

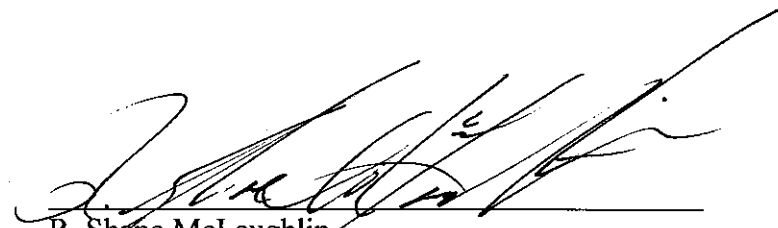
2007-CA-01942

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Patricia Fleishhacker, Appellant
2. Walter Fleishhacker, Appellee
3. John A. Ferrell, counsel for Appellee
4. J. Deborah Martin, counsel for Appellee
5. R. Shane McLaughlin, counsel for Appellant
6. Nicole H. McLaughlin, counsel for Appellant



R. Shane McLaughlin  
Attorney of record for Appellant

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT REGARDING ORAL ARGUMENT.....	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	4
STANDARD OF REVIEW.....	9
SUMMARY OF THE ARGUMENTS.....	9
ARGUMENT.....	11
<b>I. THE TRIAL COURT ERRED IN DETERMINING THAT TWENTY FIVE PERCENT OF NMP WAS WALTER'S SEPARATE PROPERTY SINCE THE PROPERTY WAS COMMINGLED.....</b>	<b>11</b>
<b>A. The framework for equitable distribution.....</b>	<b>11</b>
<b>B. Since Walter's pre-marital ownership of NMP was commingled, one hundred percent of NMP was marital property subject to equitable distribution.....</b>	<b>12</b>
<b>II. EVEN IF WALTER'S PRE-MARITAL INTEREST IN NMP WAS SEPARATE PROPERTY, THE COURT ERRED BY VALUING THE SEPARATE INTEREST AS OF THE DATE OF THE TEMPORARY ORDER, RATHER THAN THE DATE OF THE PARTIES' MARRIAGE.....</b>	<b>15</b>
<b>III. THE COURT ERRED IN VALUING NMP AS OF THE DATE OF THE TEMPORARY ORDER, RATHER THAN THE DATE OF THE DIVORCE.....</b>	<b>17</b>
<b>IV. THE COURT ERRED IN IGNORING THE DEBT WALTER OWED TO NMP IN DETERMINING THE VALUE OF NMP.....</b>	<b>20</b>

<b>V.</b>	<b>THE COURT ERRED IN DETERMINING THAT PATRICIA'S JEWELRY WAS MARITAL PROPERTY.....</b>	<b>22</b>
<b>VI.</b>	<b>THE COURT ERRED IN FAILING TO DISPOSE OF THE OLD WAVERLY GOLF CLUB AND CAMERON CLUB MEMBERSHIPS AS MARITAL PROPERTY.....</b>	<b>23</b>
	<b>CONCLUSION.....</b>	<b>24</b>
	<b>CERTIFICATE OF SERVICE.....</b>	<b>26</b>
	<b>CERTIFICATE OF FILING.....</b>	<b>27</b>

## TABLE OF AUTHORITIES

### CASES

<i>A &amp; L, Inc. v. Grantham</i> , 747 So. 2d 832 (Miss. 1999).....	13
<i>Bednar v. Bednar</i> , 474 A.2d 17 (N.J. 1984).....	18
<i>Bodne v. King</i> , 835 So. 2d 52 (Miss. 2003).....	13
<i>Box v. Box</i> , 622 So. 2d 284 (Miss. 1993).....	12
<i>Buchanan v. Ameristar Casino Vicksburg, Inc.</i> , 957 So. 2d 969 (Miss. 2007).....	20
<i>Bunyard v. Bunyard</i> , 828 So. 2d 775 (Miss. 2002).....	13
<i>Carrow v. Carrow</i> , 642 So.2d 901 (Miss. 1994).....	9
<i>Ferguson v. Ferguson</i> , 639 So. 2d 921 (Miss. 1994).....	11, 12, 22, 23
<i>Godwin v. Godwin</i> , 758 So. 2d 384 (Miss. 1999).....	17, 18, 19
<i>Goodson v. Goodson</i> , 910 So. 2d 35 (Miss. Ct. App. 2005).....	21
<i>Gray v. Edgewater Landing, Inc.</i> , 541 So. 2d 1044 (Miss. 1989).....	21
<i>Gray v. Gray</i> , 745 So. 2d 234 (Miss. 1999).....	12
<i>Heigle v. Heigle</i> , 771 So. 2d 341 (Miss. 2000).....	17, 18
<i>Hemsley v. Hemsley</i> , 639 So. 2d 909 (1994).....	12
<i>Henderson v. Henderson</i> , 703 So. 2d 262 (Miss. 1997).....	13
<i>Hopkins v. Hopkins</i> , 703 So. 2d 849 (Miss. 1997).....	23
<i>Johnson v. Johnson</i> , 650 So. 2d 1281 (Miss. 1994).....	13
<i>Maslowski v. Maslowski</i> , 655 So. 2d 18 (Miss. 1995).....	13
<i>Marshall v. Gipson Steel, Inc.</i> , 806 So. 2d 266 (Miss. 2002).....	9
<i>Myrick v. Myrick</i> , 739 So. 2d 432 (Miss. Ct. App. 1999).....	22, 23
<i>Oswalt v. Oswalt</i> , No. 2006-CA-01254-COA, 2007 WL 2840359 (Miss. Ct. App. Oct. 2, 2007).....	22, 23

<i>Owen v. Owen</i> , 928 So. 2d 156 (Miss. 2006).....	9
<i>Pittman v. Pittman</i> , 791 So. 2d 857 (Miss. Ct. App. 2001).....	17, 18, 19
<i>Reddell v. Reddell</i> , 696 So. 2d 287 (Miss. 1997).....	24
<i>Singley v. Singley</i> , 846 So. 2d 1004 (Miss. 2002).....	9, 13
<i>White v. White</i> , 868 So. 2d 1054 (Miss. Ct. App. 2004).....	24

### **SECONDARY MATERIALS**

DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW (1st ed. 2005).....	16, 18
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### **STATEMENT REGARDING ORAL ARGUMENT**

This appeal involves complicated issues of property classification, valuation and distribution. This appeal presents several inter-related issues involving the ownership, valuation and distribution of Northeast Metal Processors, Inc., a business owned jointly by the Parties which the Trial Court held to be only partially a marital asset. In resolving this appeal, the Court must determine whether any part of Northeast Metal Processors, Inc. was Walter Fleishhacker's separate property, if so, the date that should have been used to value his separate portion, and further what value of the business should have been used by the Trial Court in any event.

