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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

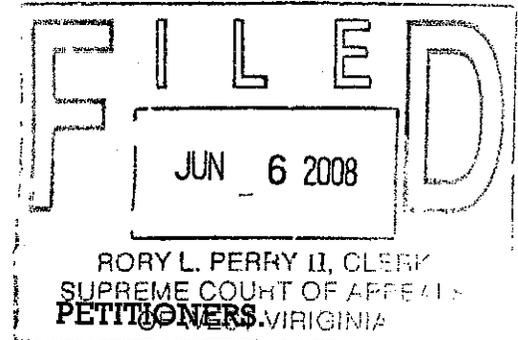
PRINCETON INSURANCE AGENCY, INC.  
AND KEVIN WEBB,  
[PLAINTIFFS BELOW]

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RESPONDENTS,

VS.

DOCKET NO.: 081181

ERIE INSURANCE COMPANY,  
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,  
ERIE FAMILY LIFE INSURANCE COMPANY,  
ERIE INSURANCE EXCHANGE,  
ERIE INDEMNITY COMPANY,  
CHARLES MICHAEL FLETCHER,  
AND CARL OLIAN, II,  
[DEFENDANTS BELOW]



FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA  
[CASE NUMBER BELOW 04-C-784-F]

**RESPONSE TO THE  
AMICUS CURIAE BRIEF OF  
THE WEST VIRGINIA  
INSURANCE FEDERATION**

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## **PRELIMINARY STATEMENT**

The West Virginia Insurance Federation ["the Federation"], as the state trade association for property and casualty insurance companies doing business in West Virginia, has in essence requested this Court to condone the conduct of one group of insurance companies [the Erie insurance companies] to unlawfully restrain the insurance sales of another group of insurance companies [State Auto Insurance Companies] and a separate agency so that the former may increase their profit at the expense of the latter. The Federation makes its presentation knowing that the restraint caused insurance customers [individuals and businesses] to pay higher insurance premiums. This case is not about restricting or redefining agency contracts between insurance companies and their agents. This case is about the Erie insurance companies treating Kevin Webb and Princeton Insurance Agency as "captive agents" for purposes of **SALES**, and then treating them as independent agents for purposes of **TERMINATION**. Frankly, it is strange that the Federation would advocate to this Court that one group of insurance companies could restrain the sales of another group of insurance companies [and a competing agency] when the Federation represents the interests of all of its member insurance companies.

## **STATEMENT OF FACTS**

Kevin Webb and Princeton Insurance Agency have exhaustively cited the trial record and established a clear picture of the facts in their **RESPONSE IN OPPOSITION TO THE PETITION FOR APPEAL**. It would be redundant to restate those facts and citations to the trial record again, and consequently, the "Statement of Facts" from that document are incorporated herein by reference.

## **LAW AND DISCUSSION**

In its "Discussion" at page seven of its brief, the Federation restates its position that this case is one of contract and not antitrust principles. It argues that this case involved only an exercise of contractual rights to terminate and there was no effect on the insurance market in Mercer County. The Federation has selectively recited and applied the facts of this case, and has not examined the facts in a light most favorable to Kevin Webb and Princeton Insurance Agency, as this Court must do. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995)

The Erie insurance companies' agency contracts *did not mandate "exclusive" representation of the Erie companies by their agents.* But, privately, the Erie insurance companies coerced, intimidated and threatened to boycott Kevin Webb and Princeton Insurance Agency to reduce and restrain the sales of State Auto insurance policies through a separate agency, Princeton Insurance Associates, so that the Erie insurance companies could boost their own sales. The Erie companies demanded the production reports for Princeton Insurance Associates (generated by State Auto) so that they (Erie companies) could confirm that the majority of the insurance sales were placed with them and *not* State Auto. When the reports were not produced, Kevin Webb and Princeton Insurance Agency lost their contracts.

### **A. ADVERSE EFFECT ON THE INSURANCE MARKET**

Before discussing how the misconduct of the Erie insurance companies had an adverse impact on the insurance market and insurance customers, it is important to understand that in light of the misconduct proven in this case, Kevin Webb and Princeton Insurance Agency did not even have to prove the actual market effect.

