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September 8, 2010

Ms. Mary Jo Kunkle
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

Re: ***In the matter, on the Commission's own motion, to order Continental Resources, Inc., to show cause why it should not be found in violation of 1929 PA 9, MCL 483.101 et seq. or 1965 PA 165, MCL 483.151 et seq. for construction of a pipeline in Hillsdale and Jackson Counties without Commission authorization or approval*, MPSC Case No. U-16388**

Dear Ms. Kunkle:

Enclosed for electronic filing on behalf of Continental Resources, Inc., is Continental's Response and Objections to Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline, Brief in Support of Continental's Response and Objections to Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline, and Proof of Service in the above-captioned matter. If you have any questions, please call the undersigned.

Very truly yours,

VARNUM

Jack D Sage

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JDS/daf
Enc.
cc: Hon. Mark E. Cummins/w. enc. All Interested Parties/w. enc.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

*** * * * ***

In the matter, on the Commission's own motion, to order Continental Resources, Inc., to show cause why it should not be found in violation of 1929 PA 9, MCL 483.101 *et seq.* or 1965 PA 165, MCL 483.151 *et seq.* for construction of a pipeline in Hillsdale and Jackson Counties without Commission authorization or approval.	)	Case No. U-16388

CONTINENTAL'S RESPONSE AND OBJECTIONS TO MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT'S MOTION TO EXTEND FILING DEADLINE

NOW COMES Continental Resources, Inc. ("Continental"), by and through its attorneys, Varnum, Riddering, Schmidt & Howlett LLP, and, by way of Continental's Response and Objections to Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline ("Continental's Objections") states as follows:

1. In response to Paragraph 1 of Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline ("Motion to Extend"), Continental states it filed Application of Continental Resources, Inc., for Leave to Appeal; Brief in Support of Application of Continental Resources, Inc., for Leave to Appeal; and Proof of Service on August 11, 2010, which speak for themselves. To the extent the allegations in Paragraph 1 of the Motion to Extend are inconsistent with this response, they are denied.

2. In response to Paragraph 2 of the Motion to Extend, Continental states the MDNRE submitted Michigan Department of Natural Resources and Environment's Brief in Response to Application of Continental Resources, Inc., for Leave to Appeal and Proof of Service with said Proof of Service dated August 27, 2010 ("MDNRE Response Brief"). To the

extent the allegations in Paragraph 2 of the Motion to Extend are inconsistent with this response, they are denied.

1[sic]. In response to Paragraph 1[sic] of the Motion to Extend, Continental states R 460.17337(1), Rule 337(1), expressly provides for a deadline requiring that any response to an application for leave to appeal "*shall* be filed within 14 days after service of the application." (Emphasis supplied.) To the extent the allegations in Paragraph 1[sic] of the Motion to Extend are inconsistent with this response, they are denied.

2[sic]. In response to Paragraph 2[sic] of the Motion to Extend, Continental states the MDNRE submitted the MDNRE Response Brief with Proof of Service on August 27, 2010 – two (2) days *after* the required *deadline* for filing of August 25, 2010, as admitted by the MDNRE. Regarding the remaining allegations in Paragraph 2[sic] of the Motion to Extend, Continental lacks knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies the same.

3[sic]. In response to Paragraph 3[sic] of the Motion to Extend, Continental states it filed Continental's Response to Michigan Department of Natural Resources and Environment's Brief in Response to Application of Continental Resources, Inc., for Leave to Appeal and Proof of Service on August 31, 2010 ("Continental Response Brief") which speaks for itself. Further responding, Continental states the Continental Response Brief, among other things, reflected the MDNRE Response Brief was submitted beyond the deadline provided by R 460.17337(1), Rule 337(1). To the extent the allegations in Paragraph 3[sic] of the Motion to Extend are inconsistent with this response, they are denied.

