

# FAX TRANSMISSION

CHANCERY COURT PART III  
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**From:** Chancellor Lyle's Office

**Subject:** *Leslie Newman v. Smart Data Solutions, LLC, et al., No. 10-507-III*

**Comments:**

Original will follow via U.S. Mail.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

LESLIE NEWMAN, Commissioner of )  
the Tennessee Department of )  
Commerce and Insurance, )  
 )  
Petitioner, )

VS. )

NO. 10-507-III )

SMART DATA SOLUTIONS, LLC, a )  
Tennessee limited liability company, )  
AMERICAN TRADE ASSOCIATION, )  
INC., an Indiana nonprofit corporation )  
with its principal place of business in )  
Tennessee, AMERICAN TRADE )  
ASSOCIATION, LLC, an Arkansas )  
limited liability company, SERVE )  
AMERICA ASSURANCE, a corporation )  
with an unknown location, BART S. )  
POSEY, SR., ANGIE POSEY, OBED W. )  
KIRKPATRICK, SR., LINDA )  
KIRKPATRICK, RICHARD H. )  
BACHMAN, KRISTY WRIGHT, )  
WILLIAM M. WORTH, II, and )  
COLIN YUELL, )

Respondents. )

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DAVIDSON COUNTY CLERK  
B. G. HALL

MEMORANDUM AND ORDER

The issue for the Court to decide in this case is whether the State of Tennessee can take over, shut down and sell off (liquidate) businesses located in Springfield, Robertson County, Tennessee. Usually the State does not have such power. There is, though, an exception: the insurance industry.

State regulation and intervention in the insurance industry are justified on two fronts. Conducting business as an insurance company is by law not a right but a privilege granted by the State and subject to conditions imposed by it. Additionally, insurance affects a great many people and has the potential to harm the public at large if conducted incorrectly or illegally. 43 AM. JUR 2D *Insurance* §§ 17, 18 (2nd ed. 1982). Accordingly, it has been held that it is constitutional for states to subject the insurance business to regulations not applicable to other industries. *Id.* In particular, Tennessee law authorizes the Tennessee Department of Commerce and Insurance to seize an insurance company doing business in Tennessee (TENN. CODE ANN. § 56-9-201), and liquidate the business (TENN. CODE ANN. § 56-9-305) where it presents a hazard, financial or otherwise, to the public (TENN. CODE ANN. § 56-9-306).

### The Dispute

The twist this case presents is that the businesses in issue, Smart Data Solutions, LLC (“SDS”), and American Trade Association, Inc. and/or American Trade Association, LLC (referred to collectively as “ATA”), do not call themselves insurance companies, do not hold themselves out to be insurance companies and deny that they are conducting insurance business. They deny, then, that the State has the authority to liquidate them. They have filed a motion for the Court to dismiss this lawsuit as an illegal exercise of power by the State. ATA’s position is that it is a nonprofit association of members. It denies that it sells

insurance products. It claims its sales are solely memberships which in turn offer access to a variety of benefits such as Direct TV, Beltone, Hertz, Best Buys. One of these benefits is limited health insurance. Affidavit of Bart Posey (owner of ATA and SDS) at ¶ 6. Claiming a similarly narrow connection to the insurance industry, SDS asserts it is a benefits administrator. ATA members pay dues into an SDS account. SDS distributes those to the vendors such as Direct TV, Hertz and the health insurance vendor. SDS then processes and administers payment of insurance claims but only as directed by the insurance company. Affidavit of Bart Posey at ¶¶ 10, 13.

Where the dispute arises is that the State contends that ATA and SDS facilitated nonexistent insurance coverage months after they knew the insurance did not exist. The facts are that Serve America Assurance ("Serve America"), the insurance company that ATA represented to its members that was underwriting and furnishing the insurance beginning in February 2008 and that SDS claims was directing payment of claims, does not exist in the United States. That is, Serve America has never issued a policy to an entity in the U.S., and its alleged holder Beema-Pakistan Company, Limited, a Pakistan company, has denied ownership of a U.S. subsidiary. ¶¶ 22, 23 of Exhibit H to Exhibit 1, Affidavit of Robert Heisse, filed March 23, 2010 in support of liquidation. In other words, ATA and SDS have been taking premiums and processing claims from ATA members for unauthorized and nonexistent insurance coverage. Thus, ATA and SDS have monies paid in by consumers and have claims to be processed, but there is no insurance underwriting company to fund and

direct payment of the claims. Nor is there any insurance company for the State to seize and liquidate under its regulatory powers of insurance companies.

