UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Kenneth E. Andersen, and Dell D. Holm, on behalf of themselves and all others similarly situated,

and

William K. Bulmer, II, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

The County of Becker, Minnesota, Tim Gordon, in his capacity as Sheriff of Becker County, and Joseph H. McArthur, in his capacity as Captain in the Becker County Sheriff's Department,

Defendants.

Case No. 08-CV-5687 ADM/RLE

ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

COME NOW defendants, and for their Joint and Individual Answer to plaintiffs' First Amended Complaint, state and allege as follows:

1.

Unless hereafter admitted, qualified or otherwise answered, these defendants deny each and every thing, matter and particular alleged in plaintiffs' First Amended Complaint or otherwise.

2.

These answering defendants affirmatively allege plaintiffs' class allegations fail to meet the four prerequisites of Fed. R. Civ. P. 23.01(a)-(d). Furthermore, the plaintiffs' class allegation fails to satisfy the qualifications required under Fed. R. Civ. P. 23(b)(3).

3.

These answering defendants deny there is an unconstitutional policy, custom and/or practice of improperly recording privileged and confidential telephone calls between attorneys/attorneys' agents and detainees/inmates, improperly informing attorneys/attorneys' agents and detainees/inmates telephone calls are not reecorded, failure to inform attorneys/attorneys' agents and detainees/inmates of a procedure by which attorneys' landline telephone numbers may be placed on a "Do Not Record" list or the fact that it refuses to place cellular phone numbers of attorneys on the "Do Not Record" list. These answering defendants further state it was clearly posted in the jail that, "ALL PHONE CALLS MAY BE MONITORED OR RECORDED." Additionally, for safety reasons, cell phone numbers cannot be placed on the "Do Not Record" list.

4.

These answering defendants admit paragraphs 6, 7 and 8 of plaintiffs' First Amended Complaint, and further admit Becker County is a political entity and Sheriff Tim Gordon is the elected official responsible for the Sheriff's Department pursuant to Minnesota Statutes and all of the actions taken by Sheriff Gordon were in his official capacity as Sheriff for the County of Becker. These defendants further admit all of the actions taken by Becker County Captain Joseph McArthur were in his official capacity.

5.

These answering defendants deny the allegations contained in paragraphs 16, 20, 25, 26, 50, 53, 62, 63, 64, 65 and 66 of plaintiffs' First Amended Complaint that neither Andersen, Holm, nor their attorneys were informed of a process to request a confidential attorney/client telephone call.

6.

These answering defendants alleged they contract with Reliance Telephone, Inc. to install and operate an inmate telephone.

7.

These answering defendants admit on December 3, 2007, a request was made for the office and cellular telephone numbers of Durkin, Bulmer, and Fladmark and other numbers to be placed on a "Do Not Record" list. The numbers were given to Reliance Telephone, Inc. for verification. The land numbers were added to the no record list on December 5, 6 and 12, 2007. On December 5, 2007, the cell phone numbers were taken off the "Do Not Record" list.

8.

These answering defendants deny the allegation that all cellular telephone attorney/client calls were monitored by Becker County.

9.

These answering defendants admit Durkin raised alleged violations of attorney/client privilege at an Omnibus hearing as alleged in paragraph 35 of plaintiffs'

First Amended Complaint but deny this hearing took place on April 14, 2008 and further state the Omnibus hearing was conducted on March 7, 2008.

10.

These answering defendants deny the allegations contained in paragraph 40 of plaintiffs' First Amended Complaint. These answering defendants allege this paragraph misstates the transcript of the Omnibus hearing and clarify that Joe McArthur was speaking of cell phone calls that were recorded and he *personally* did not tell Kenneth Andersen or his attorneys the cell phone calls were recorded. *See Ex. 3 of Pls.' Amended Compl.* pp. 134-135. Additionally, attorney/client phone calls are not monitored.

11.