4[sic]. In response to Paragraph 4[sic] of the Motion to Extend, Continental states the rules as to the Michigan Public Service Commission's ("Commission") Practice and Procedure

Before the Commission do provide, "In areas *not addressed* by these rules, the *presiding officer* may rely on appropriate provisions of the currently effective Michigan court rules." R 460.17103(1), Rule 103(1) (emphasis supplied). By its language, R 460.17103(1), Rule 103(1), reflects it is inapplicable as it pertains to actions by the "presiding officer" not the Commission. R 460.17103(1), Rule 103(1), is to allow the Administrative Law Judge to use as guidance the Michigan Court Rules where no Commission Rule addresses the matter. In the present instance, the Commission's rules *directly address* the issue in R 460.17337(1), Rule 337(1), which requires that any response to an application for leave to appeal "**shall** be filed within 14 days after service of the application." (Emphasis supplied). To the extent the allegations in Paragraph 4[sic] of the Motion to Extend are inconsistent with this response, they are denied.

5[sic]. In response to Paragraph 5[sic] of the Motion to Extend, Continental states although MCR 2.108(E) provides for an extension of time, as noted above, that rule is not applicable to this proceeding. Moreover, the MDNRE fails to provide the full text of MCR 2.108(E) which states, "However, if a rule governing a particular act limits the authority to extend the time, those limitations must be observed." R 460.17337(1), Rule 337(1), expressly requires that any response to an application for leave to appeal "**shall** be filed within 14 days after service of the application." (Emphasis supplied). Michigan authorities hold the term "shall" is mandatory. To the extent the allegations in Paragraph 5[sic] of the Motion to Extend are inconsistent with this response, they are denied.

6[sic]. In response to Paragraph 6[sic] of the Motion to Extend, Continental lacks knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies the same. Further responding, Continental states MDNRE's asserted reason for

failing to file in a timely fashion is not excusable neglect and its reference to lack of prejudice is misplaced.

WHEREFORE, for these reasons and as further supported by Continental's Brief in Support of Continental's Response and Objections to Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline ("Continental's Brief"), Continental requests the Commission to:

A. Deny MDNRE's Motion to Extend; and

B. Grant Continental any other relief that the Commission deems necessary.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Attorneys for Continental Resources, Inc.

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Dated: September 8, 2010

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

*** * * * ***

In the matter, on the Commission's own motion, to order Continental Resources, Inc., to show cause why it should not be found in violation of 1929 PA 9, MCL 483.101 *et seq.* or 1965 PA 165, MCL 483.151 *et seq.* for construction of a pipeline in Hillsdale and Jackson Counties without Commission authorization or approval.	)	Case No. U-16388

BRIEF IN SUPPORT OF CONTINENTAL'S RESPONSE AND OBJECTIONS TO MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT'S MOTION TO EXTEND FILING DEADLINE

NOW COMES Continental Resources, Inc. ("Continental"), by and through its attorneys, Varnum, Riddering, Schmidt & Howlett LLP, and, by way of Brief in Support of Continental's Response and Objections to Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline ("Continental's Brief"), states as follows.

A. The Express Language Of Commission Regulation And Rule R 460.17337(1), Rule 337(1), Governs.

In an effort to circumvent its failure to meet the express deadline in the Michigan Public Service Commission's ("Commission") Practice and Procedure Before the Commission, the Michigan Department of Natural Resources and Environment ("MDNRE") cites R 460.17103(1), Rule 103(1). However, R 460.17103(1), Rule 103(1), is inapplicable as evident from its express language, "In areas *not addressed* by these rules, the *presiding officer* may rely on appropriate provisions of the currently effective Michigan court rules." (Emphasis supplied.) Initially, it is noted R 460.17103(1), Rule 103(1), pertains to the actions of the "presiding officer" not the Commission. R 460.17103(1), Rule 103(1), is to allow the Administrative Law Judge to use as

guidance the Michigan Court Rules when no Commission rule addresses the matter. The matter of a deadline to file a response to an application for leave to appeal is expressly governed by R 460.17337(1), Rule 337(1).