Although ATA and SDS assert that they were victims and were duped by Beema and Serve America (*American Trade Association, Inc. v. William M. Worthy II, et al.*, Cause No. 21229 in the Chancery Court of Robertson County—Exhibit H to Exhibit 1 filed March 23, 2010 in this lawsuit in support of liquidation), more pertinent to this lawsuit is the disclaimer of ATA and SDS. They attempt to distance themselves from State regulation by asserting that they never promised members a certain insurance company such as Serve America, and that they never promised that they would actually pay members' insurance claims. Instead, they assert at page 5 of their Supplemental Memorandum filed April 9, 2010, that ATA merely promised that it has or will arrange for certain insurance plans to be available, and that it will pay or arrange for the payment of ATA members' insurance premiums out of membership funds. The situation, then, is that ATA and SDS deny that the State can proceed against them because they are not insurers, but because they have facilitated nonexistent insurance coverage, there is no insurance company for the State to proceed against for consumers to be reimbursed for premiums and claims.

To the contrary, the State has a legal theory which it contends renders ATA and SDS subject to Tennessee's insurance regulations: ATA and SDS are *de facto* [the Court's term] Tennessee insurers. The State alleges that there came a time when ATA and SDS knew Serve America and Beema did not write insurance in the United States. Nevertheless, ATA

and SDS continued to send Serve America policies and membership cards and take premiums and process claims. By conducting these kinds of insurance business acts themselves, ATA and SDS, the State reasons, assumed, took on and engaged in the insurance business in Tennessee. They are *de facto* insurers. And, because they are insurers in fact and reality, ATA and SDS, the State reasons, are subject to the state regulatory insurance scheme, including liquidation.

The State seeks to liquidate ATA and SDS so that it can close these businesses, thereby eliminating the hazard and risk they pose to the public, and sell off their assets to pay claims of members of the public who signed up for the insurance but where there was no existing insurance company or product in place to pay or process the claims. Liquidation is necessary, the State asserts, because ATA's and SDS's conduct of facilitation of bogus insurance months after they knew the insurance did not exist shows at a minimum poor judgment, and lack of due diligence, or at most dishonesty, and either way poses a hazard to the public. The State also asserts ATA and SDS are insolvent (liabilities exceed assets), which, as well, furnishes a basis for liquidation. For all of these reasons, the State argues, that ATA and SDS should not be allowed to stay in business.

### The Decision of the Court

After considering the facts established by both sides in affidavits and studying the Tennessee insurance statutes in issue, the Court determines that the State is correct. The

Court finds that ATA's and SDS's conduct in facilitating nonexistent insurance coverage months after they knew the insurance did not exist constitutes transacting insurance business in Tennessee. This conduct renders ATA and SDS in fact and in reality insurers and, therefore, as a matter of law, subjects them to regulation by the Tennessee Department of Commerce and Insurance, including the power to liquidate. The Court further determines that the State's petition to liquidate ATA and SDS shall be granted as they pose a significant hazard to the public. Insolvency of ATA and SDS may, as well, furnish a grounds for liquidation, but the Court needs to conduct an evidentiary hearing to determine that. Accordingly, liquidation shall not yet begin until the Court makes a determination on insolvency, which shall be made soon. In the meantime, the Order of Seizure, issued March 23, 2010, freezing assets and halting the business of ATA and SDS shall remain in effect until further order of the Court.

For procedural clarity, the Court states that its findings detailed below that (1) ATA and SDS are conducting insurance business in Tennessee and (2) that their transaction of business in Tennessee poses a significant hazard to the public are based on the papers: affidavits and filings to date. As to these two findings, the papers establish there are no genuine issues of material fact and no other reasonable inferences can be drawn. Borrowing a tool from summary judgment law, the Court concludes that it is not necessary, then, to conduct an evidentiary hearing, with "live" proof, on these two findings. Nor is the time that would be expended for an evidentiary hearing advisable, as one of the purposes of the

Liquidation Act is the “[e]arly detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures.” TENN. CODE ANN. § 56-9-101(d)(1). As to determining whether ATA and SDS are insolvent, however, despite the need for prompt action by the Court, the paper record is not sufficient and an evidentiary hearing must be conducted, as ordered below.