Oral argument would be helpful to discuss each of these related issues. Accordingly, oral argument should be granted in this case.

## **STATEMENT OF THE ISSUES**

1. Whether the Trial Court erred in finding that Walter Fleishhacker's pre-marital interest in Northeast Metal Processors, Inc. was not marital property subject to equitable division where the property was commingled with marital property.
2. Whether, in any event, the Trial Court erred in valuing Walter Fleishhacker's pre-marital interest in Northeast Metal Processors, Inc. as of the date of the temporary order in this case, rather than the date of the Parties' marriage.
3. Whether the Trial Court erred in considering the value of Northeast Metal Processors, Inc. at the time of the temporary order, rather than its value as of the date of the Parties' divorce, thus depriving Patricia Fleishhacker of the appreciation in value.
4. Whether the Trial Court erred in disregarding the significant debt owed by Walter Fleishhacker to Northeast Metal Processors, Inc. in valuing the business as marital property.
5. Whether the Trial Court erred when it found that certain items of jewelry were marital property, where the items were personal gifts from Walter Fleishhacker to Patricia Fleishhacker.
6. Whether the Court erred when it failed to determine that the Old Waverly Golf Club and Cameron Club memberships were marital property subject to equitable division.

### **STATEMENT OF THE CASE**

Patricia Fleishhacker ("Patricia") filed her Complaint for Divorce against Walter Fleishhacker ("Walter") on April 1, 2004. (R. Vol. 1 p. 5). Walter answered and filed a "Cross-Complaint" on April 21, 2004. (R. Vol. 1 p. 23). The Court entered an agreed temporary order on June 22, 2004. (R. Vol. 1 p. 31).

The matter was tried before the Chancery Court of Lee County, Mississippi on May 7, 9, 10 and 11, 2007. (R. Vol. 2, p. 233). Following the trial, the Court rendered its opinion on June 15, 2007, awarding Patricia a divorce from Walter on the grounds of adultery and ruling as to the valuation and distribution of marital assets. (*See* R. Vol. 2, p. 233-38).

The Trial Court entered an Amended Order denying Patricia's Motion for a New Trial and/or Motion to Alter or Amend Judgment on September 25, 2007. (R. Vol. 2, p. 255-56). Patricia timely perfected this appeal. (R. Vol. 2. p. 265).



## STATEMENT OF FACTS

Patricia and Walter were married on January 3, 1981. (R. Vol. 1, p. 5). The couple resided together in Belden, Mississippi, in Lee County at the time of their separation. (*Id.*). The couple separated on February 3, 2001, after Patricia learned that Walter had an affair with another woman. (*See* R. Vol. 3, p. 240). Walter admitted the affair at trial and admitted that he was guilty of uncondoned adultery. (T. Vol. 2, p. 31; Exhibits Vol. 1, Ex. 2).

No children were born to Patricia and Walter's marriage. (R. Vol. 1, p. 5). During their over twenty years of marriage, the couple lived an extremely comfortable lifestyle. (*See, e.g.*, T. Vol. 2, p. 254). The couple took frequent pleasure trips across the globe and visited casinos throughout Mississippi and Las Vegas, Nevada. (*See, e.g.*, T. Vol. 3, p. 254, Vol. 2, p. 116). Walter traveled annually to Scotland to play golf. (T. Vol. 3, p. 249). Walter and Patricia owned a second home at Old Waverly Golf Club, were members of the Club, and had paid an additional \$10,000 to join the "Cameron Club" at Old Waverly as founding members. (*See* T. Vol. 4, p. 425; T. Vol. 3, p. 259-60).

The evidence adduced at trial showed that Walter gambled heavily during the marriage. (*See, e.g.*, T. Vol. 2, p. 116; Vol. 4, 399). For instance, Walter's 2005 income tax return showed that he had gambling winnings of \$2,172,000 and that his losses had equaled those winnings. (T. Vol. 4, p. 399). Patricia had spent time with Walter at casinos during their marriage, but her gambling paled in comparison to Walter's. (T. Vol. 3, p. 249). Patricia's testimony summarized the couple's lavish marital lifestyle by noting "[w]e had a very good lifestyle. We could do about anything we wanted to do and go wherever we wanted to go whenever we wanted to go." (R. Vol. 3, p. 254).

The couple financed their lifestyle by the operation of various businesses. The most valuable business, and the couple's primary source of income throughout the marriage, was Northeast Metal Processing, Inc. ("NMP"). NMP is a highly successful scrap metal business located near Tupelo, Mississippi. (*See, e.g.*, Exhibits Vol. 2, Ex. 25). The company primarily processes ferrous scrap for sale to foundries. (*Id.*). As of September 30, 2004, the Company had annual sales of approximately \$10.4 million. (*Id.*). In addition to NMP, Patricia and Walter operated businesses called Personal Storage Rooms, Sparkle Car Wash and Green Save, Inc. during their marriage. (T. Vol. 2, p. 92-94). At the time of their divorce NMP and Green Save, Inc. continued to profitably operate as going concerns. (T. Vol. 4, p. 450).

