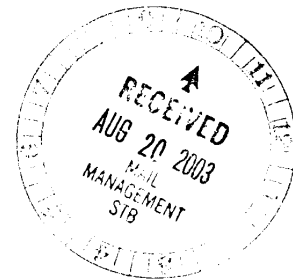


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THOMAS F. MCFARLAND

August 19, 2003

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

AUG 20 2003

Part of
Public Record

Re: Docket No. AB-308 (Sub-No. 3X), *Central Michigan Railway Company --
Abandonment Exemption -- in Saginaw County, MI*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Reply In Opposition To Petition For Exemption, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

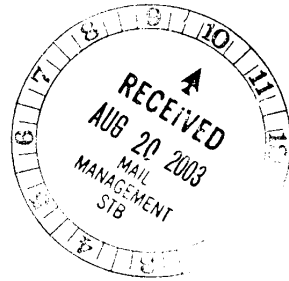
Tom McFarland

Thomas F. McFarland
Attorney for Plastatech Engineering, Ltd.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

CENTRAL MICHIGAN RAILWAY)
COMPANY -- ABANDONMENT) DOCKET NO. AB-308
EXEMPTION -- IN SAGINAW COUNTY,) (SUB-NO. 3X)
MI)



**REPLY IN OPPOSITION TO
PETITION FOR EXEMPTION**

PLASTATECH ENGINEERING, LTD.
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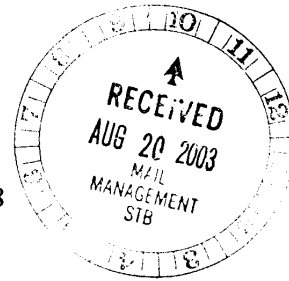
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Attorneys for Protestant

DATE FILED: August 20, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

CENTRAL MICHIGAN RAILWAY	)	
COMPANY -- ABANDONMENT	)	DOCKET NO. AB-308
EXEMPTION -- IN SAGINAW COUNTY,	)	(SUB-NO. 3X)
MI	)	



**REPLY IN OPPOSITION TO
PETITION FOR EXEMPTION**

Pursuant to the procedural decision in this proceeding served August 5, 2003, PLASTATECH ENGINEERING, LTD. (Plastatech) hereby replies in opposition to the Petition for Exemption (Petition) filed by CENTRAL MICHIGAN RAILWAY COMPANY (CMR) on July 16, 2003. For reasons explained in this reply, CMR has failed to sustain its burden of proof that the filing of an abandonment application under 49 U.S.C. § 10903 is not necessary to carry out the rail policy of 49 U.S.C. § 10101. Pursuant to 49 U.S.C. § 10502(a), therefore, the Petition is required to be denied. If CMR continues to seek abandonment of the rail line, it should be required to file a formal abandonment application that complies with all requirements of 49 C.F.R. § 1152.22.

IDENTITY AND INTEREST OF PLASTATECH

Plastatech owns and operates a facility for the manufacture of vinyl roofing laminates located on the CMR rail line here proposed for abandonment. Laminates made by Plastatech are used by its affiliated company, Duro-Last Roofing, Inc. (Duro-Last), in the manufacture of custom fabricated roofing systems for commercial use. The primary manufacturing facility of Duro-Last is located close to Plastatech's facility.

During the period between 1996 and 1998, Plastatech invested \$100,710 for installation of rail trackage (\$37,757) and rail unloading facilities (\$62,953) within its plant site. That investment was made to enable Plastatech to receive PVC resin by rail. PVC resin is a main component used in the production of vinyl roofing laminates. It can be received much more economically by rail than by truck. PVC is received in rail covered hopper cars. Plastatech's principal supplier is located at Niagara Falls, Ontario, Canada. Its secondary supplier is located at Baton Rouge, LA.