The facts, law and reasoning on which the Court’s decision is based are as follows.

### ATA and SDS Are *De Facto* Insurers

#### ATA and SDS Operations

Bart S. Posey, Sr., of Robertson County, Springfield, Tennessee, is the owner of SDS and ATA. He has signatory authority on bank accounts connected with SDS, ATA and Serve America. His wife, Angie Posey, is a director of ATA. Both Poseys have expired insurance producer licenses. Richard Bachman is the vice president of ATA. SDS and ATA have the same office location of 4676 Highway 41 North, Springfield, TN 37172.

At paragraph 6 of his April 5, 2010 affidavit, Mr. Posey states that ATA is an association of members and sells membership to consumers. ATA members receive many benefits such as Direct TV, Beltone, Hertz and access to limited health insurance plans. *Id.* at ¶¶ 7, 8. Mr. Posey asserts in paragraph 8 of his affidavit that the limited health insurance plans from February 2, 2008—December 31, 2009 were underwritten by Beema Pakistan Company Ltd. (“Beema”), an insurer based in Pakistan, and Serve America, Beema’s wholly

owned subsidiary. Beginning in January 2010, the underwriting was done by Andone Insurance Company. *Id.*

Membership dues, Mr. Posey explains, are transferred to an SDS account. *Id.* at ¶ 10. SDS then disburses the dues among the various vendors who provide benefits to members. One such vendor includes the insurance company, Serve America, who allegedly issued coverage to the ATA members. *Id.* The insurer then gives SDS, as the benefits administrator, approval and instructions to pay claims from an account SDS maintains, the "Claims Account." *Id.*

**Notice That Serve America/Beema Provides No Coverage in the U.S.**

Exhibit G to Exhibit 5 filed March 23, 2010 by the Petitioner in support of liquidation establishes that in February of 2009 the North Carolina Commissioner of Insurance issued a cease and desist order to Respondents, Bart Posey, Richard Bachman, SDS and ATA. One of the grounds for the order was that the Beema/Serve America insurance the Respondents were signing their members up for and collecting premiums on was "unauthorized" and "bogus." ¶¶ 19, 26 and 36 (pages 6-8) of Exhibit G to Exhibit 5. The Respondents were ordered to cease and desist from "[r]eceiving or collecting any premiums, commissions or other consideration for insurance issued by Beema." Accordingly and significantly, this Court finds that there is no genuine issue of material fact and that no other reasonable inference can be drawn but that by the February 2009 date of the North Carolina order, the

Respondents knew or should have known that the Serve America/Beema insurance product was a sham and posed a significant risk of nonpayment of claims for ATA members.

**Insurance Activity of ATA and SDS After Notice of Nonexistent Serve America**

Nevertheless, the Court finds that the record establishes in several ways that there is no genuine issue of material fact that after February of 2009, the Respondents continued to represent to Tennessee consumers that ATA had insurance coverage in place with Serve America.

First there is the affidavit of a Tennessee consumer who contacted ATA to obtain health insurance. See Exhibit E to Exhibit 1, the affidavit of fraud investigator Robert Heisse, in support of liquidation, filed March 23, 2010. The consumer purchased his ATA membership in August of 2009 which included a health insurance benefit. The consumer paid \$506.00 monthly directly to ATA as a premium. ATA sent the consumer a membership packet and an insurance card. Significant to the Court is that the membership packet states that the insurance is issued by "Serve America Assurance." These acts in August 2009 or thereafter were performed by ATA after the North Carolina February 2009 Cease and Desist Order that informed ATA that its alleged insurance underwriter, Serve America, did not exist.

Additional evidence is Exhibit D to Exhibit 1, the affidavit of Robert Heisse, filed March 23, 2010, in support of liquidation. Exhibit D is also a Tennessee consumer affidavit.