Prior to their marriage, Patricia had worked in marketing and sales for a radio station and earned about \$18,000 per year. (T. Vol. 3, p. 242, 272). After she married Walter Patricia quit her job and managed one of the couple's businesses for thirteen years. (T. Vol. 3, p. 242, 248). Additionally, Patricia frequently entertained customers of NMP as part of the Company's business endeavors. (T. Vol. 3, p. 248). Patricia testified that she would research the lives of NMP customers as Walter expected her to assist in the entertaining of Company clients. (*Id.*).

Two competing experts testified as to the value of NMP as of June 30, 2004.<sup>1</sup> Brent McDade, a business appraiser with Mercer Capital was retained to provide expert opinion testimony as to the value of the business on behalf of Patricia Fleishhacker. (T. Vol. 2, p. 140). McDade first noted that his opinion of the value of NMP depended on whether outstanding loans to Walter Fleishhacker were counted as receivables. (T. Vol. 3, p. 157). Walter admitted that he frequently took loans from NMP, that he intended on paying the loans back and that he remained

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<sup>1</sup> The Trial Court ruled that the operative date for valuation of NMP was as near as possible to the entry of the Agreed Temporary Order on June 22, 2004. (T. Vol. 3, p. 153). However, as discussed below, Patricia also proffered McDade's opinion as to value of NMP on October 31, 2006, nearer to the time of trial. The record exhibits that the value of NMP appreciated approximately \$2,150,000 from the entry of the temporary order in 2004 until October 31, 2006. (T. Vol. 3, p. 180-82).

indebted to NMP as of the time of trial. (R. Vol. 2, p. 38). Walter used many of the loans from NMP to satisfy his personal indebtedness from gambling markers. (T. Vol. 2, p. 46).

McDade found that, as of June 30, 2004, NMP's books indicated that Walter owed a balance of \$1,080,292 on loans from the company. (T. Vol. 3, p. 158). Based on this, McDade rendered two opinions as to the value of NMP. (T. Vol. 3, p. 157). McDade opined that if Walter's indebtedness were considered, NMP's fair market value would be \$3.4 million as of June 30, 2004. (*Id.*). If Walter's indebtedness were not counted, NMP's value would be \$2,325,000. (*Id.*). Walter's retained expert, in contrast, testified that in his opinion the Company was worth only approximately \$1,577,000 as of June 30, 2004. (T. Vol. 3, p. 173; Exhibits Vol. 2, Ex. 44). However, NMP had cash-on-hand of \$1,418,550 as of June 30, 2004; by the end of 2006 NMP had cash reserves of \$4,209,536. (T. Vol. 4, p. 388).

The Trial Court found that Brent McDade, Patricia's expert, was the more credible of the two witnesses and accepted his valuation of NMP. (T. Vol. 4, p. 443). The Court, however, did not count Walter's significant indebtedness to the Company as of June 30, 2004, and effectively found that the indebtedness was not an asset of the Company. (T. Vol. 4, p. 444). Although Walter testified that he had paid back a significant amount of the debt, considered the debt to be legitimate loans and intended to pay all of the debt to the Company eventually, the Trial Court held that:

I realize that the matter of the debt was considered by Mercer in establishing this value, the debt that Walter owes to the company. The court does not consider that debt as a part of the overall value of the company. It's basically a debt to himself. He owns the company, he is the company. Without him, there is no company. And consequently that debt is owed back to him is not considered a part on [sic] the valuation of the company as noted in one of the alternative valuations given by the Mercer group.

(T. Vol. 4 p. 444).

In addition to ignoring Walter's debt to NMP, the Trial Court found that twenty-five percent of the value of NMP was Walter's separate property, since he had acquired it before his marriage to Patricia. (T. Vol. 4, p. 429). It was undisputed at trial that Walter owned a minority interest in NMP before his marriage to Patricia. (See T. Vol. 2, p. 84, Vol. 3, p. 250). Walter acquired all of the remaining interest in NMP during his marriage to Patricia. (*Id.*).

The evidence established that Walter and Patricia both participated in the successful operation of NMP during their marriage and that the Company was the couple's most valuable asset and primary source of income. (See, e.g., T. Vol. 3, p. 242, 248). Moreover, all of the shares of NMP were titled in the name "Walter Fleishhacker and Patricia Fleishhacker, as joint tenants with right of survivorship" in the year 1996. (Exhibits Vol. 1, Exs. 18-19). Shortly before the shares were titled to the couple jointly, Patricia executed an Agreement agreeing to convey her interest in the stock back to Walter upon his request, and agreeing that her joint ownership would not give her any greater interest in NMP "than she would otherwise have." (Exhibits Vol. 2, Ex. 41).

The Trial Court found that since Walter owned a minority position in NMP prior to his marriage to Patricia this interest in NMP was therefore separate property as of the divorce. (T. Vol. 4, p. 429). However, the Trial Court allowed Walter credit, as separate property, for twenty-five percent of the Company's value *as of June 30, 2004*, rather than the Company's value as of the date of the Parties' marriage in 1981. (T. Vol. 4, p. 450). By so doing, the Trial Court found that \$581,250, twenty-five percent of the marital assets' 2004 value, constituted Walter's separate property and was not subject to equitable division. (*Id.*).

Other than NMP, the Trial Court found that the following other marital property existed and was valued as set forth below:

<u>Property</u>	<u>Value</u>
Marital residence ("Belden residence")	\$380,000
Old Waverly residence	\$290,000
Walter's furniture and jewelry	\$47,800
Walter's art	\$90,300
Patricia's art	\$100,400
Patricia's furniture and jewelry	\$145,000
Green Save, Inc.	\$460,000
Green Save land and building	\$150,000
Walter's 401(k) (less \$50,00 separate portion)	\$304,566
75 % of NMP	\$1,743,750

(See R. Vol. 2, p. 235; T. Vol. 4, p. 450). The Court recognized that Patricia testified that the value of her jewelry was \$35,000 and that all of the jewelry had been gifts from Walter to her. (See T. Vol. 4, p. 328, p. 429). However, the Court concluded that the jewelry nevertheless constituted marital property. (T. vol. 4. p. 439). Thus, the Court concluded that Patricia had no separate property at all. (*See id.*).

