

NO. 25-1048

In The
**United States Court Of Appeals
For The Fourth Circuit**

In re: CHAPTER 13 TRUSTEE.

CHRISTOPHER M. COOK,

Debtor – Appellant,

v.

CHAPTER 13 TRUSTEE,

Trustee – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA**

CORRECTED BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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No. 25-1048Caption: Christopher Cook vs. Thomas P. Gorman, Trustee

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christopher Cook, Appellant

(name of party/amicus)

who is Appellant, makes the following disclosure:
 (appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Robert S. Brandt

Date: 2/20/2025

Counsel for: Appellant

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. Section 158(d)(1).

This case arises from a confirmation order involving a chapter 13 bankruptcy case in the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division. The subject of this appeal is the Bankruptcy Court's Confirmation Order entered on February 6, 2024 (the "Confirmation Order") (JA260).

The Appellant appealed the Confirmation Order to the United States District Court for the Eastern District of Virginia. The District Court affirmed the ruling of the Bankruptcy Court on the ground that the bankruptcy appeal was now equitably moot (the District Court Order) (JA263).

The Appellant then timely appealed the District Court's ruling upholding the Order of the Bankruptcy Court to this Court by filing a timely notice of appeal.

STATEMENT OF ISSUES PRESENTED

1. Was the District Court correct in ruling that this appeal is now equitably moot as a result of the chapter 13 plan being confirmed one year ago?
2. Assuming that this appeal is not equitably moot, did the Bankruptcy Court commit reversible error by concluding that the Appellant did not meet its burden of proof on the issue of the liquidation test and good faith?

3. Assuming that this appeal is not equitably moot, did the Bankruptcy Court commit reversible error by concluding that the first plan filed by the Appellant which proposed payments of \$200 per month for 36 months could not be confirmed?

STATEMENT OF THE CASE

On May 29, 2023, Christopher M. Cook, the Appellant, filed a chapter 13 bankruptcy petition with the Bankruptcy Court for the Eastern District of Virginia, Alexandria Division (JA5). The income reflected in the bankruptcy schedules disclosed that Appellant had two sources of income: a military pension that netted close to \$4,000 per month, and a Department of Veteran Affairs disability payment of roughly \$2,300 per month as a result of injuries suffered while serving in the military (JA30). Since the debtor was “under median” for a household size of two the debtor proposed a plan that paid only \$200 per month for 36 months (JA55). Out of the total amount of \$7,200 that debtor proposed to pay under the plan, \$720 of that money was earmarked for the chapter 13 trustee administrative expenses, and the other \$6,480 was designed to go to the unsecured creditors in the case. The debtor was proposing a two percent plan (JA57).

On July 25, 2023, Thomas P. Gorman, the Appellee, filed an Amended Objection to Confirmation of Plan (JA67). The essence of the pleading was that the Appellant was simply not offering to pay enough money to the creditors.

Moreover, the Appellee maintained that the Appellant's plan did not meet the liquidation test because certain avoidable transfers had not been fully accounted for. Finally, the trustee alleged that in light of the fact that debtor had sold a former marital home which netted the debtor nearly \$98,000 some nine months prior to filing for bankruptcy, and since the debtor could not explain where that money went, that in a hypothetical chapter 7 scenario the debtor would be ineligible to receive a discharge, thus implying that a 100 percent plan was necessary to achieve confirmation.

On August 2, 2023, the Appellant responded to the objection to confirmation filed by the Appellee which took issue with the characterization of the trustee's allegations (JA69).

On September 8, 2023, the Appellant filed amended schedules with the bankruptcy court (JA71). The Appellant amended Schedule A/B to disclose that he owned two dogs. In addition, the Appellant amended his Statement of Financial Affairs (the "SOFA") as follows: In respond to question number 7 on SOFA the Appellant has originally disclosed that he had repaid his father, James Cook, \$5,000 during the one year preceding the bankruptcy filing, when in fact he had actually repaid \$11,000 to his father during this period of time. In addition, the amendment reflected that Reagan Cook, debtor's daughter, was paid back \$3,000 for money owed and not \$7,000 as originally disclosed, and that debtor's son,

Jackson Cook, was paid back \$1,800 and not \$2,000 for money lent by him to debtor. The incorrect information originally disclosed in question number 13 of SOFA was deleted when the amendment was made with the court. In short, the corrected SOFA disclosed that the total amount of transfers made to the three family members totaled \$15,800 and not \$26,000 as the original SOFA revealed (JA83). Finally, the Appellant made some relatively minor revisions to his schedule J, his listed monthly expenses. Despite these various changes in his expenses the debtor's monthly disposable income remained roughly the same; approximately \$1,600 per month in disposable income after accounting for his expenses (JA82).

