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Dept. Of Veterans Affairs
Board of Veterans Appeals
Litigation and Support Group
P.O. Box 27063
Washington DC 20038

January 3, 2022

Re: [redacted]

Legal Brief in Support of Direct Review of Appeal

Appellant, through counsel, now files his Notice of Disagreement with the August 27, 2021, rating decision as well as the Higher Level of Review HLR) rating decision of September 28, 2021, confirming and continuing the August 27, 2021, rating decision.

Relief Sought

Appellant seeks recognition of his previously awarded entitlement to SMC at the L rate under authority of 3.350(b)(3) for aid and attendance of another on March 4, 2020 based on the favorable finding of fact that the effective date of entitlement to SMC L arose no earlier than August 23, 2018- the date he was

granted 100% schedular rating for his major neurocognitive disorder. As this award of SMC entitlement has never been held to be a clear and unmistakable error in and of itself, it is a positive finding of fact and conclusion of law. ***Medrano*** *infra.*

Moreover, Appellant has now also been awarded an additional entitlement to SMC at the L rate upon revision of the March 2020 rating decision. The revised finding of fact now states the need for aid and attendance of another is based on a different subset of disabilities. But, as the record clearly and unmistakably reflects, the August 27, 2021, revision of the effective date for SMC at the L rate is clearly and convincingly predicated on the rated service connected disabilities that existed at the time the claim was filed in February 2018. Those disabilities include a 100% schedular rating for COPD with secondaries. Additionally, Appellant's subset of disabilities due to his diabetes mellitus type II, including peripheral neuropathy in all four extremities, with complications add up to only 60% combined in their own right.

Appellant seeks entitlement to the maximum rate of SMC O under the authority of §3.350(e)(1)(ii)-to wit: Conditions entitling to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. §1114(l) through (n)-those conditions being Chronic Obstructive Pulmonary Disease (COPD) rated at 100% and a major cognitive impairment with incompetency rated at 100%.

Pursuant to 3.350(h)(1), Appellant also requests entitlement to SMC at the R 1 rate as one of his current SMC entitlements to SMC L under authority of 3.350(b)(3) is being so helpless as to be in need of the aid and attendance of another.

History of the Instant Claim and Appeal

The rating decision of April 26, 2018, awarded Special Monthly Compensation (SMC) at the S rate under §3.350(i)(1) on account of Chronic Obstructive Pulmonary Disease (COPD)and Asthma rated 100% and additional service connected disabilities of peripheral neuropathy, sciatic nerve, left lower extremity, femoral nerve, left lower extremity, peripheral neuropathy, sciatic nerve, right lower extremity, diabetes mellitus type II, peripheral neuropathy, femoral nerve, right lower extremity, allergic rhinitis, sinusitis, independently ratable at 60% or more with an effective date of February 12, 2018. Notably, no mention of any major neurocognitive impairment was noted or discussed as the predicate for the additional disability or disabilities independently ratable at 60% or more. In fact, service connection was denied in Item #9 on page two of the rating narrative. See Rating Decision Narrative dated April 26, 2018- VBMS Document Title **20180425095515 – narrative.pdf.**

The accompanying April 26, 2018, Confirmed Rating, also know as the "Codesheet" in VBMS, states, on page 3 of 4, under **Not Service Connected/Not Subject To Compensation (8.NSC Peacetime)**, that a major depressive order/unspecified neurocognitive disorder, previously rated as DC 6602, is not service connected/not incurred/caused by service. See Rating Decision Code Sheet dated April 26, 2018- VBMS Document Title **2018425095515-codesheet.pdf.**

The rating decision dated June 29, 2018, granted service connection for mild neurocognitive impairment under §4.130 DC 9326 at a 50% rating with an effective date of February 12, 2018. See Rating Decision Code Sheet Document Title **20180625094206-codesheet.pdf** dated June 29, 2018.

