

2009-CA-00885 COAT

IN THE SUPREME COURT OF MISSISSIPPI

BRIAN LAYNE PEARSON

APPELLANT

VERSUS

NO.: 2009-CA-00885

TAMMY ELIZABETH PEARSON

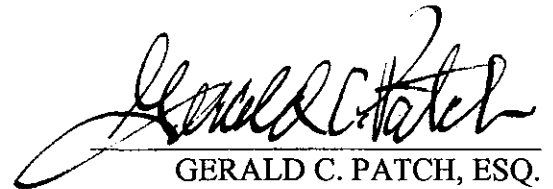
APPELLEE

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. Brian Layne Pearson  
Appellant
2. Tammy Elizabeth Pearson  
Appellee
3. Michael Joseph Pearson  
356 Granger Street  
Blossburg, Pennsylvania
4. Stephen Edgar Pearson  
2154 FM 2583  
Bowie, Texas 76230
5. Lockheed Martin Corporation QDRO Department  
Daniel Tucker  
400 Atrium Drive  
5<sup>th</sup> Floor South  
Somerset, New Jersey 08873-4162
6. Honorable Sebe Dale, Jr./Honorable Dawn Beam  
250 Broad Street, Suite 12  
Columbia, MS 39429
7. Gerald C. Patch of McDonald & Patch, PLLC  
Attorney of record for Brian Layne Pearson
8. Tara Kellar Tebo of McDonald & Patch, PLLC  
Attorney of record for Brian Layne Pearson

9. Nancy Steen of Adelman & Steen, LLP  
Attorney of record for Tammy Elizabeth Pearson
10. Joseph C. Stewart  
Post Office Drawer 1076  
Picayune, Mississippi 39466
11. James L. Gray  
Post Office Box 1682  
Picayune, Mississippi 39466

  
GERALD C. PATCH, ESQ.  
TARA KELLAR TEBO, ESQ.

**MCDONALD & PATCH, PLLC**  
124 Kirkwood Street  
Post Office Box 460  
Picayune, Mississippi 39466  
Telephone: (601) 749-7488  
Facsimile: (601) 749-7486

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## STATEMENT OF THE ISSUES

1. The Chancellor erred by not following the classifications given in *Hemsley*<sup>1</sup> when determining what portion of a mixed asset, specifically the Husband's retirement account, is marital.
2. The Chancellor erred in determining the value of the Wife's interest in the Husband's retirement account with Lockheed Martin. The Chancellor determined a valuation date at the trial that was an appropriate date, but the Chancellor failed to use the actual value of the account on that valuation date when determining the percentage of the account that the Wife should be awarded. The Chancellor failed to leave the trial record open for clarification of the correct value and/or failed to reopen the trial court record for the proper valuation to be made either by additional documentation or an expert witness.<sup>2</sup> This matter should be reversed and remanded as provided for in *Arthur*<sup>3</sup> for a proper determination of the value of the Lockheed Martin retirement pension account that was accumulated during the marriage as of March 8, 2003.
3. The Chancellor erred entering a Qualified Domestic Relations Ordered distribution of the retirement funds with Lockheed Martin. By relying upon the improper value of the account as of March 8, 2003, the Chancellor erroneously awarded Wife a percentage of the Husband's retirement account that was non-marital as there were contributions to the account made by Husband after March 8, 2003, the demarcation date determined by the Court. The Chancellor in reliance upon the incorrect value of the account, by Qualified Domestic Relations Order, not only awarded distribution to the Wife funds that were non-marital, but also funds that were not yet put into the account. The valuation that was used

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<sup>1</sup> *Hemsley v. Hemsley*, 639 So. 2d 909, 913 (Miss. 1994).

<sup>2</sup> *Ferguson v. Ferguson*, 639 So. 2d 921, 929 (Miss. 1994).