CMS Witness Pinkerton has stated that Plastatech has used the rail line only sporadically and to a minimal extent in the past two years. (Petition at 22). On the contrary, Plastatech's use of the rail line has been consistent and increasing. In the most recent 12-month period for which records are available (ended June 30, 2003), Plastatech received 99.1 percent of its PVC resin by rail. CMR's own evidence reflects Plastatech's increasing use of the rail line: 57 carloads in 2001 and 81 carloads in 2002, an increase of 42 percent. During the first six months of 2003, Plastatech received 43 carloads by rail compared to 40 carloads in the same period of 2002, a further increase of 7.5 percent. In addition, it is likely that Plastatech will begin to receive plasticizers by rail in the near future. That will increase Plastatech's rail volume by 46 carloads per year, bringing its total volume to at least 127 carloads per year.^{1/}

Mr. Pinkerton has contended that motor carrier transportation provides a viable alternative to rail transportation for Plastatech. (Petition at 22). That is definitely not true. It is not true, as alleged by Mr. Pinkerton (*id.*), that Plastatech has moved some of its truck unloading

^{1/} The projection of 46 carloads per year is based on receipt of 7.6 million pounds of plasticizers per year and average loading of 165,000 pounds of plasticizer per carload. (7,600,000 ÷ 165,000 = 46.06).

operations to the north side of its plant where its rail siding is located. The great majority of Plastatech's production is used locally in Duro-Last's manufacturing process. Duro-Last makes truck shipments of its finished products, but its use of motor carrier transportation is dictated by service considerations such as timeliness of delivery. Duro-Last's use of motor carrier transportation for its finished products does not support a finding that trucks are a viable alternative for Plastatech's receipt of PVC resin by rail. On the contrary, Plastatech's freight charges would have been higher by \$213,840 in 2002 if it had received its 81 carloads of PVC resin by truck.^{2/}

Even using the rail-truck transloading service suggested by CMR (Petition at 22), Plastatech would incur additional costs of \$143,920 per year, based on its 2002 rail traffic volume.^{3/} But that would not be the full extent of Plastatech's loss. Plastatech would also lose \$40,164 per year in savings from the ability to purchase PVC resin in volume by rail, based on its experience during the year ended June 30, 2003.^{4/} In addition, Plastatech would lose the

^{2/} The truck rate on PVC resin from Niagara Falls, ON to Plastatech is 1.6 cents per pound higher than the rail rate. At average rail loading of 165,000 pounds per carload for PVC resin, that amounts to increased freight charges of \$2,640 per carload ($165,000 \times \0.016). For 81 carloads in 2002, the increased charges amount to \$213,840 ($\$2,640 \times 81$).

^{3/} That increased cost is based on a quote of \$700 per truckload of PVC resin transloaded from rail to truck at Saginaw, MI (handling plus transportation cost). That quote was made by Schlegel Trucking, a motor carrier that provides service to Duro-Last. The 81 carloads received by Plastatech would amount to 205.6 truckloads at 65,000 pounds per truckload ($165,000 \text{ pounds per railcar} \times 81 \text{ railcars} = 13,365,000 \text{ pounds} \div 65,000 \text{ pounds per truckload} = 205.6 \text{ truckloads}$). The extra costs for 205.6 truckloads would be \$143,920 ($205.6 \times \$700 = \$143,920$).

^{4/} Suppliers of PVC resin who ship to Plastatech by rail routinely permit Plastatech to have extended use of their railcars for rent-free storage of PVC resin inventory. In contrast, truck delivery limits Plastatech to its on-site storage capacity of seven days' supply of PVC resin.
(continued...)

remaining useful life of its railroad trackage and rail unloading equipment, which had an undepreciated value of \$57,787 as of December 31, 2002.

In sum, Plastatech would suffer a first-year loss of well over \$200,000 as a result of the proposed rail abandonment, and a recurring loss of nearly \$200,000 every year thereafter. Increased costs of that magnitude would be a crushing blow to Plastatech, which is a company of modest means. In view of that very substantial harm, a finding is compelled that truck and rail-truck transportation would not be economically feasible alternatives to Plastatech's receipt of PVC resin directly by rail. *See Georgia Public Serv. Comm'n v. United States*, 704 F.2d 538, 545 (11th Cir. 1983). That factor strongly militates against approval of abandonment. *See Busboom Grain Co., Inc. v. ICC*, 856 F.2d 790, 795-796 (7th Cir. 1988).