On September 14, 2023, the parties appeared before the bankruptcy court for an evidentiary hearing on debtor's \$200 per month plan. The only witness to testify was the debtor. At the end of the hearing, the Bankruptcy Court ruled orally from the bench and denied confirmation of the Appellant's plan with leave to amend (JA140-142).

On September 18, 2023, the Appellant filed an amended plan (2nd plan) proposing payments of \$400 per month for the duration of the plan (JA155). This amended plan was again met by an objection by the Appellee (JA167). On October 30, 2023, the Appellant filed his own objection to the confirmation of his proposed amended plan asserting that the prior plan (the first plan) that proposed payments of only \$200 per month should have been confirmed (JA174).

On November 8, 2023, the Appellee appeared before the Bankruptcy Court and advised the court that the debtor was willing to accept a denial of confirmation (JA177)

On November 9, 2023, the Appellant filed his third plan which proposed that the payments increase to \$600 per month for the life of the plan (JA182). Once again, the Appellant was met with an objection by the Appellee (JA194). The objection of the Appellee could best be paraphrased as follows: “What part of you are not proposing enough of a payout to the creditors do you not understand?!”

On December 10, 2023, the Appellant filed a detailed objection to confirmation of his own third amended plan -reiterating again that the original plan should have been confirmed- (JA210). However, the Appellant made the mistake of ending his objection by stating that “For the foregoing reasons, the objection by debtor to his current plan should be denied.” Appellant meant to say that notwithstanding his objection to the third plan, that the plan should nonetheless be confirmed over his objection.

On December 14, 2023, the parties appeared before the court. After arguments by both sides the court decided that the best course of action was to deny confirmation with leave to amend (JA229).

On December 16, 2023, the Appellant filed his fourth plan, this time proposing payments of \$625 per month for the duration of the plan (JA234) The

trustee did not object to the plan. However, the Appellant, in order to maintain his standing to appeal, once again filed a detailed objection to his own plan on January 24, 2024 (JA248). This time however the Appellant did not repeat his mistake and in his pleading requested that the plan be confirmed over his own objection.

The parties then appeared before the court on February 1, 2024, where the Bankruptcy Court and the Appellee expressed their astonishment that the Appellant had once again objected to his own plan. Nevertheless, the Bankruptcy Court finally approved the plan proposing payments of \$625 for the duration of the case. On February 6, 2024, an order of confirmation was entered (JA260).

SUMMARY OF ARGUMENT

The District Court was wrong to declare that the appeal was equitably moot (JA263-267). It would not be impractical for the appellate court to consider this appeal. The appellate court can easily fashion a remedy. As for the merits of the appeal they be can summarized as follows: the Appellant had satisfied the liquidation test. The Bankruptcy Court had no reason to conclude otherwise. Rather, the Appellee and the Court simply wanted the Appellant to pay more, since by all accounts, when examining the Appellant's budget, it certainly appeared like he could pay more. However, since the Appellant's Veteran Disability income (much like Social Security income) was not "real income" subject to payment to the creditors, the Appellant was able to show a decent surplus on his budget when

looking at Schedules I and J of the bankruptcy petition. The foregoing did not sit well with Appellee. It seemed like the Appellant could afford more. The Bankruptcy Court apparently felt the same way. As such, the Appellant was “forced” to file plan after plan until a more sensible payout was proposed and one that satisfied both the Appellee and the Bankruptcy Court.

ARGUMENT

I. Standard of review as to all assignments of error.

The Court reviews the Bankruptcy Court’s findings of fact for clear error and its conclusions of law de novo. In re Meredith, 527 F.3d 372, 375 (4th Cir. 2008).

II. The District Court was wrong to conclude that this appeal is barred by the doctrine of equitable mootness.

There are a number of reasons why this case is not barred by the doctrine of equitable mootness. Virtually all cases that have invoked equitable mootness in the Fourth Circuit have involved complicated chapter 11 confirmation cases which almost always involve the sale of real estate. For instance, in the case of Mac Panel Co. v. Va. Panel Corp., 283 F.3d 622 (4th Cir. 2002) which was essentially a two-party dispute involving a chapter 11 case where the debtor achieved confirmation the Fourth Circuit noted that “Equitable mootness is often invoked when it becomes impractical and imprudent to upset the plan of reorganization....”

