

DOCKET NO. 2007-TS-01736

SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JULIUS WILLIAMS, II

APPELLANT

VERSUS

BARBARA WILLIAMS

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

BRIEF OF APPELLEE

ATTORNEY FOR THE APPELLEE BARBARA WILLIAMS

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APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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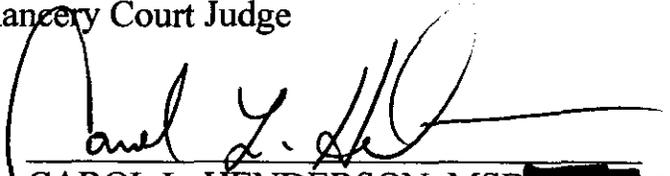
BARBARA WILLIAMS

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel 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, to-wit:

1. Julius Williams, III, the Appellant
2. Herbert J. Stelly, Sr., Attorney for the Appellant
3. Barbara Williams, the Appellee
4. Carol F. Henderson, Attorney for Barbara Williams, the Appellee
5. Honorable Sandy Steckler, Chancery Court Judge



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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF CASES	iii
STATEMENT OF THE ISSUES	iv
STATEMENT OF THE CASE	1
Chancery Court Proceedings	1
Statement of Relevant Facts	3
SUMMARY OF THE ARGUMENT	6
Standard of Review.....	7
Argument	8
The Award of Attorney’s Fees and Expenses to Appellee Was Not Error.....	10
CONCLUSION	12
CERTIFICATE OF SERVICE	14
CERTIFICATE OF FILING	15

TABLE OF CASES AND OTHER AUTHORITIES

Mississippi Case Law

<u>Banks v. Banks</u> , 648 So.2d 1116 (Miss.1994)	9
<u>Bell v. Parker</u> , 563 So.2d 594 (Miss.1990)	7
<u>Creekmore v. Creekmore</u> , 651 So.2d 513 (Miss. 1995)	10, 11
<u>D'Avignon v. D'Avignon</u> , 945 So.2d 401 (2006)	9
<u>Dunn v. Dunn</u> , 609 So.2d 1277 (Miss. 1992)	10, 11
<u>Globe Music Corp. v. Johnson</u> , 84 So.2d 509; 226 Miss. 329 (1956)	9
<u>Ivison v. Ivison</u> , 762 So.2d 329 (Miss.2000)	7
<u>Newsom v. Newsom</u> , 557 So.2d 511 (Miss.1990)	7
<u>Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.</u> , 857 So. 2d 748 (Miss. 2003)	7
<u>Scurlock v. Purser</u> , 2008-MS-A0618.003 (June 17, 2008)	11
<u>West v. West</u> , 2002-IA-O1158-SCT (Miss. 2004)	9

Mississippi Statutory Authority and Rules

Mississippi Code Annotated Section 93-5-7	1
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STATEMENT OF THE ISSUE

- I. The trial court committed no error when it entered its Judgment in which it clarified its May 16, 2006, Judgment and ordered the entry of the Qualified Domestic Relations Order *nunc pro tunc*. There was no modification of the Property Settlement Agreement which was an integral part of the May 2006 Judgment and which specifically provided for the Survivors Benefits as agreed to by the parties.

STATEMENT OF THE CASE

Chancery Court Proceedings

1. Barbara and Julius Williams were married on February 24, 1974. The contested divorce proceedings began in August of 2002 [RD p 2; RE 2]¹ and, after years of filings, hearings and negotiations, the parties entered into a Stipulation of Divorce on March 29, 2006, wherein each party stipulated that a divorce may be granted on the grounds of irreconcilable differences. [R.p.1] The Appellant and the Appellee, together with their respective attorneys, approved this Stipulation.
2. On May 11, 2006, the Chancery Court of Harrison County entered its Judgment Withdrawing Adversarial Pleadings allowing the parties to “withdraw their adversarial pleadings and proceedings and proceed with a divorce on the grounds of Irreconcilable Differences.” Said judgment bears the signatures of the Appellant and the Appellee confirming that they agreed to the form and content of the judgment. [R. p.3]
3. The parties submitted their May 11, 2006, Property Settlement Agreement [R. p.6-13; RE 21-28] and on May 16, 2006, the Williams were divorced on the grounds of irreconcilable differences thus lawfully ending their marriage of thirty-two (32) years. Pursuant to Mississippi Code Annotated Section 93-5-7, the Property Settlement

