for its own negligence.
5. In the alternative, any alleged damages or injuries resulting to the Plaintiff are solely the result of the negligence of a party or parties other than Defendant Mountaineer.
6. The Plaintiff was guilty of negligence which exceeded the negligence of Defendant Mountaineer, and so the Plaintiff is barred from recovery against Defendant Mountaineer.
7. If there is any actionable liability of Defendant Mountaineer, which liability is specifically denied, such liability should be compared to the fault of the Plaintiff and the

other Defendants, parties and actors involved in the matters alleged in the Complaint. Defendant Mountaineer alleges that any award made to Plaintiff in this action must be proportionately allocated among Plaintiff, Defendants, parties or actors found to be culpable in accordance with the percentage of any negligence or fault attributable to said Plaintiff, Defendants, parties and actors. Defendant Mountaineer further alleges that any Defendant, party or actor found to be negligent or at fault with respect to Plaintiff's alleged claims must be required to satisfy any such claims only in accordance with its proportional share of negligence or fault to be determined in this action.

8. Pursuant to West Virginia Code § 55-7-1 *et seq.*, Plaintiff's recovery is barred and/or should be reduced because of Plaintiffs' comparative fault.

9. No warranties, implied or express, existed at any time between the Plaintiff and Defendant Mountaineer other than those expressly and specifically set out within the contract between the Plaintiff and Defendant Mountaineer.

10. Defendant Mountaineer complied with or exceeded the requirements of the terms of the contract at issue and completed all of its obligations in a workmanlike manner and within industry standards.

11. Defendant Mountaineer denies that it is indebted to or liable to the Plaintiff for any sum whatsoever.

12. To the extent that various other parties, named or unnamed as Defendants herein, have concluded or may conclude settlement with the Plaintiff, Defendant Mountaineer is entitled to a setoff for any amount paid or to be paid.

13. To the extent that the Plaintiff has received payment from any alleged joint tortfeasor in full satisfaction of any of the injuries and/or claims against any of the

Defendants and/or other alleged joint tortfeasors, the Plaintiff's Complaint in each and every count and cause of action alleged therein is barred by the defenses of payment and accord and satisfaction.

14. Defendant Mountaineer denies that this civil action is one in which prejudgment interest can be properly awarded and, therefore, affirmatively moves that the portion of the Complaint demanding prejudgment interest be dismissed.

15. Defendant Mountaineer denies that this civil action is one in which attorney fees can be properly awarded. Therefore, Defendant Mountaineer affirmatively moves that the portion of the Plaintiff's Complaint seeking payment of attorney fees be dismissed.

16. Insofar as the Plaintiff's Complaint against Defendant Mountaineer is based upon contract, the Defendant affirmatively alleges that no sums of money are due to the Plaintiff for the reason that the Defendant has performed all of its contractual and other obligations to the Plaintiff.

17. The Plaintiff, by its conduct, has waived its rights to assert this cause of action.

18. The damages of which the Plaintiff complains were not the proximate result of any acts of omission or commission on the part of Defendant Mountaineer.

19. The Plaintiff, by its actions, has failed to mitigate his damages or, in the alternative, if the Plaintiff has mitigated his damages, then Defendant Mountaineer is entitled to have those mitigated damages credited to those amounts, if any, owed by Defendant Mountaineer to the Plaintiff.

20. Defendant Mountaineer reserves the right to assert all defenses that may be available to it under any constitution, statute, common law or rule, including but not limited to Rule 8(c) of the West Virginia Rules of Civil Procedure.

21. Defendant Mountaineer adopts and incorporates by reference all other applicable affirmative defenses stated by any and all other Defendants, but not specifically enumerated herein.

22. Defendant Mountaineer reserves the right to assert any and all additional affirmative defenses which discovery may reveal to be appropriate.

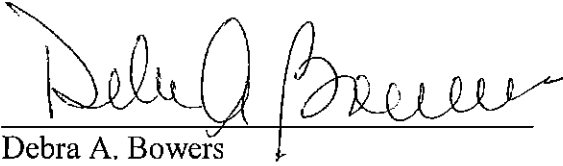
23. Defendant Mountaineer reserves the right to amend its Answer, if appropriate, after full investigation and discovery.

CROSS-CLAIM OF DEFENDANT MOUNTAINEER

In the alternative, Defendant Mountaineer incorporates the allegations of the Plaintiff's Complaint against co-Defendants, McDowell County Board of Education, E.T. Boggess, Architect, Inc., ZMM, Inc., Potesta & Associates, Inc., and The Thrasher Group, Inc., and alleges that, if the damages and losses alleged by the Plaintiff occurred and give rise to liability, the same were caused by the negligence or other wrongdoing of one or more of these named co-Defendants. Accordingly, Defendant Mountaineer asserts in the alternative that, if judgment is awarded against it, it is entitled to contribution from one or more of the named co-Defendants.

WHEREFORE, the Defendant Mountaineer demands judgment against the other named co-Defendants for contribution and indemnification, its costs incurred with the defense hereof, and any other relief this Court may deem appropriate in these proceedings.

DEFENDANT,
MOUNTAINEER CONTRACTORS, INC.,
BY COUNSEL.

A handwritten signature in cursive script, appearing to read "Debra A. Bowers", written over a horizontal line.

Debra A. Bowers
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Matthew D. Elshiaty
WV State Bar No. 12535
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IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

SWOPE CONSTRUCTION COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 16-C-87-S

McDOWELL COUNTY BOARD OF
EDUCATION, MOUNTAINEER CONTRACTORS,
INC., E.T. BOGGESS, ARCHITECT, INC.,
ZMM, INC., POTESA & ASSOCIATES, INC.,
THE THRASHER GROUP, INC.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Answer and Cross-Claim of Defendant Mountaineer Contractors, Inc.**, upon the parties on the **7th** day of **September, 2016**, by mailing a true copy thereof by United States mail, postage prepaid, to the following counsel of record:

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Post Office Box 1778
Bluefield, West Virginia 24701
Counsel for Plaintiffs

Steve Hedges, Esquire
Higgins Benjamin, PLLC
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Counsel for Plaintiffs

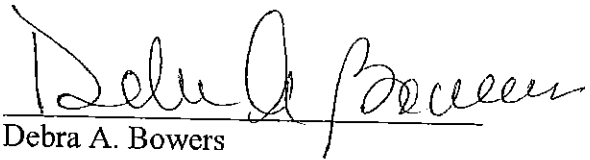
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Defendant

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