

IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC88392

STATE ex rel. FORD MOTOR COMPANY

Relator

vs.

THE HONORABLE MICHAEL W. MANNERS, CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI, AT INDEPENDENCE, CIRCUIT
JUDGE, DIVISION 2

Respondent

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Relator's Statement of Facts does not comply with Rule 84.04(c) of the Missouri Rules of Civil Procedure. It is not concise, consisting of 22 pages; it contains argument (See, e.g., Relator's Brief, pgs. 7-8); and it contains factual statements for which there is no record reference (See, e.g., Relator's Brief, pg. 8, footnote 2). Respondent cannot effectively identify each occasion of non-compliance, and cannot adopt Relator's Statement of Facts in its entirety.

Recognizing its responsibilities pursuant to Rule 84.04(f), Missouri Rules of Civil Procedure, Respondent adopts the portion of Relator's Statement of Facts that comply with Rule 84.04(c) with exceptions enumerated here.

Relator argues that the suspension orders constitute legal advice and work product of Ford's attorneys. The Discovery Commissioner, after an *in camera* review of suspension orders, found that not all of the claims asserted by Ford in the affidavit of counsel were born out by the *in camera* inspection. (Discovery Order No. 6, A29) The Discovery Commissioner found that the suspension orders do nothing more than direct that documents which may relate to a product claim should be preserved rather than destroyed, that no communications with others in the company are included

in the suspension orders, and that advising a Ford employee to keep a document rather than destroy it is a normal part of business, does not amount to legal advice protected by the attorney client privilege. (Discovery Order No. 6, A30) The Discovery Commissioner also found that the suspension orders were accessible to 170,000 Ford employees, and that wide access does not support an expectation of privacy, an element of the attorney client privilege. (Discovery Order No. 6, A15-16)

The Discovery Commissioner, after *in camera review* of suspension orders, concluded that the suspension orders did not contain or reveal the analysis or thought processes of counsel relating to strengths or weaknesses of the case, only describe documents which are to be kept rather than destroyed, and do not, therefore, constitute work product. (Discovery Order No. 6; A32-33)

The Discovery Commissioner did not “agree”, as asserted by Relator (Relator’s Brief, pg. 11), that the information on a hard drive relating to the IVD/ESC/RSC documents contained “especially sensitive current design information which, if it were disseminated outside of the litigation context, could place Ford at an immense competitive disadvantage [.]” (Discovery Order No. 2, A86) The Discovery Commissioner found that the hard drive was “described” as containing such information. *Id.*

ARGUMENT

A. INTRODUCTION

Respondent respectfully submits that the context of this argument must be kept in sight.

There are two categories of documents that are the subject of this dispute.

In one category are Records Retention policies and the so-called “IVD/ESC/RSC documents, the VEHDYN List, and CAE” (“Engineering Documents”) documents which Relator (“Ford”), without any evidentiary basis, claims are highly sensitive, proprietary documents and deserving of more protection than is afforded by Discovery Order No. 1. (A184-191)

In the other category, are the suspension orders, issued by the office of Ford’s General Counsel instructing Ford employees to retain certain documents because they have been requested in court or administrative proceedings. Despite the fact that these suspension orders are accessible to 170,000 Ford employees, Ford asserts that they are privileged as attorney-client communications or work product.

Relator, Ford Motor Company (Ford), seeks the mandate of this Court prohibiting Respondent from vacating his previously entered protective

orders, the terms of which preclude sharing by Plaintiff's counsel of documents produced by Ford in this case pursuant to interim "non-sharing orders". Vacating those orders would have the effect of making those documents subject to the protection of the general discovery order in the case below, Order No. 1 (A184-191)¹. The documents would then be eligible only for use in the underlying case and sharing with "attorneys representing Plaintiffs and the experts and consultants retained by the plaintiff in other cases pending against Ford involving Ford Explorers (including Mercury Mountaineers) in which occupant restraints, roof strength, roof crush or stability are at issue, provided that no disclosure shall be made to any expert or consultant who is employed by a competitor of Ford." (Order No. 1, issued September 21, 2006, A186). The point is that, if the writ were dissolved, the documents would not be available for distribution to Ford's competitors, as Ford seems to imply, and certainly would not be available for general public dissemination. By denying the requested writ, this Court would leave these allegedly highly sensitive and allegedly privileged documents well protected from Ford's competitors and