The Court found that, under an analysis of the *Ferguson* factors, the Parties should each be awarded one-half of the marital estate. (T. Vol. 4, p. 450). The Court held that Patricia was entitled to the Belden residence, her furniture and art, her jewelry, a vehicle to be titled from NMP and one-half of the marital portion of Walter's 401(k) for a total value of \$777,678. (R. Vol. 2, p. 235, T. Vol. 4. p. 450). The Court found that Patricia would be entitled to the amount of \$1,078,225 to bring her total share of the marital assets to \$1,855,903. (T. Vol. 4, p. 450-51).

The Court thus awarded Patricia \$800,000 as a division of the marital assets and \$278,225 as lump sum alimony. (T. Vol. 2, p. 236-37).

Finally it is notable that at the time of trial Walter testified that his salary from NMP was \$33,500 per month. (T. Vol. 2. p. 34). In addition to that, Walter received Social Security benefits of \$1,782 and rental income of \$5,700 per month. (*Id.*). Patricia was not employed, and had no prospects that would enable her to earn a living after the divorce. (T. Vol. 4, p. 327). The evidence at trial showed that Patricia had no retirement account, and her monthly expenses were approximately \$10,025. (T. Vol. 4, p. 255-60).

As discussed fully below, Patricia claims that the Trial Court erred by not giving her an equitable distribution of the true value of the marital property. Accordingly, for the below reasons, Patricia Fleishhacker requests this Court to reverse the Trial Court's decision.

### **STANDARD OF REVIEW**

This Court employs a limited standard of review of property division and distribution in divorce cases. *Owen v. Owen*, 928 So. 2d 156, 160 (Miss. 2006). A Chancellor's decision as to property distribution is upheld so long as it is supported by "substantial credible evidence." *Carrow v. Carrow*, 642 So.2d 901, 904 (Miss. 1994).

However, such deference is not afforded to the Chancellor's conclusions of law. *Marshall v. Gipson Steel, Inc.*, 806 So. 2d 266 (Miss. 2002). The Court reviews the Chancellor's interpretation and application of the law *de novo*. *Singley v. Singley*, 846 So. 2d 1004, 1006 (Miss. 2002).

### **SUMMARY OF THE ARGUMENTS**

Several errors require reversal of the Trial Court's decision in this case. First, Walter's pre-marital twenty-five percent interest in NMP was converted to marital property during the

marriage by the doctrine of commingling. All of the shares of NMP were held together and treated the same during the marriage and no portion was treated as separate property. Moreover, all of the shares had been titled jointly in Patricia and Walter's names during the marriage. Any separate interest in the company was manifestly commingled with the marital interest during the marriage, such that all of the shares of NMP became marital property. Accordingly, the Trial Court erred in concluding that twenty-five percent of NMP was Walter's separate property.

However, even if twenty-five percent of NMP was Walter's separate property, the Trial Court nevertheless erred by valuing the separate portion as of June 30, 2004, rather than the date of the Parties' marriage. Mississippi law establishes that the appreciation of NMP during the marriage is a marital asset. Thus, Walter's separate portion of NMP, if any, must be valued as of the date of the marriage, rather than the decades later date of the temporary order. Otherwise, Patricia is unfairly deprived of the appreciation in the asset during the marriage. The Trial Court erred in valuing Walter's separate interest based on its 2004 value rather than its 1981 value.

Similarly, Patricia takes issue with the Trial Court valuing the remaining interest in NMP as of the time of the temporary order rather than the time of trial. The asset appreciated approximately \$2.1 million during this short period of time. To the extent this appreciation over less than three years was attributable to economic forces, such as fluctuations in the scrap metal market, the appreciation was a marital asset and should have thus been valued as the date of the divorce. As to this issue, the Court should remand for the Trial Court to determine the extent of the appreciation attributable to market forces following the entry of the temporary order.

The Trial Court also erred by ignoring Walter's approximately \$1.1 million in outstanding loans owed to NMP. The Trial Court erred by concluding that the loans were merely a debt Walter owed to himself. Mississippi law establishes that the NMP had a legal existence

completely apart from Walter, and that Walter's account receivable was an asset of the Company which should have been considered in valuing the business.

The Trial Court next erred in classifying Patricia's jewelry as marital property. The uncontraverted testimony at trial established that the jewelry had been gifts from Walter to Patricia during the marriage. Gifts of such a personal nature are separate property of the donee spouse. Thus, these items should have been treated as Patricia's separate property.

Finally, the Trial Court committed reversible error by failing to classify or value two items of the marital estate: the Old Waverly Golf Club membership and the accompanying Cameron Club membership. These items were identified as assets by Patricia in evidence adduced at trial. The Trial Court erred in failing to mention these assets in any respect. Thus, the Court should remand the matter to the Trial Court to consider these assets.

### **ARGUMENT I.**

#### **THE TRIAL COURT ERRED IN DETERMINING THAT TWENTY FIVE PERCENT OF NMP WAS WALTER'S SEPARATE PROPERTY SINCE THE PROPERTY WAS COMMINGLED.**

##### **A. The framework for equitable distribution.**

The equitable distribution analysis involves the following steps: 1) classifying assets as either marital or separate; 2) valuation of the assets; 3) division of marital property equitably; 4) awarding alimony as needed following the division of marital assets. *See, e.g., Ferguson v. Ferguson*, 639 So. 2d 921, 925 (Miss. 1994). The Supreme Court in *Ferguson* held that Chancery Courts should look to the following factors in making an equitable division:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:
  - a. Direct or indirect economic contribution to the acquisition of the property;
  - b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and



- c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.
2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.
3. The market value and the emotional value of the assets subject to distribution.
4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;
5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution
6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;
7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,
8. Any other factor which in equity should be considered.

*Ferguson*, 639 So. 2d at 928 (Miss. 1994). Equitable division does not necessarily mean an equal division. *Gray v. Gray*, 745 So. 2d 234, 239 (Miss. 1999). However, spouses are entitled to support sufficient to maintain the lifestyle to which they were accustomed during the marriage. *Box v. Box*, 622 So. 2d 284, 288 (Miss. 1993).