These answering defendants deny the allegation in plaintiffs' First Amended Complaint that attorney/client calls between Andersen and his attorneys were monitored by Becker County and further state Joe McArthur testified at the Omnibus hearing that no calls of Andersen to his attorney's cell phone have been listened to. *Id.* p. 138:7-9. Joe McArthur also testified correctional officers are trained to terminate a call that is monitored when they become aware it is a call between an inmate and an attorney. *Id.* p. 126:8-15. McArthur testified no officer listened to any call between Andersen and his attorneys. *Id.* p. 126:16-20.

12.

These answering defendants deny the allegation contained in paragraph 44 of plaintiffs' First Amended Complaint that Agent Baumann listened to recordings of Andersen's telephone calls with his attorneys and further state Baumann testified when

he became aware of a phone call between Andersen and his attorneys, he would delete those calls. *Id.* p. 140:15-22. Agent Baumann also testified he never heard any discussions between Andersen and his attorneys concerning Andersen's criminal case, witnesses, or trial strategy. *Id.* p. 141:6-14.

13.

These answering defendants deny the allegation contained in paragraph 45 of plaintiffs' First Amended Complaint that Judge Irvine castigated Becker County at the Omnibus hearing and state that on April 14, 2008, Judge Irvine issued an Order stating "The State was not denying Defendant access to his attorney." *See Exhibit 1 attached hereto, Memorandum,* p. 6. These answering defendants further state Judge Irvine found:

> On or about December 3, 2007, authorities at the Becker County Jail, where the Defendant was incarcerated pending trial, blocked – at Defendant's request –two land line numbers so that routine recording of Defendant's phone calls would not take place on those numbers. No request was made as to cell phone numbers belonging to Defendant's attorneys. As a result authorities would record those calls and one of the Sheriff's deputies, or one of the State's agents, would listen to all of those calls, but would cease listening to any call once that deputy or agent determined it was a call between the Defendant and his attorney. Both men testified that they had never heard anything about the case or related to the case. There was no evidence presented that the deputy or agent involved ever listed to any conversation between Defendant and his attorney once the call was determined to involve the Defendant's attorney. There was no evidence that anyone else ever overheard anything related to this case; in fact, there was testimony to the contrary. . . . Because there is no evidence of any prejudice to the right of the Defendant, and because the practice of recording for screening purposes has been stopped, there are no real grounds for dismissing the indictment.

Id., pp. 6-7.

14.

These answering defendants deny they monitored or recorded phone calls between Holm and his attorney as alleged in paragraph 57 of plaintiffs' First Amended Complaint.

15.

These answering defendants specifically deny the allegations set forth in Counts I, II, III, IV, V, VI, VII, VIII, IX, X and XI of plaintiffs' First Amended Complaint.

16.

These answering defendants affirmatively allege they put very little limitations on the ability of detainees/inmates to contact their attorney. Becker County allows detainees/inmates in the jail to contact their attorneys from 7:00 a.m. to 11:00 p.m., seven days a week, at no charge. The telephone calls made by the detainees/inmates must be to their attorneys on an approved hard line so the jail can verify exactly who is receiving the telephone call. The jail cannot verify who the receiver of a call is on a cell phone.

17.

These answering defendants allege plaintiff Andersen was convicted of first degree premeditated murder and is currently serving a life sentence in Rush City.

18.

These answering defendants affirmatively allege plaintiffs' First Amended Complaint fails to state a cause of action upon which relief can be granted.

19.

These answering defendants specifically deny plaintiffs have set forth a proper *Monell* claim against Becker County and, further, deny Becker County has or had a custom, practice or policy violative of an individual's constitutional rights.

20.

Plaintiffs' claims are barred by 42 U.S.C. §1997, et seq., and plaintiffs have failed to exhaust all administrative remedies.

21.

These answering defendants specifically deny plaintiffs have stated a cognizable claim for relief under 42 U.S.C. § 1983, and further deny plaintiffs have sustained any deprivation of rights or constitutional injuries as alleged in their First Amended Complaint.

22.

These answering defendants affirmatively allege plaintiffs' claims are barred by the doctrines of qualified, statutory and official immunity.

23.

