

STROOCK

E. Gail Suchman
Direct Dial 212-806-6656
Direct Fax 212-806-7656
gsuchman@stroock.com

March 18, 2013

Mark Johnston, Acting Assistant Secretary
Office of Community Planning and Development
U.S. Department of Housing and Urban Development
Room No. 7286
451 7th Street, SW
Washington, DC 20410-7000

John Trasvina, Assistant Secretary
Office of Fair Housing/Equal Opportunity
Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410-7000

Re: Mississippi State Port at Gulfport

Dear Messrs. Johnston and Trasvina:

The undersigned co-counsel represent the Steps Coalition ("Steps") in its ongoing Campaign for a Safe and Healthy Port. During the week of February 11, 2013 a Department of Housing and Urban Development ("HUD") management team conducted its most recent review of the State of Mississippi's disaster recovery supplemental appropriations under the Community Development Block Grant ("CDBG") program. We regret that we did not have an opportunity to meet with the HUD team on this visit and write to express our ongoing concerns with the State of Mississippi's implementation of the \$570 million Port of Gulfport Restoration Project Action Plan, as modified and approved by HUD in 2008 ("2008 Plan"). We would very much appreciate meeting with you to discuss these concerns.

Specifically, our concerns are two-fold, as follows: (1) the continuing failure of the State to meet its jobs retention and creation goals in the 2008 Plan, including the failure to meet the national objective and Section 3 requirements for jobs for low and moderate income workers; and (2) major changes to the 2008 Plan recently announced by the Mississippi State Port Authority ("MSPA" or the "Port") and the Mississippi Development Authority ("MDA"), which, among other things, includes a plan for an inland port to be located in a low-income community of color, a plan that was rejected and not included in the 2008 Plan submitted to and approved by HUD after much comment from the surrounding community.

We discuss these concerns below in more detail.

I. Failure to Meet Jobs Requirements

When the initial 2007 Action Plan was submitted to HUD, MDA stated that at that time there were 1,286 direct jobs at the Port of which only 141 were held by low and moderate income (LMI) persons. The 2008 Plan projected that, by 2010, there would be 2,348 direct jobs, and by 2015, 2,586 direct jobs, and indicated that fifty one percent (51%) of the jobs created or retained would be for LMI workers and these numbers would be documented and reported.¹

Four years later, in its October 25, 2011 monitoring report, HUD made an adverse finding with respect to the job creation part of the plan -- that MDA had not developed a clear methodology for tracking job creation. The monitoring report suggested as a corrective action that MDA "create and implement a method for tracking jobs, and verify whether any jobs have been created or retained." More revealing was MDA's November 2011 response to HUD's report, in which it said that it was "confident" it had retained the 1286 jobs reported in the 2007 Action Plan." Yet, in its first quarterly report of March 2012, MDA reported only 1013 current jobs, a loss of 233 since 2007, and the third quarterly report showed 1,103, with a cumulative total of only one moderate income job retained. In its September 27, 2012 letter to HUD, MDA conceded that there were actually fewer current jobs at the Port than in 2007. Moreover, we have recently received information indicating that the current jobs number at the Port is far worse and that the current number of jobs is less than half of the number reported in September 2012.²

This represents a very *negative* performance concerning a central aspect of the 2008 Action Plan – the retention and creation of jobs. Nor is there any evidence whatsoever that the expenditure of funds to begin the planned elevation of the west pier of the port resulted in the retention of any pre-Katrina jobs nor creation of new jobs. Indeed, the International Longshoreman's Association's officers have publicly criticized the Port's job creation performance, citing the failure to restore the warehouses.³ In short, the Port has not made any progress with respect to jobs creation or retention and has actually lost jobs since its initial 2007 Action Plan was written.

With respect to Section 3 requirements, HUD, in its October 23, 2012 monitoring report, found a Section 3 plan "deficiency" due to MDA's failure to implement the training program outlined in its March 2012 Pathways to the Port Jobs Program. Moreover, since then the Port has scaled back the \$19 million WC Fore contract to elevate the port. Fore was

¹ The 2007 Action Plan was approved by HUD in January 2008. However, in October 2008 the State submitted a modification to that plan – a modification discussed in more detail below. But, nothing in the 2008 modification affected the initial 2007 Action Plan jobs projections.