In classifying marital property, there is a presumption that any property acquired during the marriage is marital property. *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (1994). A party who claims certain property is separate bears the burden of proof in this regard. *Hemsley*, 639 So. 2d at 914.

**B. Since Walter's pre-marital ownership of NMP was commingled, one hundred percent of NMP was marital property subject to equitable distribution.**

The Trial Court concluded, based on expert witness testimony, that 100 percent of NMP had a value of \$2,325,000 as of the operative date of June 30, 2004.<sup>2</sup> However, the Court held that since Walter had owned twenty five percent of NMP prior to the marriage in 1981, this

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<sup>2</sup> This valuation, as discussed more fully below, did not account for the approximately \$1.1 million owed by Walter to the Company as of this date.

percentage of ownership in the Company was Walter's separate property, rather than marital property.

Generally, property acquired before a marriage amounts to separate property of the acquiring spouse. *Bunyard v. Bunyard*, 828 So. 2d 775, 778 (Miss. 2002). However, such separate property may be converted to marital property if it is "commingled" with marital property. See, e.g., *Henderson v. Henderson*, 703 So. 2d 262, 265 (Miss. 1997). The Supreme Court has held that "[c]ommingled property is a combination of marital and non-marital property which loses its status as non-marital as a result." *Maslowski v. Maslowski*, 655 So. 2d 18, 20 (Miss. 1995). A business's appreciation in value during the marriage due to the active efforts of a spouse is a marital asset. *A & L, Inc. v. Grantham*, 747 So. 2d 832, 839 (Miss. 1999).

*L > using corp \$ as loans*  
The Supreme Court has applied the doctrine of commingling broadly. See, e.g., *Singley v. Singley*, 846 So. 2d 1004, 1005 (Miss. 2002) (\$70,000 inheritance found marital property once commingled); *Henderson*, 703 So. 2d at 265 (wife's separate funds became marital property when commingled with marital funds to construct a house). Assets which are commingled are considered marital property and are subject to equitable distribution. *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994). A conveyance of separate property to a spouse may amount to commingling, thus transforming the property into marital property. *Bodne v. King*, 835 So. 2d 52, 60 (Miss. 2003).

In this case, the Record establishes that Walter's pre-marital interest in NMP was commingled such that it was marital property. In 1974, Walter acquired a twenty-five percent interest in NMP. Walter married Patricia in 1981. During his marriage to Patricia Walter profited from NMP and was subsequently able to purchase the remainder NMP. Pursuant to the reasoning of *Grantham*, Walter's pre-marital twenty-five percent interest in NMP was

commingled with both the marital asset of seventy-five percent of NMP, together with the appreciation in value of NMP since 1981. As explained in *Grantham*, such commingling with the two marital assets renders the entirety of NMP a marital asset.

Just as in *Grantham*, the evidence in this case exhibited that both Patricia and Walter were involved in the successful operation of NMP. As explained at trial in this case, a business such as NMP is founded upon strong relationships with a small number of large customers. Patricia testified that she undertook to foster and develop these relationships by frequently hosting and entertaining the Company's customers and their families. (T. Vol. 3, p. 248). Further, the Record reveals that several marital assets were titled in the name NMP, and the couple used NMP funds as their own personal money. (*See, e.g.*, Exhibits Vol. 1, Ex 3-4; R. Vol. 2, p. 235-26). All shares of NMP were commingled together and treated the same during the marriage; none of the shares were treated differently as separate property. Obviously, any separate ownership in NMP was mixed during Walter and Patricia's marriage such that it was commingled and became marital property.

Additionally, it is undisputed that all of the shares of NMP were titled in both Walter's and Patricia's names as joint tenants with rights of survivorship in 1996. While Patricia executed an agreement that she would re-convey the stock to Walter if requested, and that the transfer would not enhance her rights to the property in the event of a divorce, the conveyance does much to substantiate that shares of NMP had become marital property. Walter testified that the shares were put in Patricia's name so that she would inherit them on his death, rather than NMP going to other beneficiaries. (T. Vol. 4, p. 397-98). Notably, it was not only a seventy-five percent interest in NMP that was re-titled in Patricia's name for this purpose. Rather, the entirety of the

stock of NMP, the couple's "family business," was conveyed to the Parties jointly together. This further exhibits the Parties treating all of the stock the same – as marital property.

The Trial Court erred in concluding that twenty-five percent of NMP could retain its identity as separate property when it had been so thoroughly commingled with all of the remaining ownership in the Company, which was undisputedly a marital asset. The property was lumped together with marital property and was never treated differently from its marital counterpart. Under Mississippi law Walter's pre-marital interest in the property was manifestly commingled such that it became marital property.

Accordingly, the Court should reverse the Trial Court's decision in this regard and remand for the Court to award Patricia an equitable distribution of this marital property.

## **ARGUMENT II.**

### **EVEN IF WALTER'S PRE-MARITAL INTEREST IN NMP WAS SEPARATE PROPERTY, THE COURT ERRED BY VALUING THE SEPARATE INTEREST AS OF THE DATE OF THE TEMPORARY ORDER, RATHER THAN THE DATE OF THE PARTIES' MARRIAGE.**

Next, even assuming that Walter's pre-marital twenty-five percent in NMP was separate property (which it was not), the Court nevertheless erred by valuing the interest as of June 30, 2004, rather than as of the Parties' marriage in 1981.

Again, the *Grantham* case is instructive. The Court in *Grantham* noted that an appreciation in a business's value during the marriage is a marital asset. *Grantham*, 747 So. 2d 839. The Court further held that the party claiming that a pre-marital ownership position in a business is separate property bears the burden of proving the non-marital character of the company. *Id.* The *Grantham* Court explained that this burden of proof goes beyond merely showing that the asset was acquired before the marriage, but also requires the spouse to show the value of the asset as separate property. *Id.* That is, according to *Grantham*, where a business's

worth is increased by a spouse's efforts during the marriage, its appreciation is a marital asset, and the spouse claiming a separate interest must prove the value of the business at the time of the marriage. *Id.* See also DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 6.07 (1st ed. 2005) (noting that "[t]wo valuation dates may be required for mixed assets. *A premarital business which appreciated during the marriage through a spouse's efforts must be valued at the date of marriage as well as at the time of trial.*") (emphasis added).