¹ References in this brief preceded by "A" are references to pages in the appendix to Relator's Brief.

the general public by the terms of Order No. 1 issued pursuant to Rule 56.01 of the Missouri Rules of Civil Procedure.

It is also important to note that the suspension orders, produced by Ford subject to interim, non-sharing discovery orders, are claimed to be privileged as work product and attorney client communications. However, the Discovery Commissioner found, by the testimony of a Ford employee, that some 170,000 Ford employees had access to the suspension orders, and that such accessibility, precluded any expectation of privacy (Discovery Order No. 6, A32).

Furthermore, Ford well knew that the non-sharing orders were interim orders subject to amendment, as was expressed by the Discovery Commissioner in Order No. 7(A42-43). This context was confirmed by the Trial Judge in his proposed order of January 29, 2007 (A210). Presumably the intent of the Discovery Commissioner was as clear to Ford as it was to Plaintiffs. Rather, however, than seek relief from the order that these allegedly privileged Suspension orders be produced, Ford produced them in an obvious environment of uncertainty as to the permanent character of extant non-sharing protective orders. The reasonableness of Ford's supposed reliance on the proposition that the protective orders would not be amended is questionable.

Respondents respectfully submit that the writ issued here should be dissolved.

B. RESPONSE TO POINTS RELIED ON

RESPONSE TO POINT NO. 1

RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER OF JANUARY 29, 2007, THAT THREATENED TO VACATE PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDERS IN THAT (1) RESPONDENT MAINTAINED JURISDICTION TO ENFORCE AND AMEND PROTECTIVE ORDERS AFTER SETTLEMENT AND NEITHER ABUSED HIS DISCRETION OR EXCEEDED HIS JURISDICTION BY DOING SO, (2) RESPONDENT EXERCISED REASONABLE DISCRETION IN CONCLUDING TO REVISE THE OUTSTANDING NON-SHARING PROTECTIVE ORDERS TO SHARING PROTECTIVE ORDERS AND IT WAS NOT AN ABUSE OF DISCRETION FOR RESPONDENT TO ENTER PROTECTIVE ORDERS IN RELIANCE ON THE REVIEW OF THE DISCOVERY COMMISSIONER; AND (3) RELATOR MADE NO SHOWING THAT IT RELIED ON THE PERMANENCE OF THE NON-

SHARING ORDERS OR THAT SUCH RELIANCE WAS REASONABLE.

1. Standard of Review

The standard of review for issuing a writ of prohibition is whether the trial court's action, if left undone, would be a usurpation of judicial power, would represent an excess of jurisdiction, or would absolutely and irreparably harm a party. *State ex rel. Abdullah v. Roldan*, 207 S.W.3d 642, 645 (Mo. App. 2006).

The standard of review for the abuse of judicial discretion is that “judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Anglim v. Missouri Pac. R.R.*, 832 S.W.2d 298, 303 (Mo. banc 1992), cert. denied, 506 U.S. 1041, 113 S.Ct. 831, 121 L.Ed.2d 701 (1992); cited with approval by *Wilkerson v. Prelutsky*, 943 S.W.2d 643 (Mo. 1997).