The rating decision dated October 11, 2018, awarded an increase from 50% to 100% for Appellant's Major Neurocognitive Impairment (MCI) under §4.130 DC 9326 with an effective date of August 23, 2018. The October 2018 rating decision also implicitly confirmed and continued Appellant's SMC at the S rate based on residuals of peripheral neuropathy, secondary to diabetes mellitus type II, independently ratable from the permanent and total 100% rating

for his COPD despite a proposed finding of incompetency. See Rating Decision Code Sheet Document Title **20180925111218-codesheet.pdf.**

The rating decision dated January 7, 2019, held that the Appellant was mentally incompetent to handle disbursement of funds. The January 7, 2019, rating code sheet implicitly confirmed and continued SMC at the S rate based on residuals of peripheral neuropathy, secondary to diabetes mellitus type II, independently ratable from the permanent and total 100% rating for his COPD. Again, no mention was made of any neurocognitive disability rating. See Rating Decision Code Sheet dated January 7, 2019, Document Title **20190107013241-codesheet.pdf.**

The Veteran formally transitioned from the Legacy claims process and entered the AMIA process on April 29, 2019, with the filing of his VA Form 10182 Notice of Disagreement with evidence submittal requesting the aid and attendance of another. *Appellant's Notice of Disagreement specifically requested entitlement to aid and attendance due to mental incapacity*. No mention was made of entitlement based on COPD, diabetes mellitus type II or any other service connected disease or injury. See 3/12/2020 VBMS Document Title: **e555989d-c0ff-473e-b523-40717e35b4fb_61bcaa16-4cd6-407e-917b-39ba7d5b20e5**.

AMA BVA Docket No. 190419-3646, dated February 24, 2020, granted entitlement to SMC at the L rate, based on the finding of fact of Appellant's need for aid and attendance of another on account of "physical and mental service-connected disabilities". See BVA Decision dated February 24, 2020, page 1, Document Title **68e37087-1719-4531-b323-83767e924f31533c1baa-452a-40a2-bd09-b55a8210b36d.pdf**.

The rating decision of March 4, 2020, effectuated the BVA grant and awarded SMC at the L rate for aid and attendance of another with an effective date of August 23, 2018-the identical effective date Appellant was granted a 100% disability rating due to his major neurocognitive impairment. See Rating Decision Code Sheet dated March 4, 2020, VBMS Document Title **20200225141833-codesheet.pdf.**

The rating revision of August 27, 2021, held that a clear and unmistakable error was made in the March 4, 2020, rating decision as to the effective date of entitlement to SMC L aid and attendance assigned from August 23, 2018. The rating decision was revised to reflect the correct effective date of February 12, 2018, for the aid and attendance of another based on the evidence of record. The rating decision further held that:

"The BVA decision found that **all** service connected disabilities, and not necessarily just on the respiratory so there wouldn't be entitlement to separate and distinct 50% or more at that time**. In reference to the 9/7/2018 PTSD exam, the 8/23/2018 increase to PTSD[ ] would warrant A/A for mental all by itself** and then the COPD/Asthma/sleep apnea is separate and distinct 100% so the full P-step to M would be warranted." (emphasis added to original).

The September 28, 2021, Higher Level of Review rating narrative confirmed and continued the award of SMC at the L rate for aid and attendance as well as the effective date. However, the etiology of the aid and attendance metamorphosed:

"Although only your respiratory disorder was 100% at this time, it is not clearly and unmistakably erroneous that the decision of August 27, 2021, found that the respiratory disorder and diabetes mellitus with residual complications excluding erectile dysfunction required the regular aid and attendance with activities of daily living **without consideration of the psychiatric disorder rated as 100% disabling from 8/23/2018."** (emphasis added to original).

From the above September 2021 narrative discussion by the higher level reviewer, reasonable minds can only concur that the Secretary has not rescinded the award for aid and attendance of another based on the 100% schedular rating and concomitant incompetency rating. Absent any rating decision announcing a rescission of entitlement to aid and attendance based on the August 23, 2018 finding of entitlement, the entitlement can only be seen as legally awarded and with no basis for rescission. Indeed, a recission or revision of the favorable finding of fact without due process would be void ab initio. See

Cushman v. Shinseki 576 F.3d 1290, 1298 (Fed. Cir. 2009); see also ***Gambill v. Shinseki***, 576 F.3d 1307, 1310-11 (Fed. Cir. 2009) (holding that entitlement to VA disability benefits is a property interest protected by the Due Process Clause of the Fifth Amendment of the US constitution).