These answering defendants affirmatively allege they, at all times material hereto, were performing discretionary acts in the scope of their duties with a good faith belief their conduct was lawful, constitutional and proper.

24.

These answering defendants affirmatively allege their actions, at all times material hereto, were objectively reasonable.

25.

These answering defendants affirmatively allege the state tort allegations in plaintiffs' First Amended Complaint set forth a cause of action for the performance or failure to perform a discretionary function or duty and this action is barred by Minn. Stat. § 466.03, Subd. 6.

26.

These answering defendants affirmatively allege any cause of action against them is governed by the provisions of Minn. Stat. § 466, et seq., and plaintiffs have failed to comply with the notice provisions of said statute.

27.

These answering defendants affirmatively allege any injuries or damages sustained by plaintiffs were due to, caused by and solely the result of plaintiffs' own carelessness, negligence, intentional and/or unlawful conduct.

28.

These answering defendants deny plaintiffs sustained any damage.

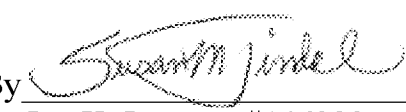
29.

These answering defendants affirmatively allege the purported class asserted of claimants is not too numerous to justify a class action claim herein and deny presumed, special and general damages as alleged.

WHEREFORE, these answering defendants pray plaintiffs take nothing by this claim for relief herein; that these answering defendants be given judgment against plaintiffs, dismissing plaintiffs' cause of action with prejudice; that defendants be given judgment for costs, disbursements and attorney's fees herein pursuant to 42 U.S.C. §1988 and for such other relief as the Court may deem just and equitable.

IVERSON REUVERS, LLC

Dated: December 11, 2008

By 

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Kenneth E. Andersen, and Dell D. Holm, on behalf of themselves and all others similarly situated,

Case No. 08-CV-5687 ADM/RLE

and

William K. Bulmer, II, on behalf of himself and all others similarly situated,

Plaintiffs,

vs.

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Defendants.

EXHIBIT 1 TO ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Exhibit 1 – The Honorable Peter M. Irvine's April 13, 2008, Order and Memorandum to This Court's Order of April 13, 2008, in *State of Minnesota v. Kenneth Eugene Andersen.*

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF BECKER | SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

ORDER

Kenneth Eugene Andersen,

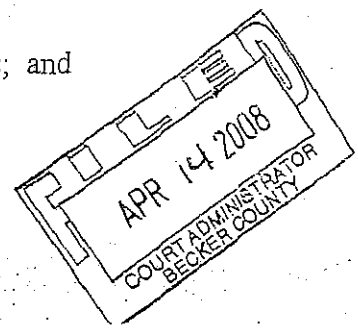
Defendant.

Court File No. 03-CR-07-171

The above-entitled matter came before the Court as a contested Omnibus Hearing on March 7, 2008, the Honorable Peter M. Irvine presiding. The State was represented by Becker County Attorney Michael Fritz. The Defendant was personally present and was represented by Rory Patrick Durkin, Esq. The Defendant had filed and served three motions:

1.) A motion dated December 5, 2007, filed the same date, seeking a.) a suppression of all evidence obtained pursuant to the search warrants on the grounds of i.) intentional material misstatements of fact in, and intentional omissions material facts from, the search warrant affidavits, ii.) stale information contained in the search warrant affidavits, iii.) law authorities exceeding the scope of the search warrants, iv.) lack of probable cause, v.) and facial invalidity, and b.) a change of venue on the grounds that a fair and impartial trial cannot be had in Becker County and in the interests of justice;

2.) A motion dated February 8, 2008 and filed February 11, 2008 seeking an order to dismiss the indictment or, in the alternative, to reduce bail for discovery violations; and



3.) A motion dated February 22, 2008 and filed February 26, 2008 seeking an order to dismiss the indictment or, in the alternative, to reduce bail on the grounds that defendant was denied access to his attorney, and therefore a right to a fair trial, based upon the State's failure to provide Defendant with private telephone access to his attorney while held in the county jail.