This case is on all-fours with the analysis explained in *Grantham* and Professor Bell's comments in her treatise. Here, there is no dispute that NMP's appreciation in value from 1981 was based on the active efforts of Walter during the marriage. Walter claimed at trial that he had "redoubled [his] efforts" in managing the company after he purchased it. (T. Vol. 4, p. 412), Walter explained that he worked "five, six, seven days a week" after he acquired the majority interest in the company and that he performed an outstanding job in running the business during his marriage. (T. Vol. 4, p. 411-12). Similarly, both expert appraisers recognized that Walter's efforts were crucial to the business. (See, e.g., Exhibits Vol. 1, Ex. 26; Exhibits Vol. 2, Ex. 44)

Thus, based on *Grantham*, there is no question that the appreciation in value in NMP since 1981 was a marital asset. Even if Walter had proven that his pre-marital twenty five percent interest in NMP was his separate property, even if the pre-marital interest had not been commingled, Walter would only be entitled to the 1981 value of the interest as his separate estate, not the appreciated 2004 value.

However, the Trial Court simply allowed Walter to have twenty-five percent of the business's June 30, 2004, value as separate property. The effect of this decision was to deprive Patricia of the appreciation in the twenty five percent interest since 1981, which was unquestionably a marital asset.

As explained in *Grantham*, Walter bore the burden of proving the character of his pre-marital interest in NMP if he claimed it to be separate property, including its value at the time of the marriage. Walter failed to introduce any evidence of the 1981 value of NMP. Accordingly, for this reason as well, the asset should have been treated as wholly marital property, as was done in *Grantham*.

The Trial Court committed reversible error by, in effect, allowing Walter to claim NMP's appreciation in value during the marriage as separate property. The appreciation was marital property under established Mississippi law. In the absence of any evidence as to the pre-marital value, the Trial Court should have found the entirety of the business to be marital property.

Accordingly, the Trial Court's decision should be reversed in this regard.

### **ARGUMENT III.**

#### **THE COURT ERRED IN VALUING NMP AS OF THE DATE OF THE TEMPORARY ORDER, RATHER THAN THE DATE OF THE DIVORCE.**

Patricia next contends that the Trial Court should have valued NMP as of the date of the trial, rather than the date of the agreed temporary order. Generally, marital property should be valued as of the date of divorce. *Heigle v. Heigle*, 771 So. 2d 341, 352 (Miss. 2000). However, as the Trial Court in this case noted, the entry of a temporary support order generally serves the same purpose as a separate maintenance order, and property acquired after the temporary order is separate property of the acquiring spouse. *See, e.g., Pittman v. Pittman*, 791 So. 2d 857, 864 (Miss. Ct. App. 2001); *Godwin v. Godwin*, 758 So. 2d 384, 386 (Miss. 1999). However, both *Pittman* and *Godwin* recognized an exception to this rule: that is, where an asset is acquired through the use of marital property after a temporary order, the asset is nevertheless marital property. *See Pittman*, 791 So. 2d at 864.

First of all, the rule explained in *Pittman* and *Godwin* applies to the acquisition of new marital property after a temporary support order. Neither case applies to the appreciation of an already marital asset between the time of the temporary order and the time of divorce. The Chancellor in this case erred in finding that *Pittman* and *Godwin* establish that such appreciation in a marital asset is necessarily the separate property of the Party in control of the asset.

No controlling authority has been located firmly establishing whether the appreciation of a going concern remains marital property after a temporary order is entered. However, Justice Banks discussed the issue in his separate opinion in *Heigle*. *Heigle*, 771 So. 2d at 353. (Banks, J., concurring in part and dissenting in part). Justice Banks stated that “a distinction must be made between value gained by the continuing non-marital efforts of the spouse in possession and that gained by passive appreciation of business assets.” *Id.* Justice Banks further noted that a fortuitous increase in value of a marital asset, due to economic forces, would be marital property while an increase in value after a temporary order based solely on active efforts of a spouse may be separate property. *Id.* (citing *Bednar v. Bednar*, 474 A.2d 17, 19 (N.J. 1984)) (holding that where appreciation is product of personal efforts of party in control appreciation is separate, but where “the increase in value is simply due to market factors or inflation, each party should share equitably in the increment.”). *See also* BELL, *supra*, § 6.02(3)(b) (noting that appreciation in a marital asset is separate is caused by the controlling spouse’s active efforts, and marital if the result of passive appreciation).

In this case, the value of NMP increased dramatically from the time of the temporary order until this case was tried on the merits. As of June 30, 2004, the business had a value of \$2,325,000 (excluding Walter’s debt to the company), whereas by October 31, 2006, nearer to the time of trial, the Company had a value of \$4,475,000 (also excluding Walter’s debt). (*See T.*

Vol. 3, p. 157, 180-82). Thus, the business appreciated \$2,150,000 between the time the temporary order was entered and the time of trial.

Patricia concedes that the appreciation in NMP from June 2004 until the time of trial was not due to her efforts; rather, Walter was in sole control of the business. Moreover, Patricia concedes that at least some of the appreciation in NMP's value may have been attributable to Walter's efforts from June 2004 to October 2006. However, it is wholly unclear from the record to what extent the appreciation during this short window of time was attributable to Walter's management of the company versus appreciation attributable to economic forces in the scrap metal industry. The Record establishes that fluctuations in the scrap metal market play a large role in the value of this business. Patricia's expert witness explained NMP "has widely varying performance, depending on a number of factors, most importantly, the overall level of scrap prices." (T. Vol. 3, p. 166). Thus, as scrap prices move up and down, the profitability, and thus the value of the company likewise move up and down. (T. Vol. 3, p. 166-67).