Assuming, arguendo that the Secretary contends Appellant is no longer entitled to the aid and attendance of another based on his incompetency and major neurocognitive impairment disorder awarded on March 4, 2020, there is an established protocol for reduction. Significantly, in a rating reduction case, VA has the burden of establishing that the disability has improved. A rating reduction case focuses on the propriety of the reduction and is not the same as an increased rating issue. See ***Peyton v. Derwinski,*** 1 Vet. App. 282, 286 (1991). In considering the propriety of a reduction, the Board must focus on the evidence available to the RO at the time the reduction was effectuated, although post-reduction medical evidence may be considered in the context of evaluating whether the condition had demonstrated actual improvement. ***Dofflemyer v. Derwinski***, 2 Vet. App. 277, 281-282 (1992). Absent a ratings proposal to reduce, Appellant cannot ascertain from the August 2021 revision whether his March 2020 grant of entitlement to aid and attendance of another has been rescinded, reduced or overlooked.

Legal Standard of Review

§3.105 Revision of Decisions deals with finally decided claims. The Secretary freely concedes a clear and unmistakable error occurred in the March 4, 2020, rating decision. Hence, the August 2021 revision. Towards that end, under §3.2500(a)(1)(ii) and §20.202(b)(1), Appellant, now no longer a Movant, is accorded one year to appeal any aspect of the newly revised decision. This accords with Congress' statute ensuring "one decision on appeal." See also:

§3.105 (a)(1)(ii) (2021) Effective date of reversed or revised decisions. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal or revision of a prior decision on the grounds of clear and

unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision."

The Secretary's M 21-1 manual prescribes the requirements for initial consideration of SMC. While the M 21 is not recognized in most instances by the BVA as controlling law, the manual section IV.ii.2.H.8.b. presumably prescribes the Secretary's considered opinion on the baseline requirement for a 100% combined or schedular component in order to even be *considered* for entitlement to SMC in the first instance. Further, in the senior reviewer's September 2021 HLR, on page 3 of 5, the she enunciated this prerequisite in layman's terms as a note thusly:

"Note: a 100% disability and a need for regular assistance with the activities of daily living is required to meet requirements for entitlement to special monthly compensation based on Aid and Attendance. However, the 100% can be a single SC disability or multiple SC disabilities as the result of a single disease entity, such as Parkinson's disease or multiple sclerosis. The 100% disability can be the sole factual basis for the need or it can be a combination of the need for aid and attendance due to the 100% disability and other SC disabilities to qualify. The actual need for Aid and Attendance (A&A) must be wholly or partially due to a service connected (SC) disability evaluated as 100-percent disabling. This means we must have evidence the 100% condition has at least a small part in the need for aid and attendance."

38 U.S.C. §1114(l) states:

"[I]f the veteran, as the result of service-connected disability, has suffered the anatomical loss or loss of use of both feet, or of one hand and one foot, or is blind in both eyes, with 5/200 visual acuity or less, or is permanently bedridden **or with such significant disabilities as to be in need of regular aid and attendance**, the monthly compensation shall be $3,327." (emphasis added).

38 U.S.C. §1502(b) states:

"For the purposes of this chapter, a person shall be considered to be in need of regular aid and attendance if such person is (1) a patient in a nursing home or (2) blind, or so nearly blind or significantly disabled as to need or require the regular aid and attendance of another person."

Discussion

The March 2020 SMC L rating for A&A

The February 2020 BVA AMIA decision specifically granted entitlement to SMC at the L rate, based on the finding of fact of Appellant's need of aid and attendance of another on account of "*physical and mental service-connected disabilities*". But this is not what the Agency of Original Jurisdiction (AOJ) promulgated in the March 4, 2020, rating decision.