¹ The following abbreviations are used: R for the Clerk’s Record; RD for the Docket as found in the Clerk’s Record; RE for the Appellee’s Record Excerpts; and, T for the Transcript.

Agreement (agreement) was incorporated into the Judgment of Divorce. [R. p 4-13; RE 19-28]

4. The Property Settlement Agreement contains the **“Survivor Benefit for Wife:”** provision which reads as follows:

It is the agreement and contract of the parties that the Wife **is to have all survivors' benefits otherwise accorded to her by law including, but not limited to,** fifty-five percent (55%) of Husband's survivor annuity, upon his death from Civil Service Retirement System. A QDRO will be entered allowing Wife 50% of Husband's Military Retirement based upon Husband's years of military service during this marriage. A QDRO will be entered allowing Wife 55% of Husband's Survivor Annuity upon his death from Civil Service Retirement System. [R. p 11-12; RE 25-26] (emphasis added)

4. On November 14, 2006, the Appellee filed her Motion to Clarify Judgment and/or For Modification and Other Relief [R p.14-18; RE 29-33] as a direct result of her efforts to verify that the Appellant had taken the necessary steps to comply with the “Survivor Benefit for Wife” provision of the agreement. As evidenced by Exhibit B to her Motion [RE 35-36], the Defense Finance and Accounting Services required clarification of the Judgment/Agreement thus the Appellee filed her Motion seeking an Order which provided the following:

(1.) Clarify the Judgment of Divorce to set out the specific formula to be used pursuant to the provisions of the Uniform Services Former Spouse Protection Act 10 USC Section 1408, (USFSPA) to grant your Plaintiff fifty (50%) percent of the defendant's Military Retirement pay, based upon the number of years of marriage, during the members creditable military service, divided by the number of months of creditable military service, to include any costs of living increases that occur from time to time and further reflecting that the same shall not be in any way effected or reduced by any claim for disability that the Defendant may make.

(2.) Clarify/modify the Judgment of divorce to specifically state that the Plaintiff should be awarded Survivor Spouse Benefit coverage (SBP), with the Defendant taking the necessary steps to secure said coverage naming the Plaintiff, as the sole beneficiary; with the Defendant being prevented from suspending or terminating said coverage.

(3.) Ordering the entry of a Qualified Domestic Relations Order or in the alternative deleting the necessity for the same from said Judgment.

5. On June 27, 2007, the lower court conducted a hearing on the Motion and both your Appellee and the Appellant gave testimony. After hearing the arguments of counsel and the testimony of the parties the chancellor entered a Judgment directing the Appellant to "do any and all things necessary for the Plaintiff, Barbara L. Williams, to receive survivor's benefits and for the entry of the Qualified Domestic Relations Order." [R p 24, para IV; RE 13] The trial court also ordered that the Appellant pay \$1,500 attorney fees incurred by his former wife, plus court costs. [R p 23; RE 12].