STANDARDS GOVERNING DISPOSITION OF PETITIONS FOR EXEMPTION OF ABANDONMENT

Prerequisite to the grant of an exemption from any statutory requirement under 49 U.S.C.

§ 10502(a) are two Board findings:

- (1) the application in whole or in part of the statutory requirement is not necessary to carry out the transportation policy of 49 U.S.C. § 10101;
and
- (2) either
 - (a) the transaction or service to be exempted is of limited scope,
or
 - (b) the application in whole or in part of the statutory requirement is not needed to protect shippers from the abuse of market power.

^{4/}(...continued)

As a result of its ability to purchase several month's worth of PVC resin in advance, Plastatech saved an average of \$3,347 per month, or \$40,164 per year, during the most recent 12-month period (*see* PVC Resin-Buying Analysis, attached to this Reply as Exhibit A).

The rail transportation policy most directly implicated by a proposed rail abandonment is 49 U.S.C. § 10101(4), i.e., “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.”

In a long line of decisions, the Board (and its predecessor, the ICC) has denied petitions for exemption of abandonment where there was an inadequate record on which to grant the petition (i.e., where the record did not support a finding that the filing of a formal abandonment application under 49 U.S.C. § 10903 is not necessary to carry out the rail policy of 49 U.S.C.

§ 10101(4)):

- (1) *CSX Transp., Inc. -- Aband. Exempt. -- (betw. Memphis and Cordova) in Shelby County, TN*, 2001 STB LEXIS 943 at *7, STB Docket No. AB-55 (Sub-No. 590X), decision served Dec. 12, 2001;
- (2) *The Burlington N. & S.F. Ry. Co. -- Aband. of Chicago Area Trackage in Cook County, IL*, 1999 STB LEXIS 553 at *11-12, STB Docket No. AB-6 (Sub-No. 382X), decision served Sept. 21, 1999;
- (3) *Gauley River Railroad, LLC -- Aband. & Discon. of Serv. -- in Webster and Nicholas Counties, WV*, 1999 STB LEXIS 345 at *14, STB Docket No. AB-559 (Sub-No. 1X), decision served June 16, 1999;
- (4) *Buffalo & Pittsburgh RR, Inc. -- Aband. Exempt. -- in Erie and Cattaraugus Counties, NY*, 1998 STB LEXIS 247 at *13-18, STB Docket No. AB-369 (Sub-No. 3X), decision served Sept. 18, 1998;
- (5) *Central RR Co. of Ind. -- Aband. Exempt. -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN*, 1998 STB LEXIS 121 at *26-27, STB Docket No. AB-459 (Sub-No. 2X), decision served May 4, 1998;
- (6) *San Joaquin Valley R. Co. -- Aband. Exempt. -- in Kings and Fresno Counties, CA*, 1997 STB LEXIS 114 at *8-9, STB Docket No. AB-398 (Sub-No. 4X), decision served May 23, 1997, *pet. to reopen den.*, 1999 STB LEXIS 76, decision served March 5, 1999;

- (7) *Tulare Valley R. Co. -- Aband. & Discon. Exempt. -- in Tulare and Kern Counties, CA*, 1997 STB LEXIS 37 at *18-19, STB Docket No. AB-397 (Sub-No. 5X), decision served Feb. 21, 1997, *pet. for recons. den.*, 1998 STB LEXIS 76, decision served March 6, 1998;
- (8) *Boston & Maine Corp. -- Aband. Exempt. -- in Hartford and New Haven Counties, CT*, 1996 STB LEXIS 361 at *12-13, STB Docket No. AB-32 (Sub-No. 75X), decision served Dec. 31, 1996;

and

- (9) *CSX Transp., Inc. -- Aband. Exempt. -- in Grant, Delaware, Henry, Randolph and Wayne Counties, IN*, 1989 ICC LEXIS 297 at *12-16, Docket No. AB-55 (Sub-No. 282X), decision served Oct. 16, 1989.^{5/}