² We specifically dispute that the Port may count as part of its economic benefits the jobs held by truckers and similar workers based outside of Mississippi. Our estimate is that domestic truck freight traffic employs no more than 150 Mississippi truckers, whereas the Port claims over 600 truckers employed at the port. See generally "Trucker says port jobs numbers inflated," Sun Herald, October 6, 2012, <http://www.stepscoalition.org/?p=1318>.

³ "Port union questions empty warehouse," Sun Herald, October 6, 2012, http://www.stepscoalition.org/?page_id=1321.

identified as the primary Section 3 business concern in HUD's October 2012 monitoring report (p. 9). The monitoring report also states there were no activities demonstrating compliance in the 2012 Form 60002 report. In light of this, we believe that any suggestion that the Port is in compliance with Section 3 must be re-examined by HUD.

In sum, the present jobs situation demands HUD's careful attention and a thorough review of implementation of the Port Restoration Plan.

II. Modifications to the 2008 Action Plan

The major components of the 2007 Action Plan were (1) the deepening of the existing ship channel to 42 feet, with an estimated cost of \$254 million; (2) the development of an inland port facility to store cargo, with an estimated cost of \$131 million; and (3) the redevelopment of the existing West Pier terminals, the development of the expanded West Pier and improvements on the East Pier, with an estimated cost of \$114 million.

After much public scrutiny, especially from Steps, the 2008 Action Plan modified the 2007 Action Plan as follows: (1) it abandoned the development of an inland port facility; and (2) it added a plan to elevate the west pier of the Port 25 feet to protect against future hurricanes. In 2011, MDA sought and received from HUD approval of the release of \$481 million of the CDBG allocation for the following activities: (1) to fill the final 24 acre (of an 84 acre fill) in the channel; (2) to elevate the west pier of the Port to 25 feet; and (3) to construct new tenant terminals and infrastructure. The Environmental Assessment ("EA") done by MDA as part of its Finding of No Significant Impact and Request for Release of Funds in 2011 did not consider the environmental impact of an inland facility.⁴

Since approval of the 2008 plan by HUD in November 2008, there has been very little progress in the Port Restoration Plan. A contract was entered into with WC Fore to elevate the west pier 25 feet and work began on that. However, in the summer of 2012, strong statements of dissatisfaction with the Port superseded earlier resolutions of support. A Gulfport councilman faulted the Port for "missteps and stumbles" and "ignoring possible solutions" to community

⁴ We question, as we have consistently, the adequacy of the EA performed by the MDA and accepted by HUD to support the release of the CDBG funds. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 et seq., and its implementing regulations require a complete EA, including an cumulative impact analysis of the entire plan for the restoration of the Port. See 40 C.F.R. §§1502.16, 1508.8. Likewise, in December 2010, the U.S. Army Corps of Engineers ("USACE") approved the request of the MSPA for a modification to a 1998 USACE permit without the appropriate environmental review required by NEPA. We are evaluating the propriety of USACE's action to grant permission to undertake major activities under the guise of a minor modification to an old 1998 permit. Furthermore, USACE approved this modification which it knew was part of a larger permit application submitted in March 2010 by MSPA to USACE, for which USACE required a complete Environmental Impact Statement ("EIS") to review the impacts of the entire port restoration project. Clearly, the USACE's approval of the modification to the 1998 permit without environmental review violated NEPA's prohibition against segmentation. See 40 C.F.R. §1508.7. It should be noted that the EIS was never completed and the 2010 permit application should be voided due to the recent changes in the 2008 Plan as discussed herein.

concerns.⁵ In addition, the Gulfport City Council passed -- and the Port rejected -- a resolution demanding that the port fund an air emissions forecast of the traffic corridor to evaluate environmental justice concerns.⁶ Then, in July 2012, the Port made public that the port expansion would no longer entail the deepening of the channel to allow for mega-ships from the Panama Canal as contemplated in the 2008 Plan.⁷ This means the Port will not be able to support the largest ships coming through the Panama Canal, and less ship cargo coming into the Port means fewer jobs and less economic expansion. In short, the loss of any new jobs over the last four years could very well be exacerbated by this major change to the 2008 Plan.⁸

Thereafter, numerous elected officials across the state have publicly questioned the Port's overall performance, including the following:⁹