As R 460.17103(1), Rule 103(1), is inapplicable, the MDNRE's reference to MCR 2.108(E) is misplaced. Moreover, MCR 2.108(E) would provide no support as an avenue for relief regarding the MDNRE's failure to meet the deadline for filing a response to the Application of Continental Resources, Inc., for Leave to Appeal ("Continental's Appeal"). Although MCR 2.108(E) provides for an extension of time, it limits its applicability. Significantly, the MDNRE fails to quote the relevant portion of the court rule. The section ignored by the MDNRE states "However, if a rule governing a particular act limits the authority to extend the time, those limitations *must be observed*." (Emphasis supplied). R 460.17337(1), Rule 337(1), expressly requires that any response to an application for leave to appeal "**shall** be filed within 14 days after service of the application." (Emphasis supplied). Continental previously provided the authority governing the word "shall." As advised, the Michigan Supreme Court has found the word "shall" is unambiguous and denotes a *mandatory*, rather than discretionary, action. See *Roberts v Mecosta County General Hosp*, 466 Mich 57, 65; 642 NW2d 444 (2003). The MDNRE likewise ignored the aforementioned direction of the Michigan Supreme Court. The 14-day requirement is mandatory.

B. <u>MDNRE's Reference To Lack Of Prejudice Is Misplaced</u>.

MDNRE's reference to a lack of any prejudice is misplaced. Nowhere in R 460.17337(1), Rule 337(1), does it reference a late filing nor does it provide for any relief based on any purported lack of prejudice. Timeliness is the issue, which in this instance was the necessity to file any response to Continental's Appeal within the specified fourteen (14) days. Again, as

noted by the Michigan Supreme Court, "shall" is mandatory. Fourteen (14) days came and passed with the MDNRE failing to meet the expressly required deadline.

C. MDNRE's Reference To Excusable Neglect Is Irrelevant.

Excusable neglect is not a basis to circumvent the failure to meet a mandatory deadline. R 460.17337(1), Rule 337(1), does not provide any exception to the deadline, excusable neglect or otherwise. By use of the term "shall," all parties were on notice the deadline must be met.

Moreover, where a party claimed "inadvertent miscalendaring of the hearing date," the Court of Appeals found "no excusable neglect." *Longacre v Kalamazoo County Friend of the Court*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 1997 (Docket No. 183040); 1997 WL 33347980 (Mich App), attached hereto and incorporated herein as Appendix 1. A similar view was more recently expressed by the United States District Court for the Western District of Michigan, Southern Division:

> "Excusable neglect has been held to be a strict standard which is met only in extraordinary cases." *Id.* (citing *Marsh v. Richardson, 873 F.2d 129, 130 (6th Cir. 1989)*; *see Barnes v. Cavazos, 966 F.2d 1056, 1061-62 (6th Cir. 1992)* (holding that mistakes arising from ordinary and typical aspects of trial practice, like calculating deadlines, will not constitute unique and extraordinary events arising to excusable neglect).

Housholder v Hastings Mutual Ins Co, ____ F Supp ____ (WD Mich, 2010), Docket No. 1:08-cv-937, 2010 US Dist LEXIS 39257. MDNRE acknowledges its inattention, stating it failed to "... file its brief in response in a timely fashion… as a … result of a scheduling error…." MDNRE Motion, ¶ 6. Though R 460.17337(1), Rule 337(1), governs the timely filing of any response and therefore the MDNRE's reference to excusable neglect is irrelevant, even then the MDNRE is unable to meet the test it suggests.

WHEREFORE, Continental requests that the Commission deny Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline and grant Continental any other relief that the Commission deems necessary.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Attorneys for Continental Resources, Inc.

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Dated: September 8, 2010

APPENDIX 1

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Debra Kay LONGACRE, also known as Debra Kay Chapo, Plaintiff-Appellee,
and
KALAMAZOO COUNTY FRIEND OF THE COURT, Appellee,
v.
Clayton Ernest LONGACRE, Defendant-Appellant.
No. 183040.