However, a reversal by this Court is not impractical. For one thing, the Appellant is not asking this Court to undo what has been done to date. The Appellant is not

asking the creditors to disgorge the payments they have received to date. The Appellant is merely asking that moving forward the creditors no longer receive \$625 per month, but rather \$200 per month. In addition, a reversal by this Court would not be impractical since unlike major chapter 11 case that involve third parties relying and taking certain action based on the confirmation order entered by the bankruptcy court, such is not the case here. No third parties will be harmed. In short, the Appellant is not asking this Court to put the proverbial horse back in the barn, but rather to correct things moving forward. After all this Court has also stated that the application of the equitable mootness doctrine is not to employ “rigid rules.” Rather, a court must determine whether judicial relief on appeal can, as a pragmatic matter, be achieved. A ruling that states that moving forward the creditors would receive a lesser payout for the remaining 24 months left in this case is pragmatic and would not disturb what has transpired to date. The ruling of this Court in In re Bate Land & Timber LLC, 877 F.3d 188 (4th Cir. 2017) demonstrates that this Court knows how to fashion rulings that allow for the issue on appeal to be decided on the merits without unnecessarily foreclosing the right to be heard on appeal by a party aggrieved merely because a bankruptcy plan has been confirmed.

Second, a bankruptcy confirmation should not be an immediate impediment to the Appellant’s right to have his appeal heard. After all, the Supreme Court of

the United States made it clear in Bullard v. Blue Hills, 135 S. Ct. 1686 (2015) that a debtor may not appeal a denial of confirmation, but rather must await for his case to be confirmed before filing an appeal of the confirmed plan. Moreover, some circuit courts have placed further demands on the debtor to also object to his own plan and explain why a previous plan should have been confirmed in order to preserve his standing to appeal. It would seem rather peculiar that a debtor who follows the law, would then be prevented from having his appeal heard on the merits.

Third, the District Court made much of the fact that the plan had been substantially consummated, but the reality is that with roughly 24 months left in this plan it is incorrect to draw this conclusion.

Finally, in Long v. Robinson, 432 F.2d 977 (4th Cir. 1970) this Court stated that “mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough” to satisfy the second prong necessary to achieve a stay. The second prong requires the appellant to prove that he will suffer irreparable harm if his motion seeking a stay is denied. Which is to say, in the present case, if a stay was sought by the Appellant it would not had been granted because the harm to debtor was strictly monetary.

In short, the Appellant could not have obtained a stay, the plan has not been substantially consummated, the relief requested by the Appellant would only

impact the creditors moving forward, and this would have no impact on any third parties. Creditors to whom a debtor owes money to are not third parties; at least not in the context of equitable mootness.

As for the assertion that courts in this circuit have applied the theory of equitable mootness in the context of chapter 13 cases, that statement by the District Court is correct. However, the cases upon which the District Court relies upon are distinguishable from the facts of this case. In the case of Kahn v Citibank, Civil Action No. PX 16-3121 (D. Md. May. 26, 2017) relied upon by the District Court involved a debtor challenging the legality of the foreclosure of his home. After his various legal challenges in state court failed, the debtor filed a chapter 13 bankruptcy to stop the bank from evicting him from his home. The bankruptcy court allowed for the lifting of the automatic stay and permitted the bank to transfer Mr. Khan's property to a third-party purchaser. The District Court asserted that they could not assist Mr. Kahn because the property had already been conveyed to another party that had purchased the property. The District Court was relying on prior court holding that stated that an appeal is moot where the property that was the subject of the original case has been transferred pursuant to a bankruptcy court's order. The foregoing makes sense. The bankruptcy court does not have the legal right to demand from the innocent third party to reconvey a property that they purchased in good faith with adequate consideration. However,

in the present case, the Court is not being asked to undo a transaction that was made involving an innocent third party. There simply is no third-party.

III. The Liquidation Test was satisfied.

In order to achieve confirmation of a plan, one of the requirements imposed on a debtor is that he satisfy what is commonly referred to as the liquidation test. The liquidation test requires that creditors receive payments having a present value at least equal to what they would receive in a chapter 7 case. In re Plascencia, 354 B.R. 774, 782 (Bankr. E.D. Va.2006).

In order to determine whether a proposed chapter 13 plan meets the liquidation test, two separate calculations are necessary. One calculation determines the value, as of the effective date of the plan, of property to be distributed to each unsecured creditor under the proposed chapter 13 plan, taking into account the associated administrative expenses. The next calculation establishes the amount that would be paid to each unsecured creditor if the debtor's estate were liquidated in a hypothetical chapter 7 case, taking into account chapter 7 administrative expenses. In re Keenan, 364 B.R. 786, 802 (Bankr. D.N.M. 2007).