It establishes that in June of 2009 the Tennessee consumer received a welcome kit from ATA which included an insurance policy stating that it was issued by Serve America and an insurance card stating that all claims were to be sent to 4676 Highway 41 North in Springfield, Tennessee, the location of the offices of ATA and SDS. The consumer sent \$445.00 per month there. Again, the record establishes that ATA transacted matters subsequent to the execution of the insurance contract when it knew or should have known that there was no Beema/Serve America insurance product in place.

As to SDS' activity after it knew or should have known Serve America did not exist, as noted above, the affidavit of Bart Posey at paragraph 10 establishes that after members pay their dues and marketing groups are paid, dues are transferred to an SDS account. SDS disburses the membership dues to vendors, and then SDS pays claims as directed by the insurer, Beema/Serve America.

The supplemental affidavit of David White, certified financial examiner for the Petitioner, filed March 31, 2010, at paragraph 8 establishes that from June of 2009 no funds were deposited into the Claims Account by any purported insurer. Monies were instead transferred directly from SDS accounts to the Claims Account. From May to December 2009, SDS itself paid over \$4 million in claims. This payment activity establishes, the Court finds, that SDS was not merely a benefits administrator but was acting on its own and independently as an insurer by collecting premiums and remitting money to providers and policyholders. Accordingly, the record establishes that subsequent to February of 2009, after

the North Carolina Commissioner had provided in its cease and desist order information from which SDS and ATA knew or should have known that Beema/Serve America was nonexistent and subsequent to June 2009 when no money was deposited into the claims account by any insurer, SDS continued to process insurance claims and pay them without the direction of an insurance underwriter.

There is also, as to SDS, the March 23, 2010 affidavit of Robert Heisse, fraud investigator for the Petitioner at paragraph 14. It states that from his investigation of Respondents' papers "SDS has and continues to prepare and distribute insurance cards and fulfillment packages to enrollees of ATA" for purported Serve America health insurance coverage.

Finally, the record establishes that ATA and SDS were collaborators in representing and conducting business to make it appear that an ATA membership benefit included Serve America insurance coverage after February 2009 when they knew Serve America did not exist. The affidavit of David White, certified financial examiner for the Petitioner, dated March 31, 2010, establishes at paragraph 8 that SDS and ATA pooled funds. Money taken in by SDS went into a general account, SDS Account 1, and then was moved to a Claims Account disbursements of claims were made. There was no indication or evidence that SDS or ATA segregated funds from individual employer groups to offset their individual plan liabilities. There was also commingling of funds of SDS and ATA, and liabilities for claims payments for coverage were shared by SDS, ATA, employer groups and anyone who had

contributed to the pool. Mr. White concludes at paragraph 14 of his affidavit that “[t]he joint operation of SDS, ATA and Serve America appears to perform the functions of an insurance company. The money gets deposited into SDS Account 1 and then the money is transferred into the Claims Account from which claims are paid, the same as an insurance company would do.” At paragraph 13, Mr. White explains that Bart Posey is the signature on SDS Accounts 1, 2 and the Claims Account.

#### **What Constitutes A De Facto Insurer Under Tennessee Law**

Both Tennessee Code Annotated sections 56-2-107 and 56-9-103(5) provide that (1) issuing or delivering contracts of insurance to Tennessee residents, (2) soliciting applications for contracts of insurance, (3) collecting premiums, membership fees or other considerations for contracts of insurance or (4) transacting matters subsequent to the execution of contracts of insurance and arising out of them, constitute doing insurance business in Tennessee. The findings above that ATA and SDS engaged in these tasks even after they knew in February of 2009 that the Beema/Serve America insurance coverage was a sham and that there was no legitimate underwriter establish that ATA and SDS were no longer functioning as a vendee of or administrator for Beema/Serve America. In the absence of a legitimate underwriter, the Court finds that ATA and SDS were acting on their own initiative, that their actions were those listed in sections 56-2-107 and 56-9-103(5), and that

those actions constitute conducting insurance business in Tennessee. See TENN. CODE ANN. § 56-6-114 (a person shall be personally liable for sales of unauthorized insurance).