May 16, 1997.

Before: GRIFFIN, P.J., and DOCTOROFF and MARKMAN, JJ.

UNPUBLISHED

PER CURIAM.

***1** Defendant appeals by leave granted the trial court's order denying his motion to set aside the July 25, 1994, post-divorce order in which the court found him in contempt and modified the amount of child support previously ordered. We modify that portion of the July 25, 1994, order regarding the time to which the increased support payments are retroactive. In all other respects we affirm the orders.

Defendant's claim that the friend of the court's petitions were procedurally defective and deprived him of procedural due process is without merit. Defendant did not properly preserve these claims for appeal, raising them for the first time in his misnomered "motion to set aside default judgment," which was untimely filed. MCR 2.119(F)(1). See also MCR 2.116(C)(3) and (D)(1) regarding waiver of service of process claim. However, we will briefly discuss these claims.

In support of his claim that the manner of service of the petitions was improper, defendant relies on MCR 3.203(A) and MCR 2.105. However, defendant's reliance is misplaced because personal jurisdiction over defendant was established in 1978 by virtue of the service of process of the complaint for divorce. Jurisdiction was merely continued in the instant proceedings. See *Ewing v. Bolden,* 194 Mich.App 95, 101; 486 NW2d 96 (1992). Because jurisdiction was continuing in the divorce action, service of process under MCR 2.105 was not necessary, only notice to defendant of the petitions. *Id.* Service of the original petition for modification was properly accomplished on defendant pursuant to MCR 2.107(C)(3) by mailing it to him by first class mail. Service by mail is complete at the time of mailing. MCR 2.107(C)(3); *Magnuson v. Zadrozny,* 195 Mich.App 581, 586; 491 NW2d 258 (1992). Thus, service of the friend of the court's original petition for modification was effected on April 28, 1993, the date of mailing.

We reject defendant's claim that the petitions were procedurally defective and denied him due process because the friend of the court's report and recommendation did not "accompany" the original petition as required in M.C.L. § 552.517(4); MSA 25.176(17) [as in effect prior to 1994 PA 37]. When construing statutes, the primary goal is to ascertain and give effect to the intent of the Legislature. *Frame v. Nehls,* 452 Mich. 171, 176; 550 NW2d 739 (1996). In construing the language of a statute, this Court should apply a reasonable construction in order to accomplish the statute's purpose. *Thompson v. Merritt,* 192 Mich.App 412, 420; 481 NW2d 735 (1991). The purpose of having the report and recommendation accompany the petition for modification, or to be available for review (which is the requirement under the statute as now amended), is to provide notice to the parties of the specific recommendations being made and the doc-

umentation in support of the recommendation. This is designed to allow the parties an opportunity to challenge the reports and recommendation before modification is ordered. Where defendant received the report and recommendation with the amended petition and had ample opportunity to challenge the report and recommendation, he was not denied due process. *Vincencio v. Ramirez*, 211 Mich.App 501, 504; 536 NW2d 280 (1995).

***2** Defendant's further claim that the amended petition is procedurally defective because the friend of the court did not seek leave of the court under MCR 2.118(A) to file the amended petition is likewise without merit. Defendant errs in relying on MCR 2.118(A), because that rule regards amendments to "pleadings." The petition for modification is not a "pleading." See MCR 3.206, MCR 3.213, MCR 2.110. It is treated as a motion governed by MCR 2.119. See MCR 3.213. Even if the friend of the court was required to seek leave of the court, any error by virtue of its failure to seek leave did not adversely affect defendant's substantial rights. MCR 1.105. The only change in the petition was that the investigation had been completed and the resulting report was attached with specific recommendations.