Consider this important principle of law established by the United States Supreme Court:

**“Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of the competitive conditions and may be condemned *without proof of its actual market effect.*” Associated General Contractors of America, Inc. v. California State Council of Carpenters, et al, 459 U.S. 519, 103 S. Ct. 897, 74 L.Ed. 2d 723 [1983]; Klors Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 741 [1959] [*emphasis added*]**

Anticompetitive conduct also has an adverse effect when it:

**“Cripple(s) the freedom of traders and thereby restrain(s) their ability to sell in accordance with their own judgment.” Associated General Contractors of America, Inc. v. California State Council of Carpenters, et al, supra @ ftnt 18, citing Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)**

Furthermore, Kevin Webb and Princeton Insurance Agency did not even have to prove an actual lessening of competition in order to recover. Again consider the wisdom of the United States Supreme Court:

**“A § 4 plaintiff need not ‘prove an actual lessening of competition in order to recover. [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition thereby lessened.’ [Id., at 489, n. 14, 97 S. Ct., at 698 n. 14].” Blue Shield of Virginia, et al, v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 [1982], citing, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed.2d 701 [1977]**

It is also noteworthy that the West Virginia Unfair Trade Practices Act contemplates the above principles of law. In West Virginia Code, 33-11-4(4), the legislature defined the following as an unfair trade practice:

"No person shall enter into any agreement to commit, or by any concerted action commit, any act of boycott, coercion, or intimidation resulting in *or tending to result in* unreasonable restraint of, or monopoly in, the business of insurance." [*emphasis added*]

Consequently, by statute, Kevin Webb and Princeton Insurance Agency only had to prove misconduct *which would tend to result in an unreasonable restraint*, which obviously means that the restraint had not occurred, and thus no market effect could have occurred. Yet the evidence to support the actual adverse impact on customers and the market is apparent.

Kevin Webb and Princeton Insurance Agency, as well as Princeton Insurance Associates, were "crippled in their freedom to sell insurance" and they could not "sell in accordance with their own judgment." Consequently, insurance customers "lost the freedom of choice" and ultimately paid higher premiums as a result of the misconduct of the Erie insurance companies. Just as the Erie insurance companies had instructed him to do, Kevin Webb, to save his agency contracts, began to "push" sales from State Auto/Princeton Insurance Associates to the Erie insurance companies/Princeton Insurance Agency by "directing" or placing the insurance customers with the Erie insurance companies *regardless of the higher premiums*. [T.R. 206, 261, 262, 384, 981, 988] After the Erie companies [acting through Mr. Olian and Mr. Fletcher] met with Kevin Webb in April and May of 2003, Kevin Webb

began placing insurance customers with the Erie companies, in spite of their higher premiums and more stringent underwriting guidelines, unless the customers complained or inquired of other companies; then he would quote other companies. [T.R. 380, 381] The evidence illustrates that prior to the April and May, 2003 meetings, the majority of business was actually going to State Auto and Princeton Insurance Associates [T.R. 505, 506, 554], but after those meetings, the sales shifted so substantially that the majority of the sales went to the Erie insurance companies, and not State Auto. [T.R. 287-289] This shift was confirmed not only by the production information given by Kevin Webb to Mr. Fletcher during the October 15, 2003, meeting at Bob Evans, but it was also confirmed by the dramatic eleven [11] point decrease in loss ratio for Princeton Insurance Agency and Kevin Webb during the 60 plus day period from July 1, 2003, through August 31, 2003. [T.R.850-853]

Plaintiffs' Exhibit 12, drafted by Mr. Olian, proved that insurance premiums were often cheaper for insurance customers with State Auto, and that customers generally preferred cheaper premiums. Plaintiffs' Exhibit 12 also proved that Kevin Webb had, prior to the April 1, 2003, meeting, allowed the customers to make an informed choice after being presented with the premiums for both groups of insurance companies. Finally, Plaintiffs' Exhibit 12 proved that the Erie companies did not like competing with State Auto and Princeton Insurance Associates, ***and that Mr. Olian and Mr. Fletcher were going to meet to determine the future of the agency because of it!***