2. Respondent Maintained Jurisdiction to Enforce and Amend Protective Orders After Settlement and Neither Abused His Discretion Nor Exceeded His Jurisdiction by Doing So

Were one to accept the argument here made by Ford, i.e., that once a case is concluded the trial court can no longer enforce its protective orders, then all protective orders would be worthless after a case was concluded. No Missouri courts have held as Ford would have this Court hold, and other courts in other jurisdictions have specifically held to the contrary, i.e., that a trial court maintains jurisdiction to enforce or modify its protective orders. *See, e.g., Gambale v. Deutsche Bank, AG*, 377 F.3d 133, 141 (2nd Cir. 2004); *Marshall v. Planz*, 347 F. Supp. 2d 1198, 1200 (M.D. Ala. 2004); *Hallett v. Carnet Holding Corporation*, 809 A.2d 1159, 1162 (Del. Supr. 2002).

None of the cases cited by Ford address the issue.

3. Respondent Exercised Reasonable Discretion in Concluding to Revise the Outstanding Non-Sharing Protective Orders to Sharing Protective Orders

a. It was not an abuse of discretion for Respondent to enter protective orders in reliance on the review of the Discovery Commissioner

The standard against which Ford seeks to judge the conduct of Respondent in its subpoint 3 to Point No. 1 is not immediately evident. The appropriate standard is whether the trial court abused its discretion in

entering whatever protective orders were entered. Accepting that trial courts have broad discretion to control discovery, *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. 1997), in order to find an abuse of discretion, a reviewing court must find that “the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. (internal citations omitted) If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion.” *Id.*

Certainly, Ford has made no showing that the ruling of the Trial Court was so “arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration”. Whether or not Respondent cited to an inappropriate discovery order number, it is clear from the Order of January 29, 2007 (A210), that Respondent knew what was at issue, had issued its previous orders to protect a trial date, and concluded that Ford had not met its burden of showing why Order No. 1 would not adequately protect its interests.

Indeed, one might ask what other course of action the Trial Court could reasonably have taken. The record here is devoid of any evidentiary showing that the “Engineering Documents” are indeed as sensitive as Ford

contends, a burden which Ford had to bear by the terms of Rule 56.01. Ford makes much of the fact that there was considerable controversy about the “Engineering Documents” and the manner in which discovery would be had with respect to those documents (Relator’s Brief, pgs. 57-58). Ford even goes so far as to suggest that the Discovery Commissioner found this information “exceptionally sensitive” when, in fact, the Discovery Commissioner reported in Discovery Order No. 2 that Ford had *reported* that certain of the information sought by Plaintiffs was “exceptionally sensitive” (A75). Ford saying it is so, does not make it so, and Ford made no showing in the court below that its interests would not be protected by Order No. 1, a sharing protective order.

More importantly, despite the absence of an evidentiary basis for finding that the “Engineering Documents” deserve protection under Rule 56.01(c)(7), Discovery Order No. 1 (A184-191) gives the documents the protection afforded “confidential research, development, or commercial” information by limiting dissemination to very specific persons, and preventing dissemination to competitors (A186). It will be to that status that these documents will default if the issued writ is dissolved.

Ford offers no justification or authority for the proposition that the documents deserve of more protection than that. Although Ford argues that

the Trial Judge was untruthful in the Order of January 29, 2007, when confirming that the non-sharing orders were endorsed to expedite discovery (See, Relator's Brief, footnote 12, pg. 59), that is what the Trial Judge said (A210) and it is what the Discovery Commissioner said (A43).

There is no record here upon which the Trial Judge can be convicted of an abuse of discretion. The Order of January 29, 2007, is founded upon the detailed analysis of the Discovery Commissioner of these issues. Ford made no showing that there was any reason for more protection than that afforded by Order No. 1. Certainly, whether to give these items non-sharing protection is a subject on which reasonable persons could differ.

b. Respondent did not abuse his discretion by relying on the findings and reasoning of the Discovery Commissioner

Respondent might be criticized for not being more clear in the Order of January 29, 2007 (A210), about the bases for his ruling vacating the non-sharing protective orders, but less than perfect expression does not rise to the level of an abuse of discretion. Reading that order for its substance and without parsing it, Respondent said that he was familiar with the issues in dispute through his association with the litigation, that he did not believe that the suspension orders were privileged, and that Ford had failed to demonstrate that any of the documents in dispute were entitled to more

protection than was afforded by Discovery Order No. 1 (A184-191). Of course, none of the cases cited by Ford stand for the proposition that it is an abuse of discretion for a trial judge to rely on the review by a master or discovery commissioner of items claimed to be privileged.