At the hearing the Defendant withdrew his motions concerning the facial validity of the search warrants and whether law authorities exceeded the scope of the search warrants. Defendant called five witnesses and submitted two exhibits. Defendant also submitted a packet of paperwork in support of his motion for change of venue. At the close of the hearing Defendant requested a speedy trial

Having heard the oral arguments of counsel at the hearing, and considered the parties' memoranda, exhibits, and other submissions, and having reviewed the file and applicable law, the Court hereby makes the following:

ORDER

1. The Defendant's motion praying this Court for an order to dismiss or suppress any or all evidence obtained pursuant to any search warrant on any grounds is hereby **DENIED**;

2. The Defendant's motion praying this Court for an order to dismiss the indictment on any grounds is hereby **DENIED;**

3. The Defendant's motion praying this Court for an order to transfer venue of the pending matter to another county is hereby **DENIED;**

4. The Defendant's request for a speedy trial is **GRANTED**: A jury trial shall commence on May 12, 2008 at 9:00 a.m.;

5. The Defendant's motion to reduce bail as a sanction for the recording of Defendant's telephone calls with counsel is hereby **DENIED;**

6. Any motion by Defendant not specifically addressed above is hereby **DENIED**; and

7. A Memorandum or Findings of the Court will be issued in the near future.

Dated this 13th day of April, 2008.

Peter M. Irvine
Judge of District Court

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF BECKER | SEVENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Kenneth Eugene Andersen,

MEMORANDUM TO THIS COURT'S ORDER OF APRIL 13, 2008

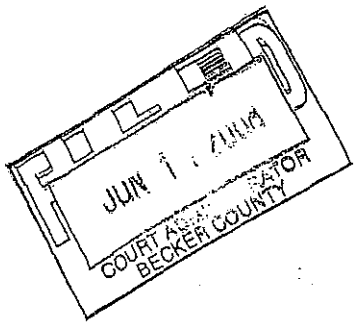
Defendant.

Court File No. 03-CR-07-171

This Memorandum is issued as a part of the Court's Order of April 13, 2008, a copy of which is attached hereto. This Memorandum is hereby made of part of, and incorporated into, that Order.

Dated this 11th day of June, 2008.

Peter M. Irvine
Judge of District Court



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MEMORANDUM

Each of the issues raised by the Defendant in his motions will be dealt with separately:

1. Should any and all evidence found, seized, or obtained pursuant to any search warrant be dismissed on the grounds that law enforcement officials intentionally made material misstatements of fact and intentionally omitted material facts from the search warrant affidavit in violation of Defendant's Fourth and Fifth Amendment rights under the United States Constitution and Article 1, section 7 and 10, under the Minnesota State Constitution?

No. There were no material misstatements or omissions in the search warrant affidavit that would invalidate the search warrant.

In *State v. Smith*, 448 N.W.2d 550 (Minn.App. 1989) the Court, in citing the U.S. Supreme Court case of *Franks v. Delaware*, indicated that a search warrant may be held void and the fruits of the search excluded from evidence, if it is demonstrated by a preponderance of the evidence that the affiant, knowingly or with reckless disregard for the truth, included a false statement in the affidavit. *Franks v. Delaware*, 438 U.S. 154 at 155-56, 98 S.Ct. at 2676-77. However, if the material that is not false is sufficient to sustain the search warrant, the search warrant is not voided. *Id.* at 171-72, 98 S.Ct. at 2684-85. The Minnesota Supreme Court extended *Franks* to material omissions from the affidavit as well. The test is whether, after supplying the omissions, the affidavit established probable cause. *State v. Doyle*, 336 N.W.2d 247, 252 (Minn. 1983).

The Minnesota Supreme Court enunciated the standard to be used when evaluating a search warrant application in *State v. Harris*, 589 N.W.2d 782 (Minn. 1999):

> The task of the issuing judge charged with determining whether probable cause to search exists "is simply to make a practical, common-sense decision

> whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v.Gates,* 462 238, 103 St. Ct. 2317.