When the agency contracts were terminated, insurance customers who had purchased their insurance with the Erie insurance companies and who could be non-

renewed were in fact non-renewed, and thereby lost their insurance company. [T.R. 409, 410] Those individuals who could not be non-renewed lost Princeton Agency and Kevin Webb as their insurance agents, and those individuals were then managed from the Parkersburg branch office of the Erie insurance companies. [T.R. 409, 410] Those insurance customers who could not be non-renewed and who were moved for management by the Parkersburg branch ***did not receive a decrease in premiums that were paid as commissions for having a local agent.*** [T.R. 411, 412, 839] In fact, the impact on some insurance customers was great enough that a number of individuals who could not lawfully be non-renewed by the Erie insurance companies *were non-renewed* [such as Mr. Vaughn and Magistrate Harold Buckner]; some of those individuals complained to the West Virginia Insurance Commissioner because they were illegally non-renewed and therefore the Erie insurance companies had to reinstate them. [Tr. 530-533; Defendants' Exhibit 1] When the agency contracts were cancelled and the insurance customers who could not be non-renewed were managed by the Parkersburg branch, Princeton Insurance Agency became "bankrupt" or "empty" because it had lost its business. [Tr. 409]

The Federation cites the decision of **Dull v. Mutual of Omaha Ins. Co.**, 85 N.C. App. 310, 354 S.E. 2d 752 [1987] for the proposition that customers were not "prevented from purchasing insurance contracts on an open market as a result of the defendants' acts or that the defendants' competitors were in any way foreclosed from marketing insurance products to the public." This was not correct in this case. To the contrary, by citing **Dull**, the Federation condemns the position which it advocates.

In addition to the fact that the Dull decision is neither a federal case nor a North Carolina Supreme Court decision, is the reality that there are two huge factual differences in Dull, which help illustrate the contentions proposed by Kevin Webb and Princeton Insurance Agency.

First of all, in Dull, the agency contract restricted the sales of competitors' products which was like an "exclusive agency agreement." Consider the language:

"The undisputed facts disclose that each plaintiff entered into a contract with Mutual which specified that his duties would be 'to procure applications from insurable risks for health and accident and life insurance, **only in the Company or its partially or wholly owned subsidiaries,**' ..." Id. @ 754, 755 [emphasis added]

Thus, in Dull, when the agents signed the agency contracts with Mutual of Omaha, they knew that they could not offer insurance sales for any insurance company other than Mutual of Omaha-those agents *agreed* to that restriction. Kevin Webb and Princeton Insurance Agency do not challenge the right of an insurance company to restrict its agents as "captive" agents for sales (knowing that "captive" agents are also protected from terminations at will by virtue of West Virginia Code, 33-12A-1, et.seq.), but such was not the case for them. *The Erie companies openly acknowledged that Kevin Webb and Princeton Insurance Agency could market insurance sales for other companies, not just the Erie insurance companies-their agency contracts did not restrict sales exclusively to the Erie companies.* [T.R. 980, 981; Plaintiffs' Exhibit 9A and 9B] Clearly, it was NOT an unfair trade practice or unreasonable restraint of trade to merely enforce that which the agents in Dull agreed to refrain from doing, but that is not the case before this Court.

Second, and equally as important, is that in Dull, there was no restraint imposed by Mutual of Omaha on a separate insurance company selling insurance products through agents *separate* from the plaintiff agents who signed the restrictive, exclusive agency contracts with Mutual of Omaha. *But in the case before this Court, the Erie insurance companies restricted and restrained the sales of a competing insurance company [State Auto] selling through a separate insurance agency [Princeton Insurance Associates] by threatening the termination of the agency contracts for Kevin Webb and Princeton Insurance Agency unless the majority of business was placed with the Erie companies, and NOT State Auto.*

Consequently, the Dull decision illustrates a point made by Kevin Webb and Princeton Insurance Agency: if the Erie insurance companies wanted exclusive agency agreements with Mr. Webb, Princeton Insurance Agency, and others, they were entitled to do so, *provided that Mr. Webb, Princeton Insurance Agency, and others would have had the protection of West Virginia Code 33-12A-1, et. seq. from terminations at will!* The Erie companies chose *not* to have "captive" agents.