- Governor Phil Bryant (Port needs to move forward "with a sense of urgency"),
- Lieutenant Governor Tate Reeves (citing port's "lack of vision"),
- State Senate Ports Chairman Brice Wiggins R-Pascagoula ("not going to turn out to be what was promised"),
- State House Port Chairman Philip Monsour R-Vicksburg ("calling for action in 18 months, not years" on restoring freezer capacity),
- State Senator Sean Tindall, R- Gulfport ("first I've heard we weren't going to get the really big ships"), and
- Gulf Coast Business Council said he only learned this summer that there weren't immediate plans to deepen the Port ship channel ("We had not heard it expressed that way.")

Then, a week after the October 23, 2012 HUD monitoring report, the Port made another major change to the 2008 Action Plan by dropping the part of the plan to elevate the west pier to 25 feet. More recently, on January 14, 2013, the Port decided to begin preliminary planning and engineering for the previously rejected inland port facility to support freezer storage and evacuation plans. As mentioned above, this inland port is to be located between 33rd and 34th Streets in North Gulfport, abutting this predominantly African-American community. This action has renewed fears first expressed when an inland facility was originally proposed in the 2007 Action Plan about the health and safety impacts on the North Gulfport community. At the time the plan was abandoned in 2008, our clients welcomed the decision. But, by doubling back now and again considering an inland facility, these concerns have resurfaced, including serious

⁵ "Councilman lambasts port officials," Sun Herald, July 26, 2012, <http://www.stepscoalition.org/?p=1318>.

⁶ "Port plans showed by bureaucracy, funding issues," Sun Herald, June 15, 2012, <http://www.stepscoalition.org/?p=572>.

⁷ "Port official: Don't expect mega-ships from Panama Canal in Gulfport," Sun Herald, July 24, 2012, <http://www.stepscoalition.org/?p=572>.

⁸ "Port official: Don't expect mega-ships from Panama Canal in Gulfport," Sun Herald, July 24, 2012.

⁹ "Political leaders and community were counting on jobs," Sun Herald, July 26, 2012; "Bryant: Port funds for channel, not elevation?" Sun Herald, July 28, 2012.

concerns about possible toxic contamination on this site and the health impacts of increased truck traffic on the North Gulfport community if this facility is built.

On January 15, 2013, the Steps' Port Campaign Coalition wrote to the Governor, MSPA and MDA expressing its concerns with the impact of these changes on jobs for low and moderate income persons and on the environmental impact on the North Gulfport community. Noted in this letter was our belief that these changes were major modifications to the 2008 Plan that require a new Action Plan to be submitted to HUD. The changes that have occurred mean that the Port has abandoned two of the major elements of the 2008 plan – the elevation of the Port and the deepening of the channel -- with major negative implications for the ability to retain and create the jobs as projected back in 2007 and 2008.

Moreover, reconsideration of the once discarded plan for an inland facility has exacerbated the serious environmental justice issues that residents of North Gulfport have with respect to the Port. Community opposition to the location of the connector road from the Port to I-10 has been longstanding because of the adverse impact on North Gulfport from air pollution from the road. The location of the inland facility exacerbates these adverse environmental impacts. The Environmental Assessment done by the State as part of its request for release of HUD funds in 2011 never considered these impacts.¹⁰

In its 2008 Action Plan approved by HUD, MDA stated that it “recognizes that adding or deleting an activity or changing the planned beneficiaries of an activity may necessarily constitute a substantial change requiring an amendment of the action plan.” The Port has now abandoned two major elements of the 2008 Plan – the 25 foot elevation and the deepening of the channel – and is considering adding an inland facility. This means that the projected spending of CDBG funds has changed drastically from that projected in 2007 and 2008. Yet, in their February 1, 2013 response to the Port Campaign Coalition’s January 15th letter, the State takes the position that a new Action Plan is not required (Attachment A). We maintain that the major changes require a new Action Plan and accompanying EA to be submitted to HUD for review and approval before any more CDBG moneys are spent.¹¹

III. Conclusion

The Steps Coalition and its partners represent a significant portion of the Gulfport community. Two members -- the North Gulfport Civic Club and the North Gulfport Community Land Trust represent residents in and adjacent to North Gulfport, whose census tracts comprise 6,855 residents who are over 80% African American. The Soria City Civic Club

¹⁰ Moreover, the environmental justice analysis done with respect to the connector road commits the most fundamental possible error: it misidentifies the geography of the relevant environmental justice communities. Instead of analyzing the four predominantly African American and Hispanic census tracts along the traffic corridor, the Port and MDA’s analysis focuses upon census tract 14, which is among the whitest and oldest census tracts in the city of Gulfport and is unaffected by the traffic corridor.