The same court made the standard even clearer in *Rosillo v. State*, 278 N.W.2d 747 (Minn. 1979):

> Although the affidavit did not contain any averment of firsthand information that fruits of the crime would be found at defendant's residence, the Fourth amendment does not make such information essential. All that is required is that the affidavit, interpreted in a common-sense and realistic manner, contain information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched. *United States v. Rahn,* 511 F.2d 290 (10Cir. 1975), cited in *Rosillo* at pp. 748-49.

The Defendant's individual objections to the search warrant are set forth in great detail in the Defendant's and the State's submissions, both found in the Court's file. When the law and standards set forth in the cases cited above are applied to the Defendant's objections to the affidavit application for the search warrant, and therefore the legal validity of the search warrant itself, and furthermore, taking into account the editing, amendments, and additions of omissions to the affidavit application conceded and agreeable to the State as set forth in its "State's Responsive Memorandum of Law Regarding All issues Heard at the Contested Omnibus Hearing," the Court finds that there simply is no legal basis to suppress any of the evidence obtained pursuant the search warrant in question.

2. **Did the supporting affidavit fail to establish any direct connection between any alleged criminal activity and the site(s) to be searched in violation of *State v. Souto*, 578 N.W.2d 744 (Minn. 1998)?**

No. Although there did not appear to be any ongoing criminal activity, the items sought were very incriminating, considering the nature of the criminal activity itself, i.e., the murder, and the fact that the Defendant owned and possessed the type of firearm that was used in that murder.

3. **Was the information contained in the search warrant affidavit stale in violation of *State v. Souto*, 578 N.W.2d 744 (Minn. 1998)?**

No. The part of the search warrant application citing the purchase of the firearm in 2005 by Josh Bogatz for the Defendant is alleged as being stale. The State, while not agreeing with that conclusion, has agreed those paragraphs should be removed. However, the application makes reference to the possession by the Defendant within the last year of a gun that could be the murder weapon, information which was not only not stale, but highly relevant and critical to the investigation. The articles sought were not innocuous, but highly incriminating, easily disposable, and certainly had an enduring utility.

4. **Did the supporting affidavit fail to establish probable cause in violation of Defendant's Amendment rights under the United States Constitution and Article 1 section 10, under the Minnesota State Constitution?**

No. Pursuant to the standards set forth in the *Harris* and *Rahn* cases cited above, and the standards set forth in the *Souto* case, including the totality of the circumstances, the judge signing the search warrant had a substantial basis to conclude that the source of the information provided a fair probability that the articles sought in the search warrant application would be located at the place to be searched. There was adequate probable cause.

5. **Were there Discovery violations and if so, based on those violations, should the Court dismiss the indictment against the Defendant?**

There were no discovery violations of such a nature as to require dismissal of the indictment against the Defendant. *Minn. R. Crim. P.* 9.01 and *Minn. R. Crim P.* 9.03, subd. 2 require the prosecution to continue to disclose as material comes into the prosecutor's possession. The prosecution has continued to disclose as required. There are no facts or circumstances in this case that reveal any intent on the prosecution's part not to disclose in accordance with the rules and the relevant law. There have been some communications problems, but they seem to have been

ironed out without any serious prejudice to the Defendant. All the discovery items requested by the Defendant, to which he is entitled under law, have been or will be made available to him well in advance of trial. Under the leading case regarding discovery violations, *State v. Lindsey*, 284 N.W.2d 368 (Minn, 1979), there would appear there would appear that nothing further is required or merited regarding this issue.

6. Was the State denying the Defendant access to his attorney, and hence denying the Defendant his right to a fair trial, such that the Court should dismiss the indictment or release Defendant on his own recognizance?

The State was not denying Defendant access to his attorney.