#### **B. MISCONDUCT OCCURRING AFTER CONSUMMATION OF A CONTRACT**

The Federation next argues that no anticompetitive behavior is actionable if it occurs *after* the execution of an agency contract, citing two 1987 decisions from the United States Court of Appeals for the Ninth Circuit and one 1977 Pennsylvania United States District Court case. Not only is this contention contrary to United States Supreme Court decisions applicable to this case, but the three cases cited by the Federation *clearly illustrate that, unlike the case before this Court, the contracts governed the conduct occurring later in time, alleged to be anticompetitive.*

(1) **RELEVANT UNITED STATES SUPREME COURT PRECEDENT**

The argument of the Federation is contrary to the principles of law in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1891, 20 L.Ed 2d 892 (1968). In that case, franchisors threatened to terminate franchisees, *who had already entered into a franchise agreement with the franchisor*, unless certain restraints were honored by the franchisees. In sustaining the cause of action for an antitrust violation, the United States Supreme Court, citing precedent, stated as follows:

"In any event each petitioner can clearly charge a combination between ... Midas and other franchisee dealers, whose acquiescence in Midas' firmly enforced restraints was induced by ' **the communicated danger of termination,**' United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967); United States v. Park, Davis & Co., 362 U.S. 29 (1960)." *Id.* @ 142, 1986, 992 (emphasis added)

The facts of the case before this Court fit squarely in the Perma Life Mufflers legal mold. The Erie insurance companies *threatened the termination* of the agency contracts with Kevin Webb and Princeton Insurance Agency *unless* they complied with the restraints, being a shift in the majority of the insurance sales to the Erie companies and away from State Auto, and providing a copy of the Princeton Insurance Associates production reports from State Auto. The Federation is plainly wrong in its analysis.

(2) **THE CASES CITED BY THE FEDERATION**

The Federation cited three cases which do not apply to the facts of this case. In Newman v. Universal Pictures, 813 F.2d 1519 (9<sup>th</sup> Cir. 1987), the Court was

confronted with contracts that were entered into in 1972 and 1976 which defined and fixed the payment to each party. Later in 1981, when Universal construed the contract language adversely to Newman and Hill, they complained that there was an unreasonable restraint on services. In summary, the Court found that a conspiracy in 1981 could not affect competition for Newman's services and Hill's services that were determined by the contracts signed in 1972 and 1976 respectively.

In Orion Pictures v. Syufy Enterprises, 829 F.2d 946 (9<sup>th</sup> Cir. 1987), the Court established that a party's later conduct to monopolize did not affect competition to license "*The Cotton Club*" at the time of the original bidding; it was already fixed by contract.

In Black v. Nationwide Mutual Insurance Co., 429 F.Supp. 458 (W.D.Pa. 1977), the Court determined whether an "exclusive" agency contract constituted a boycott and was actionable under federal antitrust laws. The Court stated that there was no case law which holds an "exclusive agency provision to be such" (a boycott under the federal acts). *Id.* @ 460. Very important to the rationale in its decision, the Court cited a Utah case as follows:

*"The court finds nothing in the operation of Farmers that contemplates a 'boycott' of its competitors, agents, or the public. Farmers sells its insurance through exclusive agents. Its competitors are not prevented access to the market, merely access through Farmers agents...They are unfettered by Farmers' agency system from competing with Farmers on whatever basis the marketplace will allow...But it is not anticompetitive for Farmers to refuse its competitors the right to sell insurance through Farmers agents." Blackley v. Farmers Insurance Group, Inc., C 74-126, D.Utah, August 26, 1976.(emphasis added)*

The agents in **Black** signed the agency agreements knowing that they could not sell insurance for any other insurance company. The facts in **Blackley** are essentially the same, requiring only a "first submission" of insurance customers, not an exclusive agency agreement. It is logical that the insurance companies could restrict and restrain sales of competitors *since the agents originally signed agency contracts providing for "exclusive" representation or "first submission."* But, this was not the circumstances for Kevin Webb and Princeton Insurance Agency.