4. Relator Made No Showing That It Relied on the Permanence of the Non-Sharing Orders or That Such Reliance was Reasonable.

Everybody but Ford: Plaintiffs, their counsel, the Discovery Commissioner and the Trial Judge, apparently believed that sharing versus non-sharing protective orders was an issue that could be revisited. Ford, however, feigns surprise at the occasion, and concedes as much by admitting that it considered seeking appellate relief from the order of production pursuant to non-sharing orders.

Ford does apparently concede that reliance on the protective orders of a court must be reasonable before a court will be precluded from amending its order “absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.” *AT&T Corp. v. Sprint Corp., et al.*, 407 F.3d 560, 562 (2nd Cir. 2005). Indeed, *S.E.C. v. TheStreet.com.*, 273 F.3d 220 (2nd Cir. 2001) relied upon by *AT&T, supra*, acknowledges that:

“some protective orders may not merit a strong presumption against modification. For instance, protective orders that are on their face temporary or limited may not justify reliance by the parties. Indeed, in such circumstances reliance may be unreasonable. In *Agent Orange* we held that appellants ... could not have relied on the permanence of the protective order.... [B]y its very terms, [the order] was applicable solely to the pretrial stages of the litigation ... [and] would be reconsidered upon commencement of the trial.... Any reliance on such a sweeping temporary protective order simply was misplaced.”

*Id.*230

That court went on to hold that, when a litigant cannot be found to have reasonably relied on the permanence of a protective order, the decision about whether or not to modify that order is left to the “sound discretion of the trial court.” *Id.*231

Ford, of course, now declares vigorously that it did believe that the non-sharing order was permanent, an assertion that strains credulity, particularly given Ford’s long history of discovery abuse (cases summarized at A10-A14). It was unreasonable for Ford to rely on the permanence of the non-sharing protective order in the face of the expressions of the Discovery

Commissioner to the contrary.

RESPONSE TO POINT NO. 2

RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER OF JANUARY 29, 2007, THAT THREATENED TO VACATE PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDERS IN THAT THE FINDINGS BY THE DISCOVERY COMMISSIONER IN THE CASE AFTER ARGUMENT BY COUNSEL WERE THAT THE SUSPENSION ORDERS WERE NOT PRIVILEGED UNDER THE ATTORNEY CLIENT PRIVILEGE OR THE WORK PRODUCT PRIVILEGE, THE TRIAL JUDGE WAS NOT OBLIGATED TO APPLY THE DOCTRINE OF COMITY TO ADOPT THE FINDINGS OF OTHER JURISDICTIONS ON OTHER SUSPENSION ORDERS, AND ANY RELIANCE BY RELATOR ON THE PERMANENCE OF THE NON-SHARING ORDER WAS NOT REASONABLE.

The standard of review for issuing a writ of prohibition is whether the trial court's action, if left undone, would be a usurpation of judicial power, would represent an excess of jurisdiction, or would absolutely and irreparably harm a party. *State ex rel. Abdullah v. Roldan*, 207 S.W.3d at

645. Quite obviously, the Trial Judge had the jurisdiction to control discovery in his court by determining the terms of and issuing protective orders relating to cases on his docket. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. 1997) It is certainly sensible to argue that the Trial Judge did not have jurisdiction to order the production of privileged documents, but the determination that the suspension orders were not privileged was made in the trial court after extensive review of the suspension orders and analysis by the Discovery Commissioner. Ford makes no credible effort here to persuade this Court of the privileged character of the suspension orders, except to contend that other courts have held them to be privileged under the law of other states. Indeed, the record provided in support of Ford's efforts here has specific findings that the suspension orders are not privileged. Absent some showing to this Court that the suspension orders are privileged, Ford's argument that the Trial Judge should have deferred to the rulings of other jurisdictions after reviewing other documents seems incredible, and certainly makes no argument for the subjugation of Missouri law to the law of other states on the basis of comity.