Minn. Stat. 481.10 sets forth the framework for confidential communication between client and attorney. *Minn. Stat.* 481.10, Subd. 2 requires that "[r]easonable telephone access . . . be provided following the request of the person restrained . . ." [emphasis added]. On or about December 3, 2007, authorities at the Becker County Jail, where the Defendant was incarcerated pending trial, blocked—at Defendant's request-- two land line numbers so that routine recording of Defendant's phone calls would not take place on those numbers. No request was made as to cell phone numbers belonging to Defendant's attorneys. As a result authorities would record those calls and one of the Sheriff's deputies, or one of the State's agents, would listen to all

of those calls, but would cease listening to any call once that deputy or agent determined it was a call between the Defendant and his attorney. Both men testified that they had never heard anything about the case or related to the case. There was no evidence presented that the deputy or the agent involved ever listened to any conversation between Defendant and his attorney once the call was determined to involve the Defendant's attorney. There was no evidence that anyone else ever overheard anything related to the case; in fact, there was testimony to the contrary.

The State maintains that no attorney calls have been recorded on or after February 21, 2008, the date when the defense learned the cell phone numbers were not blocked. On March 7, 2008, Court ordered any recording of Defendant's phone conversations to cease at once. The State has made assurances that now even the cell phone numbers are blocked.

Because there is no evidence of any prejudice to the rights of the Defendant, and because the practice of recording for screening purposes has been stopped, there are no real grounds for dismissing the indictment. Since bond has been set on the Defendant in part in the interest of public safety, the Court will not now release the Defendant on his own recognizance.

7. Is a change of venue warranted?

No.

The Defendant asserts that a fair and impartial jury cannot be had in Becker County. Defendant conducted his own survey in Becker County and found that approximately 20% of the respondents felt that the Defendant was guilty. That means that—pursuant to the survey that Defendant himself chose—80% of those surveyed either did not believe the Defendant guilty or had no opinion. With 80% of those surveyed showing no prejudice that they already believe the Defendant guilty, the process of *voire dire* will remain an effective tool in selecting a fair and impartial jury.

The Defendant also claims that pretrial publicity has created a reasonable likelihood that a fair trial cannot be had.

There is no presumption of prejudice of pretrial publicity unless there is "massive publicity surrounding the trial." The defendant in a criminal case seeking reversal on this ground must show he was actually prejudiced by the publicity. *State v.Kinsky* 348 N.W.2d 319, 323 (Minn. 1984). News reports are insufficient to establish that pretrial publicity is prejudicial if they are factual. *State v. Whalen*, 563 N.W.2d 742 at 748. Even articles that recite information from portions of the original indictment, a quote from an indictment or complaint, cannot be considered prejudicial if they are purely factual reports. *State v. Fratzke* 354 N.W.2d 402 at 407.

From the Defendant's submissions, there appear that there were 17 articles published or broadcast from July through November. There were references to defendant's prior criminal record, to the fact that he had charges pending in Roseau County, to a hearing regarding defendant's bail, and of his trial and acquittal for arson. All were accurate. There were some misleading reports.

The publicity has not been massive and has been factual for the most part. The Defendant has not made a showing that he has been prejudiced by the publicity he cites. If there is any problem with prejudice, the process of jury selection will reveal it and Defendant can renew his motion at that time.

PMI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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and

William K. Bulmer, II, on behalf of himself and all others similarly situated,

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Defendants.

Case No. 08-CV-05687 ADM/RLE

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2008, I caused the following documents:

ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

Daniel Bryden	dbryden@sprengerlang.com
Jeffrey Abrahamson	jabrahamson@sprengerlang.com
Mara Thompson	mthompson@sprengerlang.com

I further certify that I caused a copy of the foregoing documents and the notice of electronic filing to be mailed by first class mail, postage paid, to the following non-ECF participants:

n/a

I further certify that I caused the proposed order to be filed with the court via e-mail to the following judge who is hearing the motion:

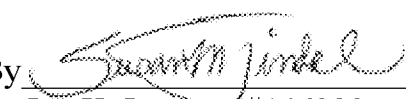
n/a

and I certify that I caused a copy of the proposed order to be e-mailed or mailed by first class mail, postage paid, as noted below, to the following:

n/a

IVERSON REUVERS

Dated: December 11, 2008.

By 

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