In the case before the Court, the agency contracts were not "exclusive" and did not require "first submission" to the Erie companies. To the contrary, the contracts provided "independent" agent status where the agent could sell for multiple insurance companies. [T.R. 240, 241, 980, 981] Customers benefited from the "competition." [T.R. 240] Unlike **Black** and **Blackley**, the Erie companies restrained the sales of a competing insurance company (State Auto) *selling through a separate agency (Princeton Insurance Associates)*. Restraining sales through a separate agency is the type misconduct that **Black** and **Blackley** prohibit.

Since the conduct of the Erie insurance companies to treat Kevin Webb and Princeton Insurance Agency as "exclusive" agents for sales was not provided in the agency agreements, the misconduct of the Erie companies is not protected or preempted by the "consummation of a contract" because the parties thereto did not agree to such a course of dealings.

### **C. PRESERVATION OF AGENCY AGREEMENTS**

There is no question that agency agreements must be preserved to promote the best service and price, but the Federation does not perceive the hypocrisy of its

argument. It is permissible in the view of the Federation for one insurance company to terminate the agency contract of an agent who refuses to help that insurance company to illegally "push" and "direct" sales from another insurance company *and a separate agency* (to increase profit of the former insurance company) when customers would choose the latter, if given an unbiased choice, because of cheaper premiums. **The Erie insurance companies have failed to do the very thing that the Federation argues: "PRESERVE AGENCY CONTRACTS TO ENSURE THE BEST AVAILABLE SERVICE AND PRICE!"**

The type of misconduct proven in this case is a reason that the West Virginia legislature enacted West Virginia Code 33-12A-1, et. seq. *The type of misconduct proven in this case is also the very reason that the West Virginia legislature enacted legislation making unreasonable restraints in the business of insurance an unfair trade practice. West Virginia Code 33-11-4(4)*

(1) **This case will not impose a chilling effect on agency contracts.**

The jury's verdict and judgment of the Circuit Court will not impair agency contracts in West Virginia. If insurance companies want "captive" agents for sales, they may prepare the contracts accordingly, but then those agents ultimately get the protection of West Virginia Code 33-12A-1, et. seq. which prevents terminations at will, and mandates terminations for "just cause." On the other hand, if insurance companies want independent agents who can sell for multiple insurance carriers and also be terminated at will, *then those insurance companies cannot privately treat them as "captive" agents while threatening to terminate them at will to restrain the sales of competing insurance companies and competing agencies.*

Contrary to the standard of review for this Court, in an effort to portray the facts in a light most favorable to the Erie companies (and not Kevin Webb and Princeton Insurance Agency), the Federation attempts to convince this Court of that which the jury rejected-Kevin Webb and Princeton Insurance Agency were so bad that they should have been terminated. Yet the Federation did not address the facts or issues raised by the following questions:

1. If Kevin Webb and Princeton Insurance Agency were such bad agents, why did Mr. Fletcher during a tape recorded telephone conversation on November 20, 2003 (when he was discussing the potential agency terminations unless the production reports were produced) tell Kevin Webb the following:

"I think, man, if I was Kevin if I really wanted to keep with Erie and I think that you do. I think you do want to keep your contract with Erie. \* \* \* **I'll be honest with you. I want to keep our contract with you. I do.**" [Plaintiffs' Exhibit 20; T.R. 309, 310, emphasis added]

**"I am not bullshitting you. It is our best interests at Erie Insurance to keep this contract in force. I believe that from the bottom of my heart. But I also believe that I need your help."** [Plaintiffs' Exhibit 20; T.R. 312, emphasis added]