<sup>3</sup> *Arthur v. Arthur*, 691 So. 2d 997, 1003-04 (Miss. 1997).

was an estimated value of what the value of the account would be in the future, with the assumption that the Husband would continue paying into the account until January 31, 2012, long after the demarcation date of March 8, 2003. The Chancellor's award of a percentage of the future value of the account accumulated after the demarcation date selected by the Chancellor clearly falls outside the scope of marital assets under *Hemsley*.<sup>4</sup>

### **STATEMENT OF THE CASE**

Brian and Tammy Pearson were married to one another on or about October 13, 1984, in Pearl River County, Mississippi where they resided together as husband and wife until their separation on or about January 7, 2003. During their marriage to one another, the parties had one son, Stephen Edgar Pearson, born September 3, 1988. Also during the parties' marriage, they adopted one son, Michael Joseph Pearson, born April 25, 1981.

Mrs. Pearson filed her Complaint for divorce on or about January 22, 2003, alleging Habitual Cruel and Inhuman Treatment as her grounds for divorce; or in the alternative, Irreconcilable Differences. She sought custody, child support, alimony, an equitable division of marital property and debt, and attorney's fees. Mr. Pearson filed an Answer to Complaint for Divorce on or about February 4, 2003, and in his Counter-Complaint for Divorce he sought a divorce on the grounds of Adultery, or in the alternative Irreconcilable Differences. He sought custody, child support, and an equitable distribution of property. Along with his Answer and Counter-Complaint for Divorce, Mr. Pearson filed a Motion for Temporary Relief seeking temporary custody, child support, and a use of certain marital property.

A Temporary Order was entered on or about March 19, 2003, giving the parties joint physical and legal custody of the minor child, Stephen Edgar Pearson; waiving the necessity of

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<sup>4</sup> *Hemsley* at 913.

temporary child support; ordering Mr. Pearson to pay Mrs. Pearson temporary spousal support in the amount of \$250.00 a month beginning March 1, 2003; ordering Mr. Pearson to be responsible for all marital debts incurred by the parties through December 28, 2002; ordering the parties to attend parenting classes; and further giving Mr. Pearson temporary use of the marital home.

A Notice of Trial Setting was filed on or about September 3, 2003, setting the matter for trial on December 17, 2003, at 9:30 a.m. in the Chancery Court of Pearl River County, Poplarville, Mississippi. The parties exchanged discovery requests and subpoenaed witnesses. The case was then reset for trial by Notice of Trial Setting filed on or about March 1, 2004, setting the matter for trial on June 30, 2004, in the Chancery Court of Pearl River County, Poplarville, Mississippi.

The parties filed a Joint Pre-Trial Order on or about June 30, 2004. A Joint Motion to Dismiss Fault Grounds was filed on or about June 30, 2004. An Order Dismissing Fault Grounds was filed on or about June 30, 2004.

The parties signed a Consent to Divorce on the grounds of Irreconcilable Differences which was filed on or about June 30, 2004 and agreed to permit the Court to determine the following issues:

1. Determination of marital property, its valuations and an equitable division;
2. Alimony;
3. Determination of each parties' separate indebtedness;
4. Determination of marital indebtedness and an equitable division thereof;
5. Attorney's fees;
6. Court costs.

A copy of the Bench Ruling for June 30, 2004, was transcribed for the attorney of Mr. Pearson and filed with the Chancery Court of Pearl River County on or about July 23, 2004. The

Chancellor awarded Mrs. Pearson 33% of the value of the Lockheed Martin retirement pension account as of March 8, 2003. The Court then stated that the value would be based upon the Pension Estimator dated June 23, 2003, but did not state that it would use the total values of the estimate as of January 31, 2003.

A Final Judgment of Divorce was entered on or about August 18, 2004, which awarded Mrs. Pearson 33% of the Lockheed Martin retirement/pension account through the date of March 8, 2003. It awarded Mrs. Pearson temporary or rehabilitative alimony in the amount of \$800.00 a month for 30 months as a nonmodifiable award of alimony that would inure to the benefit of Mrs. Pearson's estate, and otherwise divided the property of the parties.