The rating decision of March 4, 2020, granted aid and attendance of another based on the dicta of the Secretary's M 21 Manual-i.e., to award SMC at the L level required, at a minimum, a total combined or schedular 100% rating. See M 21-1 IV.ii.2.H.8.b. This was a positive finding of fact and conclusion of law under both 38 USC §1502(b); §3.352. The award of entitlement to SMC at the L rate for the aid and attendance of another solely for appellant's major neurocognitive disorder, in and of itself, has yet to be shown to have been a clear and unmistakable error of law. It is protected as a matter of law unless obtained by an act of commission or omission. See ***Medrano v. Nicholson***, 21 Vet. App. 165, 170 (2007) aff'd in part, dismissed in part sub nom. ***Medrano v. Shinseki***, 332 F. App'x 625 (Fed. Cir. 2009) (The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board). Appellant recognizes full well the Board does not recognize the Secretary's M 21-1 Adjudications manual as boilerplate law. However, the trier of fact cannot ignore a favorable finding of fact and a subsequent award based on a demonstrated factual need. Appellant points to the VA Examiner's established M 21criteria for awarding Appellant entitlement to the aid and attendance of

another in the first instance on August 23, 2018. As the Secretary has declared a CUE and revised the March 2020 rating decision, the decision to award SMC L for aid and attendance of another based solely on the neurocognitive impairment was not, and has not, been shown to be clear and unmistakable error. The August 2021 revision deals solely with the effective date, not a dispute or error involving the underlying disability which demonstrated a factual need under §3.352(a). However, the September 2021 HLR held differently and attributed entitlement to aid and attendance based on the 100% COPD "hook".

The March 4, 2020, rating decision granting entitlement to SMC L utilized Appellant's August 23, 2018, 100% rating under the M 21-1 requirement and unarguably assigned the 100% major neurocognitive disorder as the predicate for the need of aid and attendance of another. Reasonable minds can only concur the October 2018 100% schedular rating award, in whole or in part, was the "tipping point" for the later March 2020 finding of fact establishing the effective date of the SMC L grant for aid and attendance. This, in spite of the award of a qualifying 2008 100% schedular COPD disability. See rating revision narrative of August 27, 2021. The VA examiner, in his own words, freely concedes this under Contention number 3. Entitlement to a higher level of special monthly compensation on page 4 of 5- to wit:

"In reference to the 9/7/2018 PTSD exam, the 8/23/2018 increase to PTSD[] would warrant A/A for mental all by itself."

Subsequent to the March 2020 rating decision, the claims file reflects Appellant made numerous attempts to draw attention to his clear and unmistakable entitlement to an increase in SMC under §3.350(f)(4) based on his additional 2008 100% schedular rating for COPD with complications of diabetes mellitus type II.

The August 27, 2021 CUE Revision

On August 27, 2021, the Agency of Original Jurisdiction held a clear and unmistakable error (CUE) occurred in the March 2020 rating awarding SMC at the L rate for aid and attendance of another under 3.350(b)(3) based on a 100% rating for his major neurocognitive disorder. The Rating authority revised the decision to award aid and attendance of another based on Appellant's *preexisting* February 2018 100% ratings for COPD with complications of diabetes mellitus type II (60%) and a 50% psychiatric disability. Of note, at the time, Appellant was only rated 50% for his *mild* neurocognitive impairment. He would not be rated 100% for his **major** neurocognitive impairment until more than six months later.

The August 27, 2021, CUE rating revision was predicated solely on the evidence of record revealing a broadly construed intent to file (ITF) in February 2018 and a March 2019 VA Form 21-2680 Examination For Housebound Status or Permanent Need for Aid and Attendance showing the need for aid and attendance. In the instant August 2021 rating revision, the Secretary claims that multiple etiologies- among them a service connected **major** neurocognitive disorder-were the predicate for a grant of Appellant's earlier effective date for entitlement to aid and attendance. On page 3 of the August 27, 2021, rating decision, the revision narrative states in haec verba:

"**The service connected disabilities of major neurocognitive impairment MCI)**, diabetes mellitus type II, and the peripheral neuropathies effecting [sic] your lower extremities all contribute to your need for aid and attendance, and all have dates established as February 12, 2018." (emphasis added to original).