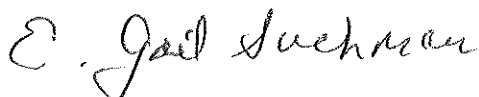
¹¹ To reduce the 25 foot elevation to 14 feet or less has taken MSPA out of compliance with federal flood zone requirements, which is a substantial change. In fact, MSPA announced last week that it is in negotiations to secure a new conditional letter of map revision (CLOMR) from FEMA.

represents a community whose census tract includes 3,200 residents who are 47 percent African American and 5 percent Hispanic. The NAACP Gulfport branch represents residents throughout the city of Gulfport, including the Central and West Gulfport census tracts that have 2,153 residents, who are 57 percent African American. Together, these groups work in census tracts with over 12,000 residents affected by the traffic corridor of the Port connector road, railway and U.S. Highway 49. This represents the majority of residents in the vicinity of the Port and the traffic corridor.¹²

Although we have made numerous efforts to meet and work with State officials, the State has fallen far short of addressing the concerns from community organizations. Moreover, the Bryant administration and MSPA have rejected many efforts by Steps to enter into discussions and have excluded the public from briefings and withheld documents until lawyers for Steps demanded compliance with state sunshine laws.¹³ Most recently, in its January 31, 2013 letter, the MSPA again rejected our effort to meet and discuss these issues (Attachment B).

For these reasons, we now bring these issues to your attention. The alarming failure to meet the jobs projection in the 2008 Plan and the major changes in the Plan itself **MUST** be carefully considered by HUD as part of its review of the use of public CDBG funds for the Port Restoration Project. We look forward to hearing from you promptly regarding the scheduling of a meeting with us to discuss these critical matters of concern.

Very truly yours,



E. Gail Suchman
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038

Joseph D. Rich
Diane Glauber
David Zisser
Lawyers' Committee for Civil Rights Under Law
1401 New York Avenue, NW, Suite 400
Washington, D.C. 20005

¹² We reiterate again that no comprehensive environmental review of the Port project has been completed as required by NEPA prior to any major federal decision-making. Further, Secretary Donovan signed President Obama's August 4, 2011 Memorandum of Understanding ("MOU") on Environmental Justice, assuring that HUD would advance environmental justice in its decision-making. We sincerely hope that HUD pursues vigorously its obligation with respect to NEPA and the MOU.

¹³ "Bryant reviewing port report; port withholds copy from public," Sun Herald July 31, 2012.

Reilly Morse
Mississippi Center for Justice
963 Division Street
Biloxi, MS 39530

Attachments

cc: Ed Jennings, Jr., Regional Administrator
Department of Housing and Urban Development
Atlanta Regional Office
Five Points Plaza Building
40 Marietta Street
Atlanta, GA 30303

Gwendolyn Keyes Fleming, Regional Administrator
United States Environmental Protection Agency
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

ATTACHMENT A



STATE OF MISSISSIPPI
PHIL BRYANT, GOVERNOR
MISSISSIPPI DEVELOPMENT AUTHORITY
BRENT CHRISTENSEN
EXECUTIVE DIRECTOR

February 1, 2013

Port Campaign Coalition
610 Water Street
Biloxi, Mississippi 39530

Re: Letter Dated January 15, 2013

Dear Members of the Port Campaign Coalition:

We are in receipt of your letter from January 15, 2013, and we thank you for your continued interest in the Port of Gulfport Restoration Program ("PGRP"). The Port Campaign Coalition represents one perspective of the many voices in the diverse Gulf Coast community, and we appreciate your comments as we continue to engage the community as a whole.

Your letter raises several concerns which we address as follows:

Community Engagement.