5. Feeling aggrieved the Appellant timely filed his Notice of Appeal.

Statement of Relevant Facts

6. As quoted above, the Property Settlement Agreement specifically provides for Survivor Benefits for Wife, your Appellee. "It is the agreement and contract of the parties that the Wife *is to have all survivors' benefits otherwise accorded to her by law including, but not limited to . . .*"

7. Counsel for the Appellant called Barbara Williams as a witness at the June 27, 2007, hearing. During his examination of the Appellant counsel established that Julius

Williams had remarried on May 31, 2006, fifteen (15) days after his divorce was finalized². Julius' attorney further established that Barbara Williams and/or her attorneys³ had made several efforts to obtain the signature of the Appellant as required on the SBP Election Statement for Former Spouse Coverage and/or to file the necessary paperwork so that she would qualify under the SBP, all efforts to no avail thus the need for the Appellee's motion. [T.20-26]

8. At the June 27, 2007, hearing on the Appellee's Motion the Appellant testified that at the time of the divorce he was in the military reserves and that he was medically retired in May of 2007. [T p.41; RE 45] Julius testified further that he remarried on May 31, 2006. [T 41; RE 45] Appellant testified that during the marriage to Barbara, Julius was employed by in a Civil Service position. [T 43; RE 47] The provision for surviving spouses and former spouses of civil service employees is referred to as the Survivor's Annuity. [T 47; RE 51] The military plan for a surviving spouse is referred to as the Survivor's Benefit Plan (SBP). [T 46; RE 50] and the military requires that the military member complete the Survivor Benefit Plan Election Statement or the 2656-1 form designating a beneficiary. [T49-50; RE 53-54]

9. The Appellant testified that he never signed the Qualified Domestic Relations Order as required by the Office of Personnel for the Postal Service. [T 48; RE 52] When

² During his examination of Appellee Barbara Williams counsel for the Appellant asked, "Would you agree with me that he was remarried on May 31, 2006?" [T. 21]

³ At the time of the divorce the Appellee was represented by attorney Laquetta Golden.

Barbara's attorney asked the Appellant on cross-examination about the Survivor Benefit Plan Election Statement the following exchange was had:

- A. Yes, ma'am. I've seen it before.
Q. And what is the title of that particular form?
A. Survivor Benefit Election Statement for Former Spouse Coverage.
Q. All right. And what is the form number?
A. 2656-1.
Q. All right. And was that form forwarded to you by your attorney for signature?
A. Yes, ma'am.
Q. And did you sign that form?
A. No, ma'am.
Q. And do you have any objections to signing - - -

MR. STEELY: Yes he does.

THE COURT: I want to know what he says.

BY MS HENDERSON:

- Q. Do you have any objection to signing this form today?
A. Yes, ma'am.
Q. And tell us why.
A. I didn't sign it then because I hadn't retired. And since I have remarried, therefore, my former spouse by law gets that --- correction, my current spouse, by law, gets that. Correction. So I have an objection to signing that now.
Q. You're refusing at this time to sign that form?
A. The Judge can decree it, but I refuse to sign it.

[T 50-51; RE 54-55]

10. Immediately after the above exchange was had both sides rested and the trial court opined from the bench as follows:

Both sides have rested. Mr. Williams makes it abundantly clear that he has chosen to disregard the Judgment of Divorce and he put his current wife rather than his former wife on the survivor Benefit, which he and Mr. Stelly clearly distinguished for the benefit of the Court between the husband's

survivor annuity from the civil service. Obviously, the order speaks to both of those and he refused to agree to it, or at least to the military retirement. For that reason she is entitled, in addition, to the other relief which was discussed' by me earlier she is entitled to attorney's fees of \$1,500 plus the costs of \$97 and \$50. That will be added and she's awarded a judgment accordingly. It is contempt of court for which I will award sanctions and order him to pay it within 60 days from today.

...

Now, let me finish. He is further ordered to comply with- the order and to do everything that he must do to allow Ms. Barbara Williams to get the survivor Benefit as well as the QDRO. And the order is to be clarified as to the explanation to the agency which handles these for the military to address the number of points that she is entitled to, that is the number of points that he has accumulated during the time frame that he was in the military and married to Barbara Williams wherein she is entitled to 50 percent of those points.

On September 7, 2007, the chancery court judge entered the Judgment memorializing his June 27, 2008, opinion regarding the Property Settlement Agreement. In addition, the court entered the Qualified Domestic Relations Order [R p.26-30; RE 14-18] providing the specifics as required by the Defense Department and the Civil Service Personnel Board.