The rationale for that well-established principle is quoted below from *CSX Transp., Inc.*

-- *Aband. Exempt. (betw. Memphis and Cordova) in Shelby County, TN, supra*, 2001 STB LEXIS 943 at *7, but it appears in essentially the same form in almost all of the cited decisions:

The exemption process is designed to minimize regulatory burdens. However, it is used only when the information provided is sufficient for us to reach an informed decision. Typically, the types of abandonment transactions that are exempted are those where the shippers do not contest the abandonment or, if they do contest it, where revenue from their traffic is clearly marginal compared to the cost of operating the lines. Where there is an inadequate record on which to grant an abandonment petition for exemption, the petition will be denied outright
...

^{5/} Petitions for exemption of abandonment are granted where shippers do not contest the abandonment (*see Tulare Valley R. Co. -- Aband. & Discon. Exempt. -- in Tulare and Kern Counties, CA, supra*, 1997 STB LEXIS 37 at *18), and where opponents do not effectively challenge or refute the rail carrier's evidence that continued operation of the rail line would be unduly burdensome (*see Paducah & L. Ry., Inc. -- Aband. Exempt. -- in McCracken County, KY*, 2003 STB LEXIS 344 at *5-6, STB Docket No. AB-468 (Sub-No. 5X), decision served June 20, 2003, and *Minnesota Northern RR, Inc. -- Aband. Exempt. -- betw. Redland Jct. and Fertile, in Polk County, MN*, 1997 STB LEXIS 294 at *25-26, n.17, STB Docket No. AB-497 (Sub-No. 2X), decision served Nov. 14, 1997).

It is provided in 49 C.F.R. § 1121.3(a) that a party filing a petition for exemption is required to provide its entire case-in-chief, along with all supporting evidence, workpapers and related documents, at the time that it files its petition. Consequently, any rebuttal evidence or argument filed by a petitioner will be stricken. *Paducah & L. Ry., Inc. -- Aband. Exempt. -- in McCracken County, KY, supra*, 2003 STB LEXIS 344 at *2; *Central Kansas Ry., LLC -- Aband. Exempt. -- in Sedgwick County, KS*, 2001 STB LEXIS 356 at *3, STB Docket No. AB-406 (Sub-No. 14X), decision served April 10, 2001. If a petition for exemption is denied because of an inadequate record, the deficiencies cannot be corrected by means of rebuttal; the rail carrier instead must file a formal abandonment application if it continues to seek abandonment of the rail line. *Central RR Co. of Ind. -- Aband. Exempt. -- in Dearborn, Decatur, Franklin, Ripley and Shelby Counties, IN, supra*, 1998 STB LEXIS 121 at *27.

ARGUMENT

THE RECORD IS NOT ADEQUATE TO SUPPORT A GRANT OF THE REQUESTED EXEMPTION FOR ABANDONMENT

Here, Plastatech opposes the requested exemption for abandonment and challenges CMR's contention that the revenue from Plastatech's traffic is marginal compared to the cost of operating the rail line. In light of that opposition, CMR had the burden to provide an adequate record to support a grant of an exemption for the proposed abandonment. As detailed below, CMR utterly failed to sustain that burden.

There is not a shred of evidence to support the testimony of Mr. Pinkerton that CMR's average operating cost for rail line traffic in 2002 was \$639.77 per car. (Petition at 22). Leaving aside the absence of qualifications on his part to testify on the technical subject of railroad

operating costs,^{6/} Mr. Pinkerton failed to identify any of the elements making up that alleged operating cost, let alone quantify and support the unit costs and service units assertedly associated with each element of operating cost. Without that supporting evidence, the alleged operating cost per car is entirely conclusory and unverifiable. If Mr. Pinkerton's testimony on that subject is admissible at all, it is not entitled to any weight without that essential support. The upshot is that there is no substantial evidence to support CMR's principal contention that it is operating the rail line at a loss. (Petition at 8, 22).^{7/}

Mr. Pinkerton has falsely claimed that the State of Michigan's plan to widen Interstate Highway 75 would require CMR to spend more than \$5 million to rebuild a railroad bridge over that highway unless the rail line at issue were to be abandoned. (Petition at 23). As is evident from Attachment B of the Petition, the State, not CMR, would be required to bear that cost. That is why the State is willing to pay CMR more than \$3 million to abandon the rail line. (*Id.* at 5-6, 16-17). There is no evidence that CMR itself would be faced with any rehabilitation cost in the event of denial of abandonment.