Defendant's next claim, that the trial court erred in modifying the February 28, 1989 support agreement stipulated between the parties, has no merit. As this Court correctly concluded in defendant's prior appeal in this case, "the trial court had statutory authority to modify the February 28, 1989, stipulation regarding child support." *Longacre v. Longacre*, unpublished opinion per curiam of the Court of Appeals, issued 4/26/93 (Docket No. 131479), slip op at 2. See M.C.L. § 552.17; MSA 25.97; *Calley v. Calley*, 197 Mich.App 380, 381 n 1; 496 NW2d 305 (1992). We disagree with defendant's assertion that the trial court "blindly" followed the support guidelines. We note that defendant failed to (1) provide the income information requested of him in the April 19, 1994, subpoena, (2) timely answer the petitions for modification, and (3) appear at the June 17, 1994, hearing. The amount of support as determined by the child support guidelines is presumed to be correct. MCR 722.27(2); MSA 25.312(7)(2); *Calley*, *supra* at 382. As the party challenging the support modification order, defendant failed to carry his burden of showing that application of the formula would be unjust or inappropriate. *Calley*, *supra; Thompson*, *supra* at 416. The court specifically noted that the increase of support it ordered could be retroactively modified upon receipt of information from defendant justifying modification. Therefore, defendant can petition the court accordingly. MCL 552.17; MSA 25.97.

Defendant is in error that the court could not order post-majority support, thereby modifying the 1989 support stipulation in this regard. See M.C.L. § 552.16a(2); MSA 25.96(1)(2), M.C.L. § 552.17a; MSA 25.97(1). Contrary to defendant's claim that only a parent or child can seek post-majority support for a child not on welfare, the friend of the court may initiate such a petition for modification. MCL 552.517(1)(b); MSA 25.176(17). The agreement of the parents is necessary only when post-majority support is to be continued for a period beyond the time constraints set forth in subsection (2) of the statute. See M.C.L. § 552.16a(4); MSA 25.96(1)(4).

***3** We agree, however, that the trial court clearly erred in ordering retroactive modification of child support to a time prior to the date the original petition for modification was served on defendant, in this case being April 28, 1993. By the unequivocal terms of M.C.L. § 552.603(2); MSA 25.164(3)(2), retroactive modification of support for periods prior to the time that defendant had notice of the petition for modification is prohibited. [FN1] *Jenerou v. Jenerou*, 200 Mich.App 265, 267; 503 NW2d 744 (1993); *Edwards v. Edwards*, 192 Mich.App 559, 564; 481 NW2d 769 (1992); *Waple v. Waple*, 179 Mich.App 673; 446 NW2d 536 (1989). When a statute's language is clear and unambiguous, then the Legislature is presumed to have intended the

meaning it has plainly expressed and the statute must be applied as written. *Nellis v. Nellis,* 211 Mich.App 226, 230; 535 NW2d 240 (1995). The trial court is directed to modify its July 25, 1994, order to make the modification of support retroactive to April 28, 1993, the date that defendant is deemed to have notice of the petition for modification.

> FN1. Appellees rely upon *Waber v. Waber,* unpublished opinion per curiam of the Court of Appeals, issued 11/25/91 (Docket No. 125017), in support of its argument that retroactive modification is not limited to the date on which the opposing party was noticed. However, apart from the fact that *Waber* is an unpublished opinion of this Court, we believe that it is distinguishable. In the instant case, there was a reporting event each quarter that served as a trigger by which the friend of the court was notified of defendant's duty and subsequent failure to report. Each quarter that defendant failed to report, the friend of the court could have complained, could have investigated and could have petitioned for modification. It did none of these. In *Waber,* on the other hand, there was no such triggering event that placed the friend of the court on notice that defendant had a duty to report and had failed to comply with this obligation.