SUMMARY OF THE ARGUMENT

11. The Appellant's entire argument is based on the fact that the Property Settlement Agreement does not contain the phrase "Survivor Benefit Plan" or the phrase "Survivor Benefit Package". Appellant contends that the Property Settlement Agreement speaks for itself and that the matter before this Court is strictly a contract issue and nothing more.

Your Appellee would agree that the agreement does speak for itself as the necessary language regarding the “survivor benefits” is found in the agreement. The lower court did not err when, after receiving evidence, consideration of the pleadings, argument of counsel and testimony of the parties, it ordered that the Judgment be clarified to provide the particulars as required by the different government agencies tasked with the administration of the military and civil service retirement and survivor funds/benefits.

Standard of Review

12. The Mississippi Supreme Court and the Appellate Court’s “scope of review in domestic relations matters is limited by our familiar substantial evidence/manifest error rule.” *Ivison v. Ivison*, 762 So.2d 329, 333(¶ 10) (Miss.2000). “This Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990). The appellate court is required to respect the findings of fact made by a chancellor supported by credible evidence and not manifestly wrong.” *Newsom v. Newsom*, 557 So.2d 511, 514 (Miss.1990).

13. As the Appellant argues, “[q]uestions concerning the construction and interpretation of contracts are questions of law. *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748 2001-CA-01574-SCT (14) (Miss. 2003). Questions of law are reviewed de novo. Id.

Argument

14. The provision of the Property Settlement Agreement entitled “Survivor Benefit for Wife:” does award the Appellee, Barbara Williams “all survivor benefits accorded to her by law including, but not limited to ...”

It is the agreement and contract of the parties that the Wife *is to have all survivors' benefits otherwise accorded to her by law including, but not limited to*, fifty-five percent (55%) of Husband's survivor annuity, upon his death from Civil Service Retirement System. A QDRO will be entered allowing Wife 50% of Husband's Military Retirement based upon Husband's years of military service during this marriage. A QDRO will be entered allowing Wife 55% of Husband's Survivor Annuity upon his death from Civil Service Retirement System. [R. p 11-12; RE 25-26] (emphasis added)

The phrase “including, but not limited to” means that the things (civil service and military retirement) named are part of something larger (survivor benefits), and the larger thing may also have other parts as long as those other parts are accorded to the Appellee, the Appellant's wife at the time the Property Settlement Agreement was entered, by law. At the time the agreement was executed the Appellee was the wife and the plan language of the agreement/contract provides that she “is to have all survivor benefits.” (emphasis added)

15. Appellant argues that an election under the SBP prevents the military member from designating a new wife or any other former spouse(s) as additional beneficiaries. As a result, a retired service member that was divorced from “beneficing spouse” would receive reduced benefits and would be precluded from providing survivor benefits to his

new wife/widow. Appellant contends that these factors are of "such significance as to expect specific mention of the Survivor Benefit Plan if such were to be included in a property settlement." However, as this appeal illustrates, the importance of the exclusion of the SBP is significant to the Appellant. As such, if it were the intent of the Appellant and part of the agreement of the parties that the SBP not be a part of the "all survivors' benefits otherwise accorded to her by law including, but not limited to," then one would assume that the Appellant would have insisted an exclusionary clause be included in the Property Settlement Agreement specifically excluding the SBP.

16. Your Appellee agrees that the Property Settlement Agreement is a contractual obligation whose provisions must be interpreted by courts as any other contract. West v. West, 2002-IA-OI158-SCT (Miss. 2004). However, the Appellant overlooks a well-established principle of contract construction. "[V]ague or ambiguous terms are always construed more strongly against the party drafting the agreement." D'Avignon v. D'Avignon, 945 So.2d 401 (2006). (Citing Banks v. Banks, 648 So.2d 1116, 1121 (Miss.1994); Globe Music Corp. v. Johnson, 226 Miss. 329, 334, 84 So.2d 509, 511 (1956)). As page 6 of the Property Settlement Agreement clearly reflects, Appellant's counsel prepared the agreement. [R p.11; RE 26] Thus, if the language of the "Survivor Benefits to Wife" is vague or ambiguous or too broad or does not exclude the SBP, the agreement's constructions must be construed more strongly against Julius.