A Qualified Domestic Relations Order was entered and filed on or about June 26, 2007 without knowledge nor approval of Mr. Pearson's counsel, which purported to awarded Mrs. Pearson 33% of the Lockheed Martin retirement pension account valued as of the date of March 8, 2003, but in the amount of \$85,296.82, which was based upon the total estimated value through January 31, 2012. On or about June 29, 2007, Mr. Pearson timely filed a Motion to Reconsider Qualified Domestic Relations Order. Said Motion asserted to the Court that the value of \$85,296.82 was taken from a trial exhibit which was an estimated value of the account as of January 31, 2012, assuming Mr. Pearson maintained employment with the company through that date and continued contributing to that account through that date. The award of \$85,296.82 was not based on the amount actually awarded which was 33% of the value of the account as of March 8, 2003, a figure which was not available to the parties or the court at trial, but could have been ascertained or placed in the Qualified Domestic Relations Order to be calculated by an expert at Lockheed Martin QDRO Department such as Daniel Tucker who provided valuations to the Court for the hearing on the Motion to Reconsider which was filed by Mr. Pearson and subsequently denied by the Chancery Court. Though the court had stated the value would be



based upon the Pension Estimator, it had not said it would take the total amount of the estimate that would be earned through January 31, 2012.

On or about July 31, 2007, the court entered a Stipulation to Substitute Counsel which substituted Gerald Patch as the attorney for Mr. Pearson in the place of James Gray, Esq. After several preliminary conferences with the Court, on or about December 15, 2008, Mr. Pearson filed a Motion for Pre-Trial Conference, seeking to inquire as to whether or not the Court would allow introduction of the letter into evidence stating the actual value of the Lockheed Martin account as of March 8, 2003, was \$595.86 per month, payable in the form of a of a Ten Year Certain and For Life Annuity at the earliest retirement age under the Plan, age 55 (01/0102012); or whether the Court would insist upon having the individual who did the calculations appear personally and testify.

Though at prior hearings or conferences on the matter of the valuation the Court had stated that someone would need to show him what the value of the retirement account was on March 8, 2003; at the pre-trial conference the Court decided it was going to deny Mr. Pearson's Motion to Reconsider Qualified Domestic Relations Order. Otherwise the Court was of the opinion it would have to make a new determination as to an equitable distribution of marital assets and debts. The Court said it would go by Exhibit "21" and award the Wife 33% of the figure on the Exhibit, which awarded the Wife 33% of the Husband's estimated retirement through January 31, 2012.

The amount estimated for January 31, 2012, was never even acquired as Mr. Pearson's employer lost its space contract and laid off its employees in 2010. Mr. Pearson was laid off on October 30, 2010. Therefore, not only did the Court give Wife a percentage of the retirement account which should be classified as non-marital; the Court awarded funds to Mr. Pearson which never came into existence because Mr. Pearson lost employment with the company prior

to January 31, 2012.

### **SUMMARY OF THE ARGUMENT**

Mr. Pearson is appealing the classification, valuation, and distribution of his Lockheed Martin retirement account. The Chancellor awarded Mrs. Pearson 33% of the pension/retirement plan based on a ten year guarantee per the record of the trial court. Mr. Pearson is not disputing that percentage nor is he disputing that it should be based on a ten year guarantee.

The Final Judgment of Divorce filed on or about August 18, 2004, awarded Mrs. Pearson 33% of the Lockheed Martin pension/retirement plan for the years of Mr. Pearson's employment with Lockheed Martin through March 8, 2003. Mr. Pearson has no objection to March 8, 2003 being the valuation date or the date of demarcation.

The Final Judgment of Divorce stated that the value of the pension would be based upon the Pension Estimator dated June 23, 2003. Said Pension Estimator was introduced into evidence at trial as Exhibit "21" per the trial court record. Mr. Pearson objects to the court using the total values on the Pension Estimator as the estimator clearly on its face predicts a total future value assuming Mr. Pearson continued working and paying into the pension account through January 31, 2012, and not the value as of March 8, 2003. He objects to this valuation as of January 31, 2012, as an improper classification of the retirement account as a marital asset and contrary to the demarcation date established by the Court. The pension/retirement asset is a mixed asset. Mr. Pearson has no objection with the classification of the asset being marital through March 8, 2003, but would assert that anything that he paid into the account after March 8, 2003, would be his own separate property. The trial court failed to enforce the demarcation date and instead valued the retirement based on a future date that was determined by assuming that Mr. Pearson would be able to continue working for Lockheed Martin and continue paying into that account until January 31, 2012. Mr. Pearson was laid off from that job October 30, 2010, so not only was

it improperly valued but it was also based on impossibility as he was not able to maintain that employment for that entire length of time.

