

State court. The State court *may thereupon* proceed with such case.” (Emphasis added.) Under this plain text, remand orders are not immediately effective. Instead, the U.S. District Court Clerk must first mail a certified copy of the remand order to the Hearing Committee (presumably via the Board of Professional Responsibility or the District Court for the District of Columbia (“DCCA”). The statute also appears to contemplate receipt of the certified copy mailed by the U.S. District Court clerk by the state/D.C. clerk.

No Mailing of a Certified Copy of the Remand Order Has Occurred Here. We are aware of no indication such a mailing has occurred. *See* Exh. 1 (U.S. District Court Docket Sheet). That docket sheet shows the remand order’s entry on June 8, 2023 and four later entries: (1) 6/11/23 notice of appeal; (2) 6/12/23 transmission of notice of appeal to the D.C. Circuit; (3) 6/14/23 case number entered for the D.C. Circuit appeal; and (4) 7/7/23 payment for notice of appeal. None of those four entries indicate that the Section 1447(c) mailing has occurred. Similarly, to our knowledge there are no events that will be reflected on the Board of Professional Responsibility’s docket sheet showing that the Board’s clerk has received a certified mailing from the U.S. District Court clerk compliant with Section 1447(c).

The Second and Third Circuits Have Adopted the Most Straightforward Reading of Section 1447(c). Judicial precedent supports our argument, which two Circuits (the Second and the Third) have adopted:

According to our precedent, the mailing of a certified copy of the remand order to state court is the event that formally transfers jurisdiction from a

district court within this Circuit to a state court. *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 225 (3d Cir. 1995) (“The general rule is that a district court loses jurisdiction over a case once it has completed the remand by sending a certified copy of the remand order to state court.”) ...

In our view, the text of 28 U.S.C. § 1447(c) establishes that jurisdiction remains with the district court until the jurisdiction-transferring event has occurred: “[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.” 28 U.S.C. § 1447(c).²

FN2. This accords with the rule recognized by the Court of Appeals for the Second Circuit as well. *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 312 (2d Cir. 2005) (“**Section 1447(c) ... is not self-executing**.... This provision creates legal significance in the mailing of a certified copy of the remand order in terms of determining the time at which the district court is divested of jurisdiction....”).

Agostini v. Piper Aircraft Corp., 729 F.3d 350, 355-56 & n.2 (3d Cir. 2013) (paragraph breaks added) (emphasis added).

Relevance of Respondent’s Appeal as of Right as a Federal Officer. This is not a situation where Respondent is somehow seeking appellate review of a remand order in contravention of the typical ban on such appellate review, since he possesses an appeal as of right to appeal to the D.C. Circuit the remand of his federal officer removal under 28 U.S.C. § 1447(d). Hence, cases that have tried to leverage the first clause of Section 1447(d) (“An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise”) into the conclusion that remand orders must be immediately effective are inapposite. *See, e.g., In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996). This precludes any ability here to try to use Section 1447(d) to try to blunt the plain

meaning and import of Section 1447(c). We nevertheless point the Chair (and ODC) to the *In re Lowe* case consistent with our duty of candor.

Only One Potential Reading of Section 1447(c) Could Make the June 16 and July 5 Orders Viable and Non-Void, But That Reading Violates the Most Basic Principles of Statutory Interpretation. Indeed, a survey of this area of law indicates that there are three possible alternatives for when remand orders become effective to return jurisdiction to the state/D.C. court from which a removal has occurred:

In brief, federal courts have ruled that state courts are reinvested with jurisdiction after remand at three different times:

- (1) immediately upon the oral order of the federal court to remand the case to the state court;
- (2) upon the federal court clerk's mailing of the federal remand order to the state court; and
- (3) upon the state court's receipt of the federal remand order.

David A. Furlow & Charles W. Kelly, *Removal and Remand: When Does a Federal District Court Lose Jurisdiction Over a Case Remanded to State Court?* 41 Sw. L.J. 999, 1002 (1987) (footnotes omitted).