The \$3,046,500 to be paid by the State to CMR in the event of abandonment (Petition at 19) would provide more than ample funding for CMR to arrange for continued rail service to Plastatech at another location. Conditions to authorization of abandonment requiring such

^{6/} A person does not become qualified to testify on technical railroad operating costs for track maintenance, locomotives, freight cars and train crews by virtue of holding the administrative positions held by Mr. Pinkerton as President and General Manager.

^{7/} Mr. Pinkerton's claim that CMR loses money on each car transported to Plastatech lacks credibility because in its own interest CMR would not be expected to have negotiated divisions of revenue with its connecting rail carrier that fail to cover its corresponding operating costs.

relocation or similar relief are often required by public convenience and necessity. *See* 49 U.S.C. § 10903(e)(1)(B); *St. Louis-S.F. Ry. Co. Trustees Abandonment*, 244 I.C.C. 485 (1947); *Seaboard Coast Line R. Co. - Abandonment*, 360 I.C.C. 257, 262-268 (1979). Complex issues of that nature are not suitable for consideration under accelerated and informal exemption procedure.

Mr. Pinkerton has contended that the amount of capital investment required to keep the line functional is exorbitant compared with the amount of traffic moved over the line. (Petition at 23). However, the only amount identified in Mr. Pinkerton's statement is \$16,316 per year "to keep the line within FRA compliance" (*ibid*). That is an annual cost for track maintenance, not a capital investment for rehabilitation. Far from being exorbitant in relation to traffic volume, rail line revenue provides a return of more than 250 percent per year on that amount. ($\$41,000 \div \$16,316 = 2.51$). There is nothing burdensome to CMR about that.

Moreover, the amount claimed by Mr. Pinkerton for annual maintenance is unsupported and demonstrably excessive. Mr. Pinkerton has claimed that 200 crossties per mile must be replaced each year, based on minimum maintenance requirements. (Petition at 23). However, the extent of required annual crosstie replacement depends on the existing Federal Railroad Administration (FRA) condition of the trackage at issue and the FRA condition at which the trackage is to be maintained in the future. *See Union Pacific RR Co. -- Aban. -- Wallace Branch, ID*, 9 I.C.C.2d 325, 373-376 (1992). For example, a rail line currently in FRA Class 3 condition does not require crosstie replacement for a number of years if it is to be maintained at a lesser FRA Class 1 condition in the future (*id.* at 373). CMR failed to identify the current FRA

condition of the rail line at issue. Consequently, there is no basis for a finding that any crosstie replacement is required on the line in the foreseeable future.

Even assuming a current FRA Class 1 condition of the rail line trackage and FRA Class 1 maintenance for the future, the cost of crosstie replacement put forth by Mr. Pinkerton is excessive for two reasons. First, only 28 crossties per mile per year are required to be replaced to meet minimum FRA Class 1 standards. *See Southrail Corp. - Aban. - Whistler Station, AL & Waynesboro, MS*, 7 I.C.C.2d 854, 883 (1991). That replacement rate is based on installation of new crossties in replacement, having a 30-year life. That rate should be doubled to 56 crossties per mile per year to account for CMR's proposal to install used ties in replacement, having a life of 15 years. Nevertheless, that replacement rate of 56 ties per mile per year is only 28 percent of the replacement rate of 200 ties per mile per year in Mr. Pinkerton's testimony.

Secondly, the crosstie replacement is required to be confined to the 1.77 miles of rail line proposed to be abandoned. The cost for crosstie replacement in Mr. Pinkerton's testimony encompasses two miles of rail line.