Again here, since Walter claimed the appreciation in NMP's value after the temporary order to be separate property he bore the burden of proof in this regard. Walter wholly failed to carry his burden. Walter should not be entitled to the benefit of the \$2,150,000 in accretion in NMP after the temporary order since he failed to prove the source of the appreciation. At a minimum, the matter should be remanded to the Trial Court to determine the extent, if any, to which Walter's efforts contributed to the appreciation in NMP following the entry of the temporary order.

Finally, even if the rule in *Godwin* and *Pittman* were applied as a bright-line for the appreciation in assets, this case would also meet the exception recognized in these decisions. That is, in this case, the appreciation in NMP's value was made possible because of the existence



of NMP as a marital asset. Of course, this “new asset” (the appreciation) could not have occurred but for the use of the marital asset. Based on this reasoning as well, the appreciation in value should have been determined to be marital property.

Accordingly, this Court should reverse the Trial Court’s decision and hold that the Court should have used the value of NMP as of the date of trial, thus allowing Patricia the benefit of the asset’s appreciation in value following the entry of the temporary order.

#### **ARGUMENT IV.**

##### **THE COURT ERRED IN IGNORING THE DEBT WALTER OWED TO NMP IN DETERMINING THE VALUE OF NMP.**

The Trial Court next committed error by disregarding the significant indebtedness Walter owed to NMP in determining the business’s value. Walter owed \$1,080,292 to NMP in outstanding loans as of June 30, 2004. (T. Vol. 3, p. 158). Walter testified that his debt to the corporation was “between 600 and \$750,000” as of the date of trial. (T. Vol. 2, p. 38).

The Trial Court disregarded the indebtedness in considering NMP’s value as a marital asset. The Court concluded that Walter’s debt was “basically a debt to himself.” However, Walter was adamant that the debt was legitimately owed to the corporation, that the loans did not represent dividends and that he intended to repay the debts. Walter testified that he made monthly payments on the debt of \$9,400 per month. (T. Vol. 2, p. 38). Walter listed the debt as a liability on his Rule 8.05 Financial Statement. (T. Vol. 2, p. 42; Exhibits Vol. 1; Ex. 3). The borrowed funds were used to pay Walter’s personal expenses, such as gambling markers. (T. Vol. 2, p. 46). Walter repeatedly testified that he had “borrowed funds that were to be repaid.” (*Id.*).

Of course, it is elementary law that corporate entities have a legal identity separate from their principals. *See, e.g., Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 977

(Miss. 2007) (noting that "the cardinal rule of corporate law is that a corporation possesses a legal existence separate and apart from that of its officers and shareholders."); *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1047 (Miss. 1989). It is equally well-established that the value of a business is defined as follows:

That price at which property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts.

*Goodson v. Goodson*, 910 So. 2d 35, 36 (Miss. Ct. App. 2005). According to *Goodson*, factors used to determine a business's value include "income generated, ***accounts receivable***, pending contracts, and customer lists." *Goodson*, 910 So. 2d at 37 (emphasis added).

In this case the record manifestly establishes that Walter Fleishhacker took loans from NMP, a marital asset, and that he intended to pay the loans back to the company. The loans to Walter were shown as accounts receivable on the company's books, and indicated as a liability on Walter's 8.05 Statement. Obviously, the accounts receivable from Walter amounted to an asset of NMP which would affect the Company's market value. Brent McDade testified to as much when he explained that NMP's value would be proportionately increased by the indebtedness, to a total of \$3,400,000, in his calculation which included Walter's indebtedness. (T. Vol. 3, p. 157).

Despite this evidence the Trial Court declined to consider Walter's debt owed to NMP in valuing the business. The Court erred in this regard as a legitimate account receivable is clearly an asset of the corporation which should be counted for valuation. Accordingly, as to this basis as well, the Trial Court's decision should be reversed.

## ARGUMENT V.

### **THE COURT ERRED IN DETERMINING THAT PATRICIA'S JEWELRY WAS MARITAL PROPERTY.**

The Trial Court concluded that Patricia's personal jewelry, valued at \$35,000, was also a marital asset, even though the jewelry had been a gift from Walter to Patricia during the marriage. (T. Vol. 4, p. 433, 439). The Trial Court concluded that the gift "was basically an interspousal transfer of property pursuant to *Myrick*, the case cited as 739 So. 2d 432." (T. Vol. 4, p. 439).

The Trial Court erred in concluding that the jewelry was marital property pursuant to *Myrick v. Myrick*, 739 So. 2d 432 (Miss. Ct. App. 1999). The Court in *Myrick* dealt with an interspousal gift of the parties' marital home. *Myrick*, 739 So. 2d at 434. The Court in *Myrick* held that such a gift of the homeplace does not transform otherwise marital property into separate property. *Id.*

However, the Supreme Court in *Ferguson* indicated that interspousal gifts of a highly personal nature are separate property of the recipient spouse. *Ferguson*, 639 So. 2d at 929. *Ferguson* noted that impersonal gifts such as stocks or bonds, are more likely to be considered marital property. *Id.*

The Court of Appeals recently addressed the very issue of an interspousal gift of jewelry constituting separate property in *Oswalt v. Oswalt*, No. 2006-CA-01254-COA, 2007 WL 2840359 at \* 5 (Miss. Ct. App. Oct. 2, 2007). In *Oswalt*, the Court of Appeals affirmed a Chancellor's decision that gifts of a diamond ring and a belly button ring were separate property of the donee spouse, due to the personal nature of the items. *Oswalt*, 2007 WL 2840359 at \* 5. (citing *Ferguson*). The Court held that "[e]ven though acquired during the marriage with marital assets, personal gifts of this nature are separate personal property of the donee." *Id.*

This case presents precisely the same issue as *Oswalt*, and is of course completely distinguishable from *Myrick*. Here, the inter-spousal gifts of jewelry to Patricia were manifestly of a personal nature, just as was the jewelry in *Oswalt*. This case did not present an impersonal gift of property (indeed the marital residence) as did *Myrick*.