The Award of Attorney's Fees and Expenses to the Appellee Was Not Error

17. Appellant argues that Appellee Barbara Williams was not successful in obtaining the relief as requested; however, nothing could be further from the truth. Because Barbara Williams was successful, the Appellant appeals the rulings of the lower court. Not only was the Appellee successful in establishing that she was entitled to the clarification of the Judgment, Appellee also successfully showed that Julius William's had no intention of complying with the "Survivor Benefits to Wife" provision of the Judgment/Property Settlement Agreement as prepared by his attorney. Just fifteen (15) days after the divorce was granted Julius remarried. He never intended for Barbara Williams to be his "surviving wife", as he testified at the hearing. He had not retired and he was involved with someone else, someone that he married only fifteen (15) days after the entry of the Judgment of Divorce.

18. Appellant ignores the fact that it was established at the hearing on the Appellee's motion that the Appellant refused to fulfill his obligations as set forth in the Property Settlement Agreement.

19. "The award of attorney fees in divorce cases is left to the discretion of the chancellor, assuming he follows the appropriate standards." *Creekmore v. Creekmore*, 651 So. 2d 513, 520 (Miss. 1995). Unless the chancellor abused his discretion or is manifestly wrong, his decision regarding attorney's fees will not be disturbed on appeal. *Dunn v. Dunn*, 609 So. 2d 1277, 1287 (Miss. 1992). . During the June 2007 hearing, over the

objections of counsel for the Appellant, Barbara's counsel questioned her about her earnings and her monthly obligations and financial situation. The record made in the lower court was very clear. Appellee had to borrow the money to pay the legal fee associated with the filing of the motion which resulted in the Judgment that is the subject of this appeal. Appellee established her inability to pay her attorney's fee and further proved that the fee was reasonable and required. [T 27-32]

20. The Appellant's failure to comply with all provisions of the Property Settlement Agreement necessitated the filing of the Motion which is the subject of this appeal and which required the Appellee to seek further order of the chancery court. "Attorney fees are not generally awarded unless the party requesting such fees has established the inability to pay." *Id.* "The fee should be fair and should only compensate for services actually rendered after it has been determined that the legal work charged for was reasonably required and necessary." *Scurlock v. Purser*, 2008-MS-A0618.003 (June 17, 2008); (Citing *Creekmore, Id.*; *Dunn, Id.*)

21. Appellant has further ignored the fact that the Qualified Domestic Relations Order was entered on September 7, 2007, the same date the Judgment clarifying the Judgment of Divorce was entered of record in this case in response to Barbara William's motion. The May 11, 2006, Property Settlement Agreement incorporated in the May 16, 2006, Judgment of Divorce specifically provided the following:

A QDRO will be entered allowing Wife 50% of Husband's Military Retirement based upon Husband's years of military service during this

marriage. A QDRO will be entered allowing Wife 55% of Husband's Survivor Annuity upon his death from Civil Service Retirement System.

However, the Appellee could not get the Appellant to cooperate as Julius confirmed during his testimony at the June 2007 hearing.

A. ... Tell me whether or not the Office of Personnel is requiring that she file some document to receive it upon your death?

A. It's saying that in order for you to get it you have to file a qualified domestic order.

Q. Did you ever enter into a qualified, did you ever sign or agree to a qualified domestic relations order?

A. No. No, ma'am.

Q. All right. So she need that in order to get any type of Survivor Benefits at the time of your death from the Civil Service; is that correct?