**De Facto Insurers Come Within State's Liquidation Power**

From the finding that ATA and SDS are doing insurance business in Tennessee, the Court concludes they are subject to the State's regulatory power of insurers, for three reasons.

First, section 56-9-102(1) provides that the power to liquidate applies to insurers doing business in the state. The Respondents assert this section is not applicable as ATA and SDS are admittedly not licensed insurers. The Court rejects this argument. The Court concludes that having found that ATA and SDS conducted unauthorized insurance business in Tennessee renders them insurers in fact, and subjects them to the State's liquidation power.

Additional authority is a Pennsylvania case that holds that operating an unauthorized insurance business subjects the operator to the state's regulatory insurance powers, including liquidation. See *Foster v. West Branch Administrations, Inc.*, 141 Pa. Cmwlth. 381, 597 S.2d 721 (1991).

Finally, policy reasons dictate this result. If the State is not allowed to use all its regulatory powers against unauthorized, *de facto* insurers, as well as authorized ones, the public is left unprotected.

The Court therefore concludes that ATA and SDS, having engaged in acts that constitute transacting insurance business in Tennessee, are *de facto* insurers subject to the liquidation power of the Tennessee Department of Commerce and Insurance. The Respondents' motion to dismiss this lawsuit is, therefore, denied, and the Commissioner's Petition to Liquidate states a viable claim for relief against the Respondents.

### Grounds for Liquidation

#### Hazardous Condition:

Having concluded that ATA and SDS come within the regulatory statutes that authorize the State to liquidate, the next issue for the Court is whether the State has demonstrated one of the three statutory grounds necessary for liquidation: violation of the insurance law, insolvency, or hazardous condition.<sup>1</sup> For the following reasons, the Court concludes there is no genuine issue of material fact and the record clearly establishes that the further transaction of business by ATA and SDS would be hazardous to the public.

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<sup>1</sup>Tennessee Code Annotated section 56-9-306 provides as follows:

**§ 56-9-306. Liquidation order; grounds**

The commissioner may petition the chancery court of Davidson County for an order directing the commissioner to liquidate a domestic insurer or an alien insurer domiciled in this state on the basis:

- (1) Of any ground for an order of rehabilitation as specified in § 56-9-301, whether or not there has been a prior order directing the rehabilitation of the insurer;
- (2) That the insurer is insolvent; or
- (3) That the insurer is in such condition that the further transaction of business would be hazardous, financially or otherwise, to its policyholders, its creditors or the public.

The Court's assessment of the hazard ATA and SDS pose to the public begins with its findings above of, at a minimum, poor judgment and lack of insurance acumen, or, worse, dishonesty, in continuing to facilitate Beema/Serve America insurance coverage as a membership benefit when they knew in February of 2009 from the North Carolina Cease and Desist proceedings that Serve America did not exist.

Added to that is that eight states (Arkansas, Oklahoma, Connecticut, Michigan, North Carolina, Washington, Ohio and Kansas) have issued cease and desist orders variously finding that ATA and SDS are conducting insurance business without licenses, are acting in concert to sell unauthorized health insurance, are using telemarketers to solicit members for licensed insurance companies who do not provide coverage to ATA, and that SDS has held itself out to be an administrator when it was not licensed to do so. Moreover, paragraph 6 of the March 31, 2010 affidavit of fraud investigator Robert Heisse establishes that he found at the ATA offices sales enrollment packages with health benefit cards, dated April 1, 2010, addressed to individuals in states where ATA has been ordered to cease and desist its activity in the state.

Further the record establishes in Exhibit 4 (Ribe affidavit at ¶ 6) to the State's March 23, 2010 Petition that SDS has never been licensed as a third party administrator in Tennessee despite its admission that it holds itself out as and has conducted business as an administrator in the State of Tennessee. It is undisputed, then, that SDS is in willful violation of the insurance law of the State and that fact provides a basis for liquidation.

Finally, there are the hazardous fiscal operations of ATA and SDS that support liquidation. Noted above, *infra* at 11-12, is the testimony of David White that ATA and SDS maintain "general funds" rather than trust accounts. *Id.* at ¶ 4. Also noted above was the pooling and commingling of funds of SDS and ATA, and the failure to earmark or segregate funds. Further, the fiscal implications of transacting unauthorized insurance business is that Tennessee law has requirements for reserves and capital for insurance companies to be licensed in the state. *See* TENN. CODE ANN. § 56-1-403. These surplus rules require the demonstration of millions of dollars in excess of the amount required to meet policyholders' liabilities. Because they have operated as *de facto* insurers outside of state regulation, ATA and SDS have not satisfied these requirements that protect the public.