Accordingly, under the reasoning of *Ferguson* and *Oswalt*, the interspousal gifts of jewelry from Walter to Patricia should have been determined to constitute separate property of Patricia. The Trial Court erred in finding the jewelry to be marital property and this Court should reverse the Trial Court's decision in this regard.

#### **ARGUMENT VI.**

#### **THE COURT ERRED IN FAILING TO DISPOSE OF THE OLD WAVERLY GOLF CLUB AND CAMERON CLUB MEMBERSHIPS AS MARITAL PROPERTY.**

Finally, the Trial Court erred in failing to account for the Old Waverly Golf Club membership and the Cameron Club membership. Testimony at trial established that the Parties acquired membership in the Old Waverly Golf Club and had purchased founding memberships in the "Cameron Club" at Old Waverly during their marriage.<sup>3</sup> (T. Vol. 3, p. 259-60). The Parties paid \$10,000 for the Cameron Club membership. *Id.* Patricia listed the Waverly and Cameron Club memberships as assets on her Rule 8.05 Financial Statement. (Exhibits Vol. 1, Ex. 4).

The Trial Court did not classify the Old Waverly and Cameron Club memberships as either marital or separate property and reached no valuation of these assets. Legions of Mississippi cases hold that a Trial Court commits reversible error by failing to classify assets. *See, e.g., Hopkins v. Hopkins*, 703 So. 2d 849, 850 (Miss. 1997) (failure to mention or classify

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<sup>3</sup> According to the Record, Cameron Club is a club within Waverly Club in which "everybody has kilts and dresses up in kilts and meets twice a year just about." (T. Vol. 3, p. 259).

retirement account required remand); *Reddell v. Reddell*, 696 So. 2d 287 (Miss. 1997) (remanding for consideration of omitted asset); *White v. White*, 868 So. 2d 1054, 1057 (Miss. Ct. App. 2004) (reversing and remanding where Chancellor did not inquire into value of national guard retirement).

There is no question that the Court in this case failed to classify, value or even mention the value of the Old Waverly Golf Club membership and the Cameron Club membership. Accordingly, the Court should thus remand this case for consideration of these assets.

### **CONCLUSION**

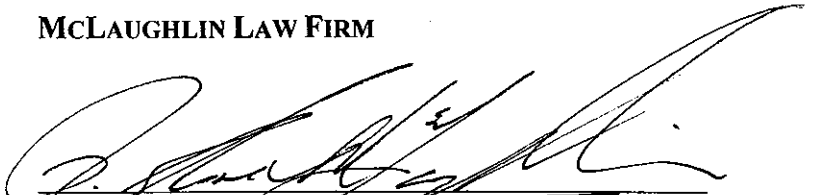
The Trial Court committed reversible error in: 1) concluding that twenty-five percent of NMP was Walter's separate property since it was commingled; 2) valuing any separate interest in NMP as of the date of the temporary order, rather than the date of the marriage; 3) valuing the remainder of NMP as of the date of the temporary order, rather than the date of the divorce; 4) ignoring Walter's indebtedness owed to NMP in valuing the business; 5) finding that Patricia's jewelry was marital property even though it was a personal interspousal gift; and 6) failing to classify or value two marital assets.

Accordingly, for the above and foregoing reasons, Appellant Patricia Fleishhacker requests the Court to reverse the Chancery Court's decision and to remand this matter for further proceedings.

RESPECTFULLY SUBMITTED, this the 4<sup>th</sup> day of June, 2008.

**McLAUGHLIN LAW FIRM**

By:



R. Shane McLaughlin (Miss. Bar No. [REDACTED])

Nicole H. McLaughlin (Miss. Bar No. [REDACTED])

338 North Spring Street Suite 2

P.O. Box 200

Tupelo, Mississippi 38802

Telephone: (662) 840-5042

Facsimile: (662) 840-5043

E-mail: [rsm@mclaughlinlawfirm.com](mailto:rsm@mclaughlinlawfirm.com)

**ATTORNEYS FOR APPELLANT**

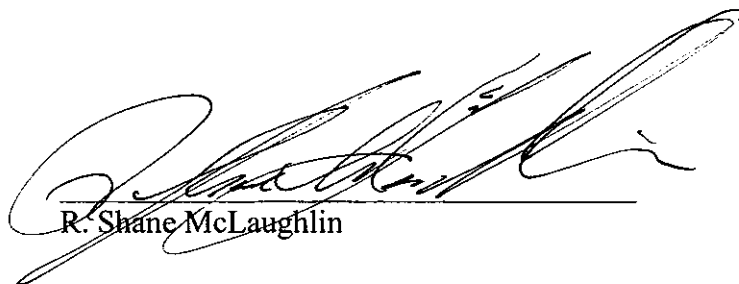
**CERTIFICATE OF SERVICE**

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellant** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

**John Ferrell, Esq.  
J. Deborah Martin, Esq.  
Ferrell & Martin  
P.O. Box 146  
Booneville, MS 38829**

**Hon. Talmadge Littlejohn  
Chancellor  
P.O. Box 869  
New Albany, MS 38652**

This the 4<sup>th</sup> day of June, 2008.

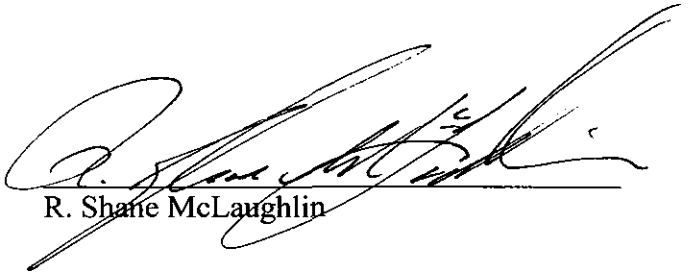
  
R. Shane McLaughlin

**CERTIFICATE OF FILING**

I, R. Shane McLaughlin, attorney for the Appellant in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

**Ms. Betty W. Sephton  
Supreme Court Clerk  
P.O. Box 249  
Jackson, MS 38295-0248**

This, the 4<sup>th</sup> day of June, 2008.

  
R. Shane McLaughlin