2. If Kevin Webb and Princeton Insurance Agency were such bad agents, why did the Erie insurance companies not terminate the agency contracts of numerous other agencies *which had worse loss ratios and other numbers than Princeton Insurance Agency and Kevin Webb for the same time period in question?* [Plaintiffs' Exhibits 43A-43H; T.R. 1000-1015]

3. If Kevin Webb and Princeton Insurance Agency were such bad agents, why did the Erie companies *intentionally* cause their loss ratio to dramatically

increase for 2003 by increasing their claims *reserves* in the amount of \$250,000.00 in 2003, for claims that predated 2003? When answering this question, it must be remembered, those same claims had \$250,000.00 *less* in reserves in 2002 which permitted an agency "profit" for 2002, **but the \$250,000.00 increase for 2003 mysteriously disappeared from the totals in January 2004!** [T.R. 546-550, 1078]

4. After district sales manager, Carl Olian, II, wrote on the agency review form for the review of 2003 performance that the re-underwriting efforts were "good," why did Mr. Fletcher *change* the review form regarding re-underwriting from "good" to "poor?" [Plaintiffs' Exhibit 24; T.R. 390, 391, 961]

The Federation did not even participate in the trial of this case, yet it criticizes Kevin Webb and Princeton Insurance Agency in the face of documents and a tape recorded conversation which establish that the Erie insurance companies did not, at the time of the misconduct, even believe that which the Federation now argues. The argument of the Federation does not have credibility.

## **(2) APPLICATION TO CONTEXTS OTHER THAN INSURANCE**

The West Virginia Antitrust Act applies to contexts other than insurance, so the final argument posed by the Federation is best presented to the legislature. On the other hand, the West Virginia Unfair Trade Practices Act in West Virginia Code 33-11-1, et.seq. does *NOT* apply to contexts other than insurance. Our legislature specifically incorporated an unreasonable restraint in the business of insurance as a defined unfair trade practice in West Virginia Code 33-11-4(4).

Perhaps the legislature recognized what this Court has already determined:

"that the insurance business is quasi public in its character, and the state may, under its police power, determine who may engage in the business, and prescribe the terms and conditions on which it may be conducted, and generally to regulate it and all persons engaged in it." State ex rel. Swearingen v. Bond, 96 W.Va. 193, 122 S.E. 539 (1924)

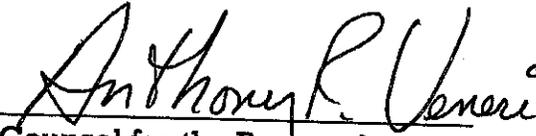
While legal minds would hope that no person or entity would conduct themselves as the Erie companies, Mr. Fletcher, and Mr. Olian did in this case, irrespective of the nature of the business, there was certainly good reason for the legislature to stress the importance of fair, unrestrained insurance sales competition in West Virginia Code 33-11-4(4), and that certainly separates insurance sales restraints from others not in the insurance context.

### CONCLUSION

If the Federation and its members truly do not want this case to act as a precedent for the insurance industry in West Virginia, then the best action that this Court can take is to *refuse* the Petition for Appeal, because if it is granted, this Court will be faced with a jury verdict and judgment supported with sound and substantial evidence, and premised upon well established statutes and case law. At least by refusing the Petition for Appeal, the Federation and the Erie companies can argue to others that the case was an anomaly.

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and KEVIN WEBB,**

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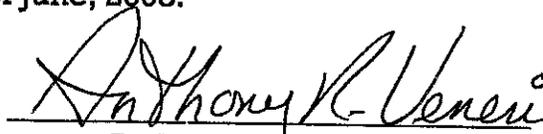
I, ANTHONY R. VENERI, Esq., Counsel for the Respondents, do hereby certify that the foregoing **Response to the Amicus Curiae Brief of the West Virginia Insurance Federation** was served upon W. Henry Jernigan, Jr., Esq., James D. Lamp and Matthew J. Perry, Esq., counsel for the Petitioners, and upon Clarence Martin III (Counsel for Amicus Curiae) by placing same in the U.S. Postal mail to the following addresses:

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Dated this 6<sup>th</sup> day of June, 2008.

  
Anthony R. Veneri, Esq.