As you are aware, the Mississippi State Port Authority ("MSPA") held a community meeting, a networking event and jobs fair, as well as a Minority Business Outreach event on January 31 at the Courtyard by Marriot Gulfport Beachfront. The events on January 31 were a continuation of the MSPA's on-going efforts to energize, educate and engage the entire community, and we hope that your members found it of value.

The job fair, Minority Business Outreach and community meeting were the most recent examples in a long history of outreach opportunities in which representatives from MSPA and the PGRP have participated in over the years. For example, in the past two years alone, representatives from MSPA and the PGRP have been involved in over sixteen meetings with state and local officials, twelve industry-related meetings (including contractor workshops and small and minority business outreach) and thirty-three meetings with community groups and stakeholders. Additionally, as you are aware, in 2011 MSPA and MDA organized and utilized a Community Working Group and met with representatives from the STEPS Coalition; the Mississippi Center for Justice; the North Gulfport Community Land Trust, the International Longshoremen Association AFL-CIO, Local #1303; and other local business and community leaders in a series of meetings to discuss community concerns. Outreach to the entire community has, and will continue to be, an integral component of the PGRP as it progresses.

The Road.

SR 601/Canal Road (the "Road") is a project planned, designed and funded by the Mississippi Department of Transportation and the Federal Highway Administration and is unrelated to the PGRP. The planning, community meetings and the environmental review for the Road were well underway before Hurricane Katrina. The need for Road would exist whether the Port is ever restored to its pre-Katrina capacity, as the Road will upgrade and increase the efficiency of traffic movement between Highway 90 and I-10, alleviate congestion on US 49 in Gulfport, aid in hurricane evacuation, and provide better access to the Gulfport central business district. Accordingly, we disagree with your assertions that the Road as planned is unnecessary, as it has long been established as essential for the growth, development and safety of the Gulf Coast as a whole.

Action Plan for Disaster Recovery.

A new Action Plan is not required at this time. Action plans pertaining to this disaster recovery appropriation are covered by a series of waivers issued by the Secretary of the Department of Housing and Urban Development. Under these alternative requirements, a state's Disaster Recovery Action Plan should set forth "the projected uses for the CDBG disaster recovery funds by responsible entity, activity, and geographic area." (See 71 Fed. Reg. 7,666-01 at 7,669 (2006)). Accordingly, merely listing an activity in a given Disaster Recovery Action Plan is not a guarantee that those activities will be implemented; it is a projection of activities which are *anticipated* to be carried out.

The Port of Gulfport Restoration Program Action Plan Amendment 5 – Modification 1, dated October 27, 2008 ("Modification 5") provides for several activities, including "[m]itigation through raising the elevation of the Port to an estimated 25 feet, *or an accepted elevation.*" (Emphasis added). Raising the Port to an elevation other than 25 feet is contemplated in Modification 5. Additionally, Modification 5 sets forth the following description of the projected scope of work for the PGRP: "the facilitation of the restoration of public infrastructure and publicly owned facilities that were destroyed by Katrina, provides mitigation against future damage and provides for the long-term restoration and recovery of the operating capacity of the Port." We are confident that the Port's preliminary investigations into rebuilding freezer space and infrastructure that were destroyed during Hurricane Katrina are well within the scope of work set forth in Modification 5.

Please also note that under these alternative requirements, a state will specify in its action plan "its criteria for determining what changes in the grantee's activities constitute a substantial amendment to the plan."¹ Modification 5 contains the following, specific definition of a "substantial amendment":

MDA recognizes that adding or deleting an activity or changing the planned beneficiaries of an activity may necessarily constitute a substantial change requiring an amendment of the action plan. For

¹ 71 Fed. Reg. 7,666-01 at 7,669 (2006).

example not every technical change in the design of the construction project constitutes a substantial change requiring an amendment to the action plan as long as that change does not go outside the overall scope of work set forth in the action plan.

Modification 5 clearly addresses providing for storm damage mitigation; possibly deepening the channel to accommodate larger ships "based [on] permitting and the availability of resources"; the purchase of land for environmental mitigation; the purchase of maritime and/or construction related assets and equipment to assist in restoration and provide for the long-term recovery of the operating capacity of the Port; commissioning studies to assist permitting agencies in the evaluation of the plan; and the restoration of public infrastructure. None of the activities contemplated by the PGRP go outside the overall scope of the work set forth in the action plan, and we do not agree that either a new action plan, or a modification to the current action, plan is appropriate at this time.