When dealing with allegations of preference payments and fraudulent conveyances made by a debtor the bankruptcy court must conduct a mini-trial to determine what would have happened in the context of a chapter 7 proceeding. The Bankruptcy Court must draw a conclusion as to how much a chapter 7 trustee could have paid out to the unsecured creditors.

As the court explained in In re Affiliated Foods, Inc., 249 B.R. 770 (Bankr. W.D. Mo. 2000):

Applying the best interests of creditors test requires the Court to "conjure up a hypothetical chapter 7 liquidation that would be conducted on the effective date of the plan." In re Sierra-Cal, 210 B.R. 168, 172 (Bankr. E.D. Cal. 1997). The Court then makes an independent finding, based on the evidence and arguments presented, whether creditors will receive as much under the plan as they would in the hypothetical Chapter 7 liquidation. The plan proponent bears the burden of proof to establish by a preponderance of the evidence that its plan meets the best interests test. In re Briscoe Enters., Ltd. II, 994 F.2d 1160, 1167 (5th Cir. 1993).

The court recognized that while the liquidation test must be based on the evidence presented, there was certainly an element of speculation involved. In addition, while determining what would happen in a chapter 7 case requires an examination of the evidence, the bankruptcy court must also consider the avoidance actions which transpired in the case not merely as an academic exercise, but based on how things work in the real world. As the bankruptcy court articulated in In re Hilliard, Case No. 11-13347 (Bankr. E.D. Tenn. Mar 12, 2012):

“The calculation is not a simple comparison of the sum of the value of the debtor's equity plus the value of the avoided interest to the value of distributions to unsecured creditors under the plan. The value of the avoided interest must reflect the probability of success_of the hypothetical chapter 7 trustee, the expense of the recovery action, the claims created by the avoidance, the dilution of the distribution to the unsecured creditors, and any other consideration that might affect the dividend that creditors in the hypothetical chapter 7 would receive. “

Against this backdrop, it is the Appellant's position that the Bankruptcy Court committed reversible error in a number of ways in concluding that the Appellant did not satisfy the liquidation test. First, the Bankruptcy Court failed to make any clear finding of facts. At the conclusion of the evidentiary hearing that took place after the Appellant filed his initial \$200 per month plan the Bankruptcy Court simply stated the following (JA140):

“I'm going to deny confirmation because the plan does not meet the liquidation test based on the information that the debtor has provided. Even if we use – and I'm not setting this as a standard in my own case, but even if we use the 50/50 rule that Mr. Gorman spoke of that Judge Kenny offered in a different case, the transfers need to be accounted for in a liquidation test. So for that reason, I'm going to deny confirmation with leave to amend.”

The bankruptcy court is obligated to explain its legal reasoning when reaching a legal conclusion. Simply asserting that the evidence put on by the debtor when he testified does not meet the liquidation test is far too broad and far too vague of a legal conclusion. The Bankruptcy Court failed to explain what specific facts led the Court to conclude that the plan did not meet the liquidation test. What did the Bankruptcy Court mean when it stated that “the plan does not meet the liquidation test based on the information that the debtor provided?” What did the Court mean when it stated that the “transfers need to be accounted for in the liquidation test?” Were all three transfers made by the Appellant not discussed at length during the Appellant's testimony?

Contrary to the legal assertion made by the Bankruptcy Court, there was ample evidence that the liquidation test had been satisfied. The Appellant's testimony, which was unrefuted, established that the \$7,200 that he was proposing to pay his creditors exceeded the amount that a chapter 7 trustee would recover if he was to pursue the preference actions disclosed by the Appellant. The Bankruptcy Court simply chose to dismiss the evidence presented by the Appellant and instead took the Appellee's opening (which is obviously not evidence) as the gospel. Thus, in failing to consider the evidence which the Bankruptcy Court had before it and instead choosing to adhere to the story presented by the Appellee, the bankruptcy court committed reversible error. The Debtor testified conclusively as to the amounts that he repaid his father, his son, and his daughter.