The correct cost for crosstie replacement, assuming current and proposed FRA Class 1 condition of the line, is \$3,172 per year (56 ties per mile per year x 1.77 miles x \$32 per tie = \$3,171.84). The cost of \$12,800 per year for crosstie replacement in Mr. Pinkerton's statement is thus overstated by a factor of more than four ($\$12,800 \div \$3,172 = 4.035$).

Supporting evidence is also lacking for Mr. Pinkerton's testimony that it would cost CMR approximately \$3,000 per year to replace missing bolts, change broken joint bars and rails, and for occasional gauging. (Petition at 23). However, even assuming the validity of that cost and a cost of \$516 per year for track inspection, the total cost for normalized track maintenance in the

future would be only \$6,688 per year (including \$3,172 per year for crosstie replacement). That cost is minuscule compared to the acknowledged rail line revenue of \$41,000 in the most recent annual period of record.

There would be additional operating costs for locomotives, freight cars and train crews, but CMR has not attempted to identify any of them. CMR has thus failed to sustain its burden to prove that the revenue from traffic on the line is clearly marginal compared to the cost of operating the line. That being the case, the record is not adequate to support a grant of an exemption for the proposed abandonment. Without an adequate record, the Board is not in a position to make the finding required by 49 U.S.C. § 10502(a)(1) that the filing of an abandonment application under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101(4).

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, the Petition for Exemption is required to be denied.

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Protestant

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DATE FILED: August 20, 2003

EXHIBIT A

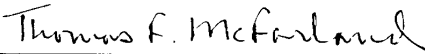
PVC RESIN - BUYING ANALYSIS

	Price / lb.	Purchases (000's)	Consumption (000's)	Residual Inventory	Pre-Buy Savings	
	0.355			342		
Dec	0.365	175	357	696		
Jan 2001	0.365	0	0	696	\$ -	
Feb	0.375	542	1053	185	\$ -	
Mar	0.375	542	730	-3	\$ -	
Apr	0.375	1396	1057	336	\$ -	
May	0.375	1071	502	905	\$ -	
Jun	0.375	1072	1084	893	\$ -	
Jul	0.355	1068	1125	836	\$ 240	
Aug	0.33	861	1194	503	\$ 1,425	
Sep	0.33	1076	1142	437	\$ -	
Oct	0.32	705	1323	-181	\$ 660	
Nov	0.28	1731	1045	505	\$ 24,720	
Dec	0.28	359	508	356	\$ -	<u>\$ 27,045</u> Jan - Dec 2001
Jan 2002	0.26	0	283	73	\$ 2,980	
Feb	0.27	1604	947	730	\$ (2,830)	
Mar	0.29	836	1251	315	\$ 13,140	
Apr	0.31	1150	618	847	\$ (8,300)	
May	0.33	1772	1380	1239	\$ 10,640	
Jun	0.37	1036	1660	615	\$ 15,680	
Jul	0.38	1665	1005	1275	\$ (6,240)	
Aug	0.39	1235	1240	1270	\$ 6,600	
Sep	0.38	1056	1080	1246	\$ 50	
Oct	0.38	511	1467	290	\$ -	
Nov	0.37	1499	1264	525	\$ 9,560	
Dec	0.36	1175	849	851	\$ (2,350)	<u>\$ 38,930</u> Jan - Dec 2002
Jan 2003	0.38	1168	396	1623	\$ 6,520	
Feb	0.40	1299	1087	1835	\$ 15,440	
Mar	0.42	1352	1095	2092	\$ 4,240	
Apr	0.44	1313	1235	2170	\$ 5,140	
May	0.44	1396	1517	2049	\$ -	
Jun	0.43	156	945	1260	\$ 1,210	<u>\$ 32,550</u> Jan - Jun 2003

Average
\$ 3,347
per month

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2003, I served the foregoing document, Reply In Opposition To Petition For Exemption, on William A. Mullins and Christine J. Sommer, Baker & Miller, PLLC, 915 Fifteenth Street, N.W., Suite 1000, Washington, DC 20005, by UPS overnight mail.



Thomas F. McFarland