As you are aware, efforts to deepen and widen the Gulfport Harbor Federal Navigation Channel ("Channel") have been ongoing since the passage of the Water Resources Development Act of 2000 ("WRDA"). Such efforts include pursuing an appropriation to fund the necessary studies and partnering with US ACE to plan such studies. Unfortunately, no WRDA bill has been passed since the funding request was submitted, and the State and Mississippi's Congressional Delegation continue to press for the necessary funding.

Despite the fact that funding for the Channel has not yet been secured, MSPA has repeatedly indicated its commitment to meeting the national objective of benefitting low and moderate income individuals through job creation or retention, as well as its commitments to the goals of Section 3. To further these goals, MSPA has developed and is in the process of implementing "Pathways to the Port", which focuses on workforce development and job placement. Through "Pathways to the Port," partners such as WIN Job Centers (through its WINGS program) connect willing and able applicants with potential employers. Job creation and retention have been, and will continue to be, critical to the PGRP's core purposes.

The restoration of the State Port at Gulfport is critical to the recovery of the Mississippi Gulf Coast, and we MDA and MSPA intend to continue to engage the entire community as the project progresses. We thank you for your continued interest in the project.

Sincerely,



Brent Christensen
Executive Director

cc: Governor Phil Bryant
Jim Simpson, President, MSPA Board of Commissioners
Tom King, Commissioner, MDOT

ATTACHMENT B

Recd 02/06/13
Scanned, rnc
sent electronically
to PCC & Legal Counsel
2/6/13



MISSISSIPPI STATE PORT AUTHORITY AT GULFPORT

JOHN K. RESTER
Commissioner
ROBERT J. KNESAL
Commissioner
JAMES C. SIMPSON, JR.
Commissioner

FRANCES TURNAGE
Commissioner
E.J. ROBERTS
Commissioner
MATTHEW S. WYPYSKI
Interim Director & CEO
www.shlpmspa.com

January 31, 2013

VIA E-MAIL (ADMIN@STEPSCOALITION.ORG)
VIA FIRST CLASS MAIL

Port Campaign Coalition
610 Water Street
Biloxi, Mississippi 39530

Re: Port Campaign Coalition Correspondence

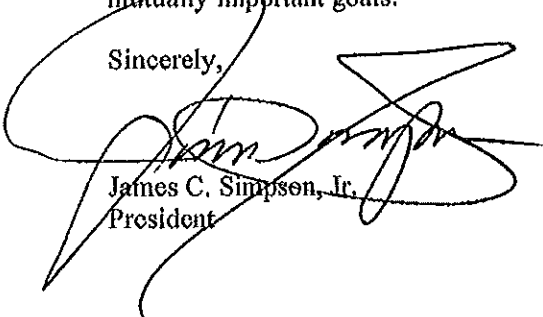
Dear Ladies and Gentlemen:

The Mississippi State Port Authority at Gulfport (the "MSPA") is in receipt of and thanks you for your January 15, 2013, correspondence expressing the Port Campaign Coalition's concerns about the MSPA's port restoration project. Specifically, your letter notes concerns regarding the MSPA's abilities to construct a modern port while considering environmental impacts and to provide job opportunities to low to moderate income residents. The MSPA remains committed to achieving both of these goals. As such, the MSPA remains in contact with the Mississippi Development Authority, the Mississippi Department of Transportation, the City of Gulfport, the Harrison County Board of Supervisors, the Department of Housing and Urban Development, and other members and leaders of the local community to ensure the MSPA receives the necessary guidance and input from all interested parties.

Regarding your request to meet with us prior to our January 31 community meeting to help ensure that our public meeting will be productive and substantive, while we appreciate your offer, the Port and MDA staff are fully capable of preparing for and conducting our own meeting in such a manner as to ensure that we address all issues important to the entire public in a productive and substantive manner, including those matters of interest to the PCC. We trust you understand that your interests are not necessarily as broad as those of the entire general public and not necessarily the only matters we need to address. All issues are important.

The MSPA thanks you for your continued input as the MSPA works towards the achievement of such mutually important goals.

Sincerely,



James C. Simpson, Jr.
President