This Court, citing longstanding Missouri case law, has written that "the rule of comity is a matter of courtesy, complaisance, respect—not of right but of deference and good will." *State ex rel. Dykhouse v. Edwards*,

908 S.W.2d 686, 689 (Mo. banc. 1995) (citing *Ramsden v. Illinois*, 695 S.W.2d 457, 549 (Mo. banc 1985)). The Supreme Court further wrote: “Comity is a voluntary decision of one state to defer to the policy of another in an effort to promote uniformity of laws, harmony in their application, and other related principles.” *Id.* at 689-90 (citing *Ramsden*, 695 S.W.2d at 459). Ford’s argument appears to be that the Trial Judge should be prohibited from declining to extend the reach of these other courts by an act which Missouri law clearly views as voluntary. To argue that Judge Manners decision not to implement the “courtesy” of comity merits the extraordinary remedy sought here by Ford, is to argue for a change in Missouri law that would substantially lower the threshold for appellate relief from a trial court’s action. Put simply, Ford has not shown and cannot show that Judge Manners’ decision to not follow the voluntary doctrine of comity requires this Court to issue a writ of prohibition under the standards of *State ex rel. Abdullah v. Roldan*, *supra*.

Perhaps more importantly, Missouri’s overriding public policy interest in judicial economy and full and fair airing of disputes is served by the plaintiffs’ ability to keep the Hachinsky documents and things and govern their use by a sharing protective order, as other courts have held. See, *Garcia v. Peeples*, 734 S.W. 2d 343, 347 (Tex.1987), *supra*; See, also

Patterson v. Ford Motor Company, 85 F.R.D. 152 (W.D. Tex 1980); *Ward v. Ford Motor Company*, 93 F.R.D. 579 (D.C. Colo. 1982); *Williams v. Johnson & Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970). *Koval v. General Motors Corp.*, 610 N.E.2d 1199 (Ohio Com. Pl. 1990).

Ford's argument of reliance simply reiterates its arguments in subpoint 4 of point 1. Respondent incorporates the arguments made in response to that subpoint, equally applicable here.

RESPONSE TO POINT NO. 3

RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS ORDER OF JANUARY 29, 2007, THAT THREATENED TO VACATE PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDERS IN THAT PLAINTIFFS WERE ENTITLED AT ANY TIME TO ASK FOR ENFORCEMENT OF AMENDMENT OF THE PROTECTIVE ORDERS, AND THE TRIAL JUDGE RETAINED JURISDICTION TO RULE ON SUCH REQUESTS.

- 1. Order No. 1 Authorized the Trial Judge To Amend and Enforce the Protective Orders.**

Order No. 1, in paragraph 8, specifically provides that the trial

court “retains jurisdiction over the parties and recipients of Protected Documents for enforcement of the provisions of this Order.” (Order No. 1, A189). “Enforcement” obviously includes designating the protected status of a document as provided in paragraph 2. (A185) As earlier established in this brief, the trial court maintains jurisdiction even after the conclusion of the litigation to revise its protective orders. *See, e.g., Gambale v. Deutsche Bank, AG*, 377 F.3d 133, 141 (2nd Cir. 2004); *Marshall v. Planz*, 347 F. Supp. 2d 1198, 1200 (M.D. Ala. 2004); *Hallett v. Carnet Holding Corporation*, 809 A.2d 1159, 1162 (Del. Supr. 2002).

Whether the Trial Court could revise the protective orders by vacating their non-sharing provisions is controlled by the cases cited by Ford, *AT&T Corp. v. Sprint Corp., et al.*, 407 F.3d 560, 562 (2nd Cir. 2005); *S.E.C. v. TheStreet.com.*, 273 F.3d 220 (2nd Cir. 2001).