For all of these reasons—poor business judgment, lack of insurance acumen, dishonesty, absence of licensure, amateur and risky fiscal operations, violations of other states' insurance laws—the Court finds that continuation by ATA and SDS of their businesses in Tennessee poses a substantial hazard to the public.

Accordingly, the Court determines that the record establishes that there is no genuine issue of material fact that the hazardous condition of section 56-9-306(3) has been demonstrated by the State so as to authorize liquidation of ATA and SDS. Moreover, this ground is sufficient under the statute for this Court to order liquidation, as the grounds are disjunctive.

### Insolvency

Nevertheless, it is likely that this case will be appealed, and it would be more efficient and just for an appeal to proceed on a complete record. Thus, although not necessary to proceed with liquidation, the Court shall also address the second ground for liquidation under section 56-9-306(2), insolvency.

Because of competing affidavits and use of different methodologies to analyze insolvency, the Court is unable to determine from the affidavits if ATA and SDS are insolvent. The March 31, 2010 affidavit of Paul Eggers, Special Deputy Commissioner, states at paragraph 13 that claims liabilities exceed available bank accounts of SDS and ATA, by over \$5.4 million. Paragraph 10 of the March 31, 2010 affidavit of certified financial examiner, David White, states that where customers have claims for refunds for having been sold a false insurance product, the liabilities of ATA and SDS shall exceed their assets.

In opposition is the affidavit of Melissa Cooper, claims manager for SDS, who states that the State's claims estimates are grossly exaggerated as they fail to reduce the claims for policy exclusions of coverage such as duplicate claims, uncovered benefits, preexisting conditions, deductible due before benefit paid. Also, that an alternative insurance underwriter can be secured, *see* affidavit of Carl Fuller, insurance broker, is some indication of financial health.

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The Court, therefore, cannot determine from the affidavits of record if insolvency exists which would provide yet another ground for liquidation. To make that determination to provide a full and complete record on appeal, the Court shall conduct an evidentiary hearing with oral testimony, not affidavits, for the State to present its proof on insolvency, and for ATA and SDS to be provided an opportunity to defend. The Docket Clerk shall contact counsel to promptly schedule an evidentiary hearing on insolvency for some time the week of April 19, 2010.

#### **Stay on Liquidation and Continuing Order of Seizure**

Considering that it has yet to decide the insolvency question, the Court determines that the best course for it to take is to stay, at this time, any order of liquidation which could proceed based upon subsection (3) of section 56-9-306 for hazardous condition until the Court has made a determination as to the insurer's insolvency. Provisions, then, need to be made for continuing the Order of Seizure to keep in place necessary employees and certain key functions during the pendency of the Court's insolvency determination. Therefore on Friday, April 16, 2010, at 1:30 pm., the Court shall conduct a hearing on Respondents' Motion to Amend Order of Seizure and the State's opposition.

It is therefore **ORDERED** that ATA and SDS, as *de facto* insurers, come within the State's insurance regulatory power to liquidate, and the Respondents' motion to dismiss the lawsuit must be denied.

It is further **ORDERED** that having demonstrated that ATA and SDS pose a significant hazard to the public, the State's Petition for Liquidation is granted pursuant to Tennessee Code Annotated section 56-9-306(3).

It is additionally **ORDERED** that liquidation under section 56-9-306(3) is stayed until the Court completes an evidentiary hearing on insolvency, another ground for liquidation found in section 56-9-306(2).

It is further **ORDERED** that the Order of Seizure remains in effect.

It is finally **ORDERED** that on Friday, April 16, 2010, at 1:30 p.m., the Court shall conduct a hearing on Respondents' Motion to Amend Order of Seizure to determine how the business of ATA and SDS shall be handled during the pendency of the insolvency determination.

  
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ELLEN HOBBS LYLE  
CHANCELLOR

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