The above finding is a favorable finding and may not be disturbed. ***Medrano*** *supra*. However, the June 2018 rating narrative characterized the 50% rating for impairment as merely a "mild neurocognitive impairment". See June 29, 2018, Document Title **20180625094206 – narrative.pdf.**

A glaring inconsistency in the above finding of fact doesn't comport with the evidence of record. Appellant has been rated at 100% schedular from

September 2008 for his COPD with use of oxygen. As the majority of his secondary disabilities all stem from this original disability, it can only be seen as the primary predicate for aid and attendance of another. If this decision represents the Secretary's considered opinion as stated in his M 21 manual under IV.ii.2.H.8.b. , then, under ***Akles*** precedence, Appellant should be equally entitled to aid and attendance of another based entirely on the favorable 100% schedular major cognitive impairment award of entitlement to aid and attendance awarded in the March 2020 rating decision and conceded in the August 2021 revision. See ***Akles v. Derwinski***, 1 Vet.App. 118, 121 (1991) (concluding that the RO "should have inferred from the veteran's request for an increase in benefits . . . a request for [SMC] whether or not it was placed in issue by the veteran). ***Medrano*** *supra.*

This outcome determinative error in the August 2021 revision cannot be reconciled. But for this error, a manifestly different outcome would have ensued. By operation of law, Appellant, by virtue of being entitled to two rates between L and N, no condition being counted twice, would be granted entitlement to the maximum rate of SMC at the O rate under authority of §3.350(e)(1)(ii). Further, he would be entitled to a higher level of aid and attendance, SMC at the R 1 rate, under authority of §3.350(h)(1). The August 27, 2021, revision glosses over this inconsistency by arduously arguing the need for aid and attendance is revised to comport with **only** the new subset of disabilities of record on February 12, 2018. The error is further compounded in the September 2021 higher level review rating narrative-to wit:

"Although only your respiratory disorder was 100% at this time, it is not clearly and unmistakably erroneous that **the decision of August 27, 2021, found that the <u>respiratory disorder</u> and diabetes mellitus with residual complications** excluding erectile dysfunction **required the regular aid and attendance with activities of daily living <u>without consideration of the psychiatric disorder rated as 100% disabling from 8/23/2018."</u>** (emphasis added).

Here, again, the above narrative does not reflect the VA examiner's rationale for the August 2021 revision-i.e., in item <u>1. Whether the level of Special</u>

Monthly Compensation assigned was clear and unmistakable error. , The Examiner states *in haec verba* on pages 2-3:

"The service connected disabilities of **major neurocognitive impairment(MCI), diabetes mellitus type II, and the peripheral neuropathies** effecting [sic] your lower extremities all contribute to your need for aid and attendance." (emphasis added).

The dichotomy between the rationale for entitlement to aid and attendance in March 2020 segues into an August 2021 revision by importing a 50% rating and calling it a major cognitive impairment rather than minor one. Further, the September 2021 VA examiner conducting the Higher Level of Review contradicts both these findings of fact and insists the award of entitlement to the aid and attendance of another is wholly independent of the earlier August 2018 100% rating for a psychiatric disorder. This is a favorable finding of fact supporting Appellant's argument.

Appellant submits the Secretary's endless stream of changing rationales for prior Agency action are unavailing, arbitrary, capricious, an abuse of discretion and not in accordance with law. See ***Doty v. United States***, 53 F.3d 1244, 1251 (Fed. Cir. 1995) ("'Courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" (quoting ***Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co***., 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983))); ***Evans v. Shinseki***, 25 Vet.App. 7, 16 (2011) (explaining that "it is the Board that is required to provide a complete statement of reasons or bases" for its decision and "the Secretary cannot make up for [the Board's] failure to do so" by providing his own reasons or bases on appeal).

Lastly, Appellant points to ***Buie v. Shinseki***, 24 Vet.App. 242, 250 (2010) in support of his argument. In ***Buie,*** the Court held that [w]henever a veteran has a total disability rating, schedular or extraschedular, based on multiple disabilities and the veteran is subsequently awarded service connection for any additional

disability or disabilities, VA's duty to maximize benefits requires VA to assess all of the claimant's disabilities without regard to the order in which they were service connected to determine whether any combination of the disabilities establishes entitlement to [SMC] under section 1114(s). This duty to maximize entitlement first voiced in ***Akles*** *supra* encompasses all SMCs and requires VA render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. §3.103(a). This the Secretary has failed to do.