Mr. Pearson would also assert that not only was the asset improperly classified and valued, but it was also improperly distributed as the Chancellor awarded Mrs. Pearson 33% of the pension as of March 8, 2003, which Mr. Pearson does not dispute. However, in the Qualified Domestic Relations Order entered on or about June 26, 2007, the Chancellor guarantees Mrs. Pearson a minimum of \$85,296.82 which is based upon the total amount Mr. Pearson would have earned had he stayed employed and contributed to the plan through January 31, 2012.

Mr. Pearson would assert that the Chancellor made clear error by failing to require or to allow the parties to supplement the record with the necessary information to properly value the pension/retirement account as of the date he determined to be the date of demarcation, and that this matter should be remanded for a clear valuation of the retirement pension account as of March 8, 2003, and award Mrs. Pearson 33% of that amount. The exhibit clearly showed on its face that the total estimated value was, based upon the assumption Mr. Pearson would be employed through January 31, 201, as opposed to calculating a value based upon said Pension Estimator, but calculated as to the actual value on March 8, 2003.

## **ARGUMENT**

### **I. GENERAL STANDARD OF REVIEW**

Chancellors have broad discretion in determining equity and the division of marital assets based on the principle of fairness.<sup>5</sup> “Our scope of review in domestic relations matters is limited under the familiar rule that this Court will not disturb a chancellor’s findings unless manifestly

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<sup>5</sup> *Ferguson v. Ferguson*, 639 So. 2d 921, 927 (Miss. 1994).

wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard.”<sup>6</sup>

## II. THE CHANCELLOR ERRED IN MAKING THE CLASSIFICATION OF MARITAL ASSETS

“The chancery court is authorized to call for an equitable division of jointly accumulated property and in doing so to look behind the formal state of title.”<sup>7</sup> Although Mississippi is not a community property state, the Court makes equitable divisions of property acquired during the marriage in an effort to be fair to both contributing spouses.<sup>8</sup> “Assets acquired or accumulated during the course of a marriage are subject to equitable division unless it can be shown by proof that such assets are attributable to one of the parties’ separate estates prior to the marriage or outside the marriage.”<sup>9</sup>

Mr. Pearson would assert that the Court should rely upon *Hemsley* in determining what portion of the Lockheed Martin pension/retirement plan is marital. “We define marital property for the purpose of divorce as being any and all property acquired or accumulated during the marriage. Assets so acquired or accumulated during the course of the marriage are marital assets and are subject to an equitable distribution by the chancellor.”<sup>10</sup>

In *Hensarling*, it was determined that it is within the discretion of the chancellor to determine a date of demarcation. It further found that any monies paid into the account by Mr. Hensarling after the date of demarcation was his separate property and any interest earned on that part which was classified as non-marital would also be considered his separate property. The

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<sup>6</sup> *Hensarling v. Hensarling*, 824 So. 2d 583, 586 (Miss. 2002) (quoting *Johnson v. Johnson*, 650 So. 2d 1281, 1285 (Miss. 1994)).

<sup>7</sup> *Hensarling*, 824 So. 2d 583, 590, See, e.g., *Jones v. Jones*, 532 So. 2d 574, 579-81 (Miss. 1988); *Regan v. Regan*, 507 So. 2d 54, 56 (Miss. 1987); *Watts v. Watts*, 466 So. 2d 889, 890-91 (Miss. 1985).

<sup>8</sup> *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994).

<sup>9</sup> *Id.* at <sup>9</sup> 914.

<sup>10</sup> *Id.* at 915.