A. That's correct, ma'am.

CONCLUSION

22. The findings by the chancery court judge at the conclusion of the June 2007 hearing and the findings in his well-reasoned Judgment clarifying the Judgment of Divorce requiring the entry of documents provided for in the Property Settlement Agreement are correct; are supported by not only substantial, but overwhelming evidence; were not manifestly wrong or clearly erroneous; no erroneous legal standard was applied; and, the lower court did not abuse his discretion.

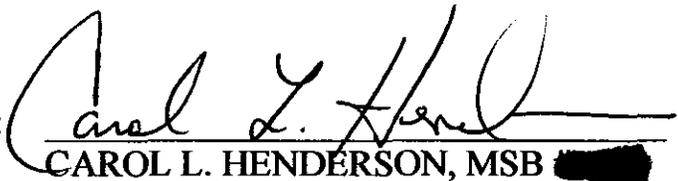
23. Additionally, the disputed language contained in the "Survivor Benefits to Wife" provision of the Property Settlement Agreement prepared by Appellant's counsel, if found to be too vague or ambiguous or broad and which does not specifically exclude the SBP must be construed more strongly against the Appellant, Julius Williams.

24. The Appellee's attorney fees were both necessitated by the inactions and actions of Appellant and were reasonable. There is ample evidence in the record that the Appellee is financially unable to afford the fees, thus the chancery court's award of attorney's fee to the Appellee was appropriate and should be affirmed.

25. The Judgments of the chancery court should be affirmed and this appeal dismissed and the Appellee awarded all costs incurred as a result of this appeal to include her attorney's fee.

RESPECTFULLY SUBMITTED, this the 19th day of August, 2008.

BARBARA WILLIAMS, APPELLEE

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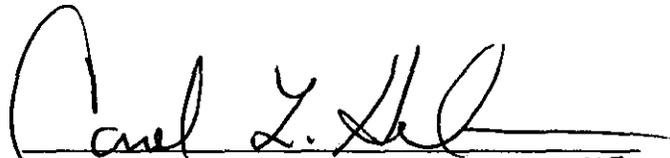
24. The Appellee's attorney fees were both necessitated by the inactions and actions of Appellant and were reasonable. There is ample evidence in the record that the Appellee is financially unable to afford the fees, thus the chancery court's award of attorney's fee to the Appellee was appropriate and should be affirmed.

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BARBARA WILLIAMS, APPELLEE

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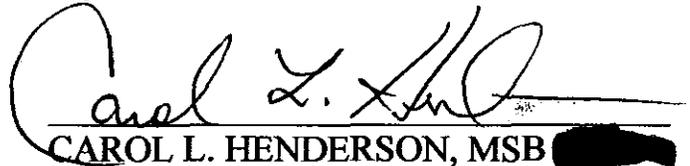
CERTIFICATE OF SERVICE

I, CAROL L. HENDERSON., do hereby certify that I have this day mailed, United States mail, first class postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Herbert J. Stelly, Jr.
P.O. Box 1206
Gulfport, MS 39502

Honorable Sanford R. Steckler
Harrison County Chancery Court Judge
P. O. Box 486
Biloxi, MS 39533-0486

So certified this the 19th day of August, 2008.



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CERTIFICATE OF SERVICE

I, CAROL L. HENDERSON., do hereby certify that I have this day mailed, United States mail, first class postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

Herbert J. Stelly, Jr.
P.O. Box 1204
Gulfport, MS 39502

Honorable Sanford R. Steckler
Harrison County Chancery Court Judge
P. O. Box 659
Gulfport, MS 39502

So certified this the 19th day of August, 2008.


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CERTIFICATE OF FILING

I, CAROL L. HENDERSON., attorney for the Appellee, Barbara Williams, do hereby certify that I have this day forwarded for filing the original and three (3) copies of the Brief of Appellee and Appellee's Record Excerpts to Betty Sephton, Clerk of the Mississippi Supreme Court and Court of Appeals at her usual mailing address of Post Office Box 249, Jackson, Mississippi, 39205-0249 via United States mail, first class postage prepaid.

So certified this the 19th day of August, 2008.



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