Conclusion

Appellant benefits from the simplicity of his argument. The Secretary has awarded him entitlement to SMC at the L rate for the need of aid and attendance of another based on a 100% psychiatric disability with an effective date of August 2018. In the August 2021, revision of that March 2020 rating decision, the Secretary conceded error in the 2020 decision and revised the effective date of the entitlement to February 2018 based on the same 100% schedular rating for a major cognitive impairment as the qualifier. But the Appellant did not have a 100% rating for his psychiatric disorder on February 12, 2018. Clear and convincing evidence of record shows Appellant only had a 50% rating on that date. This rating could never qualify, in and of itself, as to what Congress considered "such significant disabilities as to be in need of regular aid and attendance."

The September 2021 HLR senior reviewer baldly ignored the narrative of the August 2021 rating revision and held the COPD with diabetes mellitus, and not the major cognitive impairment were the primary components for entitlement to the mutual exclusion of **any** psychiatric disability- be it 50% or 100%. Thus, the Secretary explicitly concedes Appellant is entitled to an *additional* award of aid and attendance for, inter alia, a 100% rating for COPD with complications of diabetes and peripheral neuropathy independently ratable from his March 2020 award of entitlement to aid and attendance under authority of §3.350(b)(3)for the significant disability of major cognitive impairment rated as 100% with incompetency effective August 23, 2018.

The September 2021 HLR rating decision now represents the Secretary's final considered opinion and the AMA record is closed. §20.301 states:

"For appeals in which the appellant requested, on the Notice of Disagreement, direct review by the Board without submission of additional evidence and without a Board hearing, the Board's decision will be based on a review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal."

The Senior HLR Reviewer has held the award of entitlement to aid and attendance, is predicated on the respiratory disability as the 100% "hook" under M 21-1 section IV.ii.2.H.8.b. Nowhere in the four corners of either the August 2021 revision or the September 2021 HLR rating decision was there any mention of a rescission of the March 2020 finding of fact that SMC L under authority of §3.350(b)(3) was held to be clearly and unmistakably erroneous. Ergo, reasonable minds can only concur the award of entitlement to aid and attendance based on a 100% psychiatric disability was, and still is, proper and justiciable.

Likewise, reasonable minds can equally concur that an award of an earlier effective date based on a different qualifying significant disability or disabilities, separate and distinct from the March 2020 rating decision implicitly granted an additional award of entitlement to SMC L under §3.350(b)(3)-whether or not that was the intent. The September 2021 HLR inadvertently conceded this finding of fact-and stated as much. See ***Bradley v. Peake***, 22 Vet.App. 280, 293 (2008) (VA has had a long-standing policy of considering SMC where it may apply, even if not explicitly raised).

The Appellant wholeheartedly concedes the presumption of regularity attaches to the September 2021 HLR decision. See ***Butler v. Principi***, 244 F.3d 1337,1340 (Fed.Cir.2001) ("The [presumption of regularity] doctrine thus allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show the contrary."). Appellant additionally concedes the presumption of regularity of the VA examiner. See ***Sickels v. Shinseki,*** 643 F.3d,

1362, 1365-66 (Fed. Cir. 2011) (holding that the Board is "entitled to assume" the competency of a VA examiner and the adequacy of a VA opinion without "demonstrating why the medical examiners' reports were competent and sufficiently informed"). Notwithstanding the fact that the Secretary provides nothing in the way of medical evidence to support the revised September 2021 HLR etiology(ies) for the need of aid and attendance, Appellant benefits from the Colvin violation. See ***Colvin v. Derwinski,*** 1 Vet.App. 171,175 (1991)(holding that the Board may only consider independent medical evidence and may not substitute its own medical opinion.) Appellant is willing to concede this is harmless error.

As the September 2021 rating decision is presumed to be correct, Appellant is now entitled to the maximum rate of SMC O under 3.350(e)(1)(ii) - Conditions entitling to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. §1114(l) through (n). Under §3.350(h)(1), he is further entitled to SMC at t he R 1 rate by operation of law.

Respectfully submitted,

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