Supreme Court remanded the case to the trial court for a proper determination of the value of the account as of the valuation date and also the amount of the account which would be considered separate property.<sup>11</sup>

In *Godwin*, the Court found that the date of the parties' separation was the demarcation date and that all property acquired by either party after that date was their own separate property. The Court found that the deferred compensation plan that Mr. Godwin acquired after the date of demarcation was Mr. Godwin's separate property. The Court found that, "Assets acquired after an order for separate maintenance should be considered the separate property of the parties, absent a showing of either (1) contribution to the acquisition of the asset by the other spouse as contemplated in our decisions in *Ferguson v. Ferguson*, 639 So. 2d 921, 928-29 (Miss. 1994), and *Magee v. Magee*, 661 So. 2d 1117, 1123 (Miss. 1995) or, (2) acquisition of the asset through the use of marital property."<sup>12</sup>

The valuation date that was provided in the Final Judgment of Divorce and the Qualified Domestic Relations Order was March 8, 2003. Mr. Pearson would agree that all monies paid into the account through that date are marital property. In relying on *Hemsley*, *Hensarling*, and *Godwin*, however, Mr. Pearson would assert that any funds paid into the account after March 8, 2003, should be classified by the court as his separate property and Mrs. Pearson should not be entitled to any portion of the funds that he contributed to the account after March 8, 2003.

### **III. THE CHANCELLOR ERRED IN VALUING THE MARITAL INTEREST IN THE LOCKHEED MARTIN RETIREMENT ACCOUNT**

In *Ferguson*, the Court determined that a pension plan with Bell South was a mixed marital asset and awarded Mrs. Ferguson one half of the value of the pension as of October 24,

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<sup>11</sup> *Hensarling*, 824 So. 2d 583, 591-92.

<sup>12</sup> *Godwin v. Godwin*, 758 So. 2d 384, 386 (Miss. 1999).

1991, and found that future increases into the account made after that date would be Mr. Ferguson's separate property.<sup>13</sup> The Court further found that "...expert testimony may be essential to establish valuation sufficient to equitably divide property..."<sup>14</sup> In the case at bar, the chancellor stated on the record that the value of the Lockheed Martin account was not clear from the evidence and that the parties failed to provide an expert witness to clarify that valuation.

In *Hensarling*, the Court found that the valuation date or date of demarcation is within the discretion of the Chancellor.<sup>15</sup> Mr. Pearson has no objection to the valuation date of March 8, 2003, which was ordered in the Final Judgment of Divorce and subsequently in the Qualified Domestic Relations Order, but instead would assert that the actual value of the retirement/pension account on March 8, 2003, should be determined for the purpose of equitable distribution, and that he should have been allowed to reopen the trial court record to show by expert testimony the valuation of the retirement/pension plan as of the date of demarcation determined by the trial Court after the trial. Prior to the Court's ruling after the trial, the Husband had no knowledge of the date of demarcation that would be determined by the Court. The husband should have then been allowed to show the value as of the date decided by the Court.

*Hensarling* further found that interest accruing on the portion of the asset which was considered marital should be also considered marital and that interest accruing on the portion classified as separate property should also be separate property. The Court remanded the matter to the trial court for a determination of the valuation of the portion of the asset which was marital and the portion of the asset which was separate.<sup>16</sup>

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<sup>13</sup> *Ferguson* at 933.

<sup>14</sup> *Id.* At 929.

<sup>15</sup> *Hensarling* at 591.

<sup>16</sup> *Id.* At 591-592.

In *Arthur*, the Court determined that the retirement funds at issue were a mixed asset with both marital and non-marital funds in the account as the entire asset was not “acquired or accumulated during the marriage”.<sup>17</sup> The Court finding that there was not sufficient evidence presented at trial to determine the value of the marital portion of the asset and the value of the separate portion of the asset, reversed and remanded the matter for the determination of the values for a property equitable distribution of the asset.<sup>18</sup>

In reliance on *Ferguson*, *Hensarling*, *Hemsley*, and *Arthur*, Mr. Pearson would assert that this matter should be reversed and remanded for a proper valuation of the Lockheed Martin retirement/pension account as of March 8, 2003, and that the record be opened to allow additional evidence to prove the value as of March 8, 2003, whether by expert witness or documentation, or both, and award Mrs. Pearson 33% of the value of the account as of the date of March 8, 2003.