The Bankruptcy Court further erred by sustaining the objections of the Appellee on the issue related to the health of the Appellant's father, and on the issue of what income the Appellant's father presently possessed (JA110 and JA111). The objections made by the Appellee should have been overruled. The age, location, health, and income of the Appellant's father was in fact of paramount importance and relevance. After all, the probability of success and the ability to collect on a judgment is the first thing that a chapter 7 trustee evaluates when considering whether to file an avoidance action lawsuit. How eager would a chapter 7 trustee be to bring a lawsuit against an 88-year-old retired man, living on

Social Security, in Alabama, in order to recover \$11,000? What is the likelihood that a chapter 7 trustee would not even bother bringing such a suit, or in the alternative agreeing to settle this matter by accepting a fraction of the \$11,000 transferred? In that vein, how likely is a chapter 7 trustee to file suit against a couple of 20-year-olds who have received \$1,800 and \$3,000 respectively from their father during the year preceding the bankruptcy filing? Is it not logical to conclude that a chapter 7 trustee would gladly accept a check for \$8,000 from the Appellant as a “global settlement” for not pursuing any avoidance actions against the Appellant’s father and children? What are the odds of a chapter 7 trustee balking at this settlement offer at the conclusion of the meeting of creditors before having to do any “heavy-lifting?” All of these practical questions should have been considered by the Bankruptcy Court in determining if the liquidation test had been satisfied or not.

In failing to allow the Appellant to make his closing argument the Bankruptcy Court yet again committed an error. As the case law logically explains, when it comes to avoidance actions the bankruptcy court must conduct this mathematical analysis with specificity, based on the evidence presented, and the arguments presented by each party. The Appellant was deprived of the opportunity of making a compelling and logical argument to the Bankruptcy Court which was that a chapter 7 trustee would not have bothered to pursue these miniscule actions,

or in the alternative, in a worse-case scenario for the Appellant, that a trustee would have settled these preference actions for \$8,000. Had a closing argument been permitted the Appellant would have explained that after the chapter 7 trustee settled these preferences for \$8,000, and after the trustee paid himself his administrative expenses and commission due of at least \$4,000 that a total of \$4,000 would have been disbursed to the creditors. And since the Appellant's original plan proposed a payout to the creditors far in excess of \$4,000 the liquidation test had been satisfied.

As for the argument that the debtor's discharge would be denied in a chapter 7 case because the debtor could not explain what happened to the \$98,000 after selling his former marital home, that argument lacks any merit and was not supported by the evidence. Thus, to the extent that the bankruptcy court gave any weight to this argument -which presumably the Bankruptcy Court did not-, that Appellant's chapter 7 discharge would have been in jeopardy had he filed a chapter 7 case instead of filing a chapter 13 case, the bankruptcy court again committed error.

As the First Circuit explained in Hernandez v. Shove (In re Shove), 22-9005 (1st Cir. Oct 06, 2023)

To prevail "[u]nder § 727(a)(3), a creditor" must prove that the debtor (1) "unreasonably failed to maintain sufficient records" and (2) that this failure makes it impossible "to adequately ascertain [their] financial situation."

As the court explained:

Although a debtor's "[r]ecord-keeping need not be precise to the point of pedantry," the records must "sufficiently identify the transactions [so] that intelligent inquiry can be made of them." In re Simmons, 810 F.3d at 857-58 (citation omitted) (second alteration in original).

In the instant case the Appellee did not prove that the Appellant “unreasonably failed to maintain sufficient records.” The unchallenged testimony of the Appellant was that he possessed the bank records which disclosed every transaction that took place from the time that the \$98,000 was deposited into his bank account some 9 months prior to filing to the day that his bankruptcy petition was filed (JA114 and JA115). As such, the Bankruptcy Court could not have concluded that the Appellant did not keep sufficient records. In addition, the Appellant testified that he possessed every single bank statement from the time that the money was deposited in his Navy Federal bank account. As such, the Bankruptcy Court could not have concluded that debtor’s actions made it impossible to adequately ascertain his financial situation. Finally, it was error for the Bankruptcy Court to refuse to allow into evidence as an exhibit an email from Appellant’s counsel to the Appellee which demonstrated that the bank statements were provided to the Appellee prior to the evidentiary hearing. Regardless of the foregoing, no bankruptcy court could possibly conclude that it would be impossible for a chapter 7 trustee to obtain bank records from a debtor (after all, the trustee has subpoena power) even if the debtor proved to be recalcitrant or was

stonewalling the trustee. The fact of the matter is that there was not a shred of evidence to support any type of legal conclusion that in a chapter 7 scenario that Debtor would not be entitled to a chapter 7 discharge.

CONCLUSION

The argument presented by the Appellee about liquidation test and the allegation that the Appellant would likely not be able to receive a chapter 7 discharge was nothing more than a “red herring.” The Bankruptcy Court’s decision that the Appellant did not satisfy the liquidation test was arbitrary and not supported by the evidence. The ruling should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary. The record and the case law speaks for itself.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Respectfully submitted,

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