Defendant next asserts that his failure to appear at the June 17, 1994, hearing was due to his inadvertent miscalendaring of the hearing date and that this constituted excusable neglect. He therefore claims that the July 25, 1995, order should be set aside, as in *Cook v. Haynes,* 92 Mich.App 288; 284 NW2d 479 (1979). Defendant has failed to cite any legal authority in support of his claim that the July 25, 1994, order is a default judgment; he has therefore abandoned his claim in that regard. *Mallard v. Hoffinger Industries,* 210 Mich.App 282, 286; 533 NW2d 1 (1995). The court correctly characterized the motion as either a motion for rehearing or reconsideration, which was untimely filed pursuant to MCR 2.119(F)(1), or a motion for relief from judgment based on mistake, inadvertence or excusable neglect, which was timely filed pursuant to MCR 2.612(C)(2). Our review of the record reveals that the trial court did not clearly err in this case in finding no excusable neglect in defendant's failure to appear at the June 17, 1994, hearing. *Beason v. Beason,* 435 Mich. 791, 804-805; 460 NW2d 207 (1990). There being no excusable neglect, the trial court did not abuse its discretion in denying defendant's motion to set aside the July 25, 1994, order on that basis. MCR 2.612(C)(1)(a); *Haberkorn v. Chrysler Corp,* 210 Mich.App 354, 382; 533 NW2d 373 (1995).

Defendant next asserts that the trial court erred in finding him in contempt of court for failure to pay child support, failure to report as provided by the 1989 stipulation, and failure to appear at the June 17, 1994, hearing. We disagree. A trial court has the power to issue an order of contempt to a party who disobeys or refuses to comply with an order to pay support, a party who disobeys any lawful order of the court, or a party who refuses or neglects to obey a subpoena. MCL 600.1701(f), (g), and (i); MSA 27A.1701(f), (g), and (i). A trial court's findings in a contempt proceeding must be affirmed on appeal if there is competent evidence to support them. *Cross Co v. UAW Local 155,* 377 Mich. 202, 218; 139 NW2d 694 (1966). There is ample evidence on the record before us to support the trial court's findings of contempt. *Id.* Defendant's conduct in this case is replete with instances of failure to report, failure to pay child support and failure to appear. We review the issuance of a contempt order for an abuse of discretion, *Deal v. Deal,* 197 Mich.App 739, 743; 496 NW2d 403 (1993), and find that the court was well within it discretion in issuing the contempt order.

***4** Regarding his final claim, that the trial court abused its discretion when it issued a bench warrant without setting a sum certain amount necessary to

purge the contempt order, defendant cites no authority other than a citation to the statute regarding acts punishable for contempt, M.C.L. § 600.1701; MSA 27A.1701, which is not relevant to this issue. Therefore, defendant has abandoned this claim. *Mallard, supra.* In any event, we find that the amount due was readily ascertainable by the conditions set forth in the contempt order and the warrant set a sum certain by which it could be satisfied. Defendant's claim in this regard is without merit. We note, however, that the bench warrant was recalled by the court in October 1995. Should the court deem it necessary to reissue a bench warrant to satisfy the order of contempt, any arrearage for increased support as ordered in the July 25, 1994, modification order should be made retroactive only to April 28, 1993, and calculations of amounts due should be made accordingly.

Affirmed in part, modified in part. Appellees substantially being the prevailing parties, they may tax costs pursuant to MCR 7.219.

Mich.App.,1997.
Longacre v. Longacre
Not Reported in N.W.2d, 1997 WL 33347980 (Mich.App.)

END OF DOCUMENT

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

*** * * * ***

In the matter, on the Commission's own motion, to order Continental Resources, Inc., to show cause why it should not be found in violation of 1929 PA 9, MCL 483.101 *et seq.* or 1965 PA 165, MCL 483.151 *et seq.* for construction of a pipeline in Hillsdale and Jackson Counties without Commission authorization or approval.	)	Case No. U-16388

PROOF OF SERVICE

Deliah A. Fowler says that she is an employee of VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP and on September 8, 2010, she caused to be served a copy of Continental's Response and Objections to Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline, Brief in Support of Continental's Response and Objections to Michigan Department of Natural Resources and Environment's Motion to Extend Filing Deadline, and Proof of Service upon the following persons in the attached Service List by electronic mail.

I declare that the statement above is true to the best of my information, knowledge, and belief.

Deliah A. Fowler

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