Suggesting, as Ford seems to, that the jurisdiction of the Trial Court to enforce and revise its orders was lost if enforcement or revision was not accomplished within 10 days of the order of the Discovery Commissioner doing one thing or another, would make the entire protective order valueless.

2. The Engineering Documents Are Protected Pursuant to Rule 56.01(c) of the Missouri Rules of Civil Procedure

No argument is made here that the “Engineering Documents” are not

deserving of protection. The litigants, Discovery Commissioner and the Court apparently accepted that they were protected during discovery pursuant to Order No. 1. The issue here is whether they deserved more protection than that. Order No. 1 established in paragraph 2 that the burden to prove that a document was entitled to any protection fell to Ford. (A185) This provision is consistent with interpretations of Federal Rule of Civil Procedure 26 (*See, e.g., Centurion Industries, Inc. v. Warren Steurer and Associates*, 665 F.2d 323, 325 (10th Cir. 1981)), which is identical to Missouri Rule of Civil Procedure 56.01(c)(7).

Ford made no showing that protection more pervasive than Order No. 1 was appropriate, and the Trial Judge so found in the Order of January 29, 2007. (A210) In fact, Ford does not here establish what it is about the “Engineering Documents” that would be harmful if released to other lawyers and their experts pursuing similar claims against Ford. Referencing federal cases, the court in *State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167(Mo. App. 1995) enumerated the criteria for concluding that something was a trade secret:

“(1) the extent to which the information is known outside of the business; (2) the extent to which the information is known to those involved in the business; (3) the extent of the measures

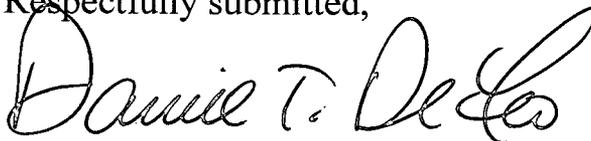
taken to guard the secrecy of the information; [and] (4) the value of the information to the business and its competitors.”*Id.* 170

Ford, by the record presented here, made no showing that the “Engineering Documents” met any of those criteria. No showing was made in the Trial Court that the “Engineering Documents” met even the criteria for protection, let alone that they met the criteria for a non-sharing protective order.

CONCLUSION

Protective orders are an essential part of this kind of litigation. Provisions permitting the sharing of information serve the broad purpose of the judicial system to resolve disputes efficiently, fairly and quickly. No justification exists to limit the authority of trial judges to control discovery in cases assigned to them. Ford has not demonstrated that the documents which this writ effects are privileged, or that they contain sensitive commercial information, and cannot and have not, therefore demonstrated that the Trial Judge, by vacating non-sharing orders will exceed his jurisdiction or abuse his discretion.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word and contains approximately 4,267 words and approximately 491 lines, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 14 point type. A CD-ROM (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk. Further, the brief includes the information required by Rule 55.03 of the Missouri Rules of Civil Procedure.

**CERTIFICATE OF SERVICE AND RULE 84.06(g)
COMPLIANCE**

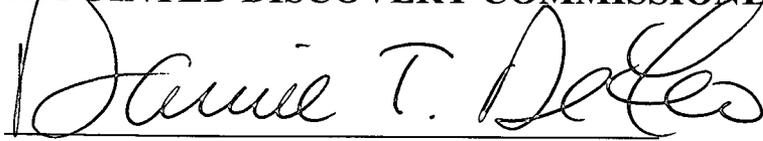
I hereby certify that a true and correct copy of the above and foregoing together with a CD-ROM copy scanned for viruses under Supreme Court Rule 84.06(g) was served by United States mail, postage prepaid, on this 18th day of July, 2007 to:

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A handwritten signature in cursive script that reads "Daniel T. DeFEO". The signature is written in black ink and is positioned above a horizontal line.

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