#### **IV. THE CHANCELLOR ERRED IN THE EQUITABLE DISTRIBUTION OF THE LOCKHEED MARTIN RETIREMENT ACCOUNT**

In the case at bar, the Chancellor awarded Mrs. Pearson 33% of the Lockheed Martin, a.k.a. Martin Marietta, retirement/pension account on the record. In the Final Judgment of Divorce and in the Qualified Domestic Relations Order the court determined that Mrs. Pearson was entitled to 33% of the account through March 8, 2003, which based on the earlier referenced case law would show that the asset was determined to be marital through March 8, 2003, and anything contributed to that account after that date would be Mr. Pearson’s separate property.

Mr. Pearson is not appealing the percentage of which the Chancellor awarded Mrs. Pearson as an equitable interest. He is also not appealing the valuation date or the date of

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<sup>17</sup> *Arthur v. Arthur*, 691 So. 2d 991, 1003 (Miss. 1997) (quoting *Hemsley* at 915).

<sup>18</sup> *Id.* At 1003-1004.

demarcation. The primary issue is the valuation of the asset as of the date of March 8, 2003, as has been herein discussed. Mr. Pearson would further show that the chancellor erred by wrongfully distributing to Mrs. Pearson in the QDRO a 33% interest in the portion of the asset that was his separate property by relying upon the total amount shown on the Pension Estimator, which was based on the assumption that Mr. Pearson would continue working for that company and continue contributing to that account through January 31, 2012.

Mr. Pearson would assert that the trial court should have reopened the record to allow expert testimony and further documentation to correct the improper valuation and distribution of the account. In *Hemsley*, the court found that an equitable division of property acquired during the marriage should be divided between the parties.<sup>19</sup> In *Prescott*, the court determined that the wife was only entitled to the portion of the severance package which was accumulated during the marriage.<sup>20</sup> It further found, that only those retirement funds acquired during the marriage should be classified as marital property and equitably distributed.<sup>21</sup>

Therefore, in reliance on *Hemsley* and *Prescott*, Mr. Pearson would assert that Mrs. Pearson has no right to the contributions that he made to the account after March 8, 2003, and that the Chancellor improperly relied on the January 31, 2012, a projected total valuation of the account for a future date, when awarding Mrs. Pearson a dollar amount, and instead should have required or allowed the parties to provide further evidence to the court for a proper determination of the valuation so that the court could properly and equitably distribute that portion of the asset to the parties that was marital.

### CONCLUSION

This Court should reverse and remand this case to the trial court for a proper valuation of

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<sup>19</sup> *Hemsley* at 914.

<sup>20</sup> *Prescott v. Prescott*, 736 So. 2d 409, 412 (Miss. 1999).

<sup>21</sup> *Id.* at 413.



the Lockheed Martin retirement/pension account as of March 8, 2003. It is improper for Mrs. Pearson to have any portion of the retirement account after the valuation date of March 8, 2003, as funds contributed after that date are the separate property of Mr. Pearson. Once the account is properly valued as of March 8, 2003, the Court should determine what amount constitutes her 33% marital interest in said account and distribute that account per QDRO accordingly.

The Court should award Mr. Pearson the remaining value of the account and contributions after March 8, 2003, as his separate interest in the asset.

**CERTIFICATE OF SERVICE**

I, Gerald C. Patch and Tara Kellar Tebo, counsel for the Appellant, do hereby certify that I have this day served by United States Mail Postage Prepaid a true and correct copy of the above and foregoing Brief of the Appellant, as follows:

Honorable Dawn Beam  
250 Broad Street  
Room 12  
Columbia, Mississippi 39429

Nancy Steen  
Adelman & Steen, LLP  
Post Office Box 368  
Hattiesburg, Mississippi 39403-0368

James Gray  
Attorney at Law James Gray  
Post Office Box 1682  
Picayune, Mississippi 39466

Joseph C. Stewart  
Williams, Smith & Stockstill, PLLC  
Post Office Box 1076  
Picayune, Mississippi 39466

THIS, the 23<sup>rd</sup> day of August, 2012.

  
GERALD C. PATCH

  
TARA KELLAR TEBO