The June 16 and July 5 orders (and holding a July 12 pre-hearing conference) are proper only under possibility (1). The Chair should reject that alternative, however, first and foremost because it is contrary to the plain text of Section 1447(c). That provision speaks, in relevant part, in mandatory terms. It directs that the federal court clerk "shall" "mail[]" a "certified copy of the order of remand" to the clerk of the state/D.C. court. And,

even more importantly, Section 1447(c)'s last sentence states that only once that mailing occurs "may" the state/D.C. court "*thereupon* proceed with such case." (Emphasis added.) The word "thereupon" becomes surplusage if the mailing (or impliedly, the receipt of the mailing by the state/D.C. court clerk) is not the operative date for when jurisdiction is returned to the state/D.C. court. And it violates the cardinal rule of statutory construction to interpret the word "thereupon" as if it were surplusage, which is what possibility (1) contemplates.¹ See *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality) (explaining and applying this cardinal rule); *Amoco Production Co. v. Watson*, 410 F.3d 722, 733 (D.C. 2005) ("It is a familiar canon of statutory construction that, if possible, we are to construe a statute so as to give effect to every clause and word.") (quotation marks omitted).

Relief Requested in Light of the Void Nature of the June 16 and July 5 Orders. For these reasons, the Chair should choose to follow the Second and Third Circuits and vacate its June 16, 2023 and July 5, 2023 orders and take the July 12, 2023 pre-hearing conference off of the calendar until, at the very least, some date after the mailing of a certified copy is completed and preferably, until after the date at which the reception of the certified remand order occurs. For the only extent to which any ambiguity exists in Section 1447(c)

¹ See OXFORD LEARNERS DICTIONARY (definition of "thereupon" as "immediately after the situation mentioned; as a direct result of the situation mentioned. The audience thereupon rose cheering to their feet."), available at <https://www.oxfordlearnersdictionaries.com/definition/english/thereupon> (last visited July 9, 2023).

is whether the “thereupon” refers to the act of mailing alone (the equivalent of contract law’s “mailbox rule”) or to the completion of the federal clerk mailing *and* the receipt of the certified order by the state/D.C. clerk.

In any event, it would not be proper for the Chair to proceed with the Wednesday, July 12, 2023 pre-hearing conference without addressing this issue after the completion of briefing by the parties, and the study of the issue by the Chair and issuance by the Chair of a reasoned decision on this point explaining its choice of which of the three conceptual timing possibilities best comports with Section 1447(c). State/D.C. court orders issued in between the time of removal and remand are void. *See Roman Catholic Archdiocese of San Juan, P.R. v. Acevedo Feliciano*, 140 S. Ct. 696, 700 (2020).²

² “Once a notice of removal is filed, ‘the State court shall proceed no further unless and until the case is remanded.’ 28 U. S. C. § 1446(d). The state court ‘los[es] all jurisdiction over the case, and, *being without jurisdiction, its subsequent proceedings and judgment [are] not ... simply erroneous, but absolutely void.*’ *Kern v. Huidekoper*, 103 U.S. 485, 493 (1881). ‘Every order thereafter made in that court [is] *coram non judge*,’ meaning ‘not before a judge.’ *Steamship Co. v. Tugman*, 106 U.S. 118, 122 (1882)” *Roman Catholic Archdiocese of San Juan*, 140 S. Ct. at 700 (footnote omitted).

As we have argued to the U.S. District Court, in removal papers that were filed to the Board of Professional Responsibility, Mr. Clark removed this matter to federal court as both a civil matter and a criminal matter, arguing that bar discipline cases are hybrids of civil and criminal cases. We have also argued for applicability of Section 1446(d) here, meaning that the bar operative on the civil side on any proceedings in the DCCA and its adjunct forums makes void any proceedings to the contrary prior to a legally effective remand. And we believe recognition of the rule the *Roman Catholic Archdiocese of San Juan* outlines is the reason why this case was placed into an abeyance posture beginning from the October 17, 2022 date of removal. This bar, pursuant to Section 1447(c) continues here until the provisions of that statute are complied with.

The Chair should not wish to violate this ban until it is lifted or to risk building upon prior orders it issued before it was made aware of Section 1447(c)’s import. Additionally, any orders that build upon orders issued during the void phase would themselves be the fruit of such a tree of voidness and would risk later invalidation, which would not serve the purposes of judicial efficiency.

Independent Ground for Vacatur and Taking the July 12, 2023 Hearing Off Calendar. The grounds set out in this Motion to Vacate, which we again lodge so as not to be taken to concede the point that this Hearing Committee has reacquired jurisdiction, is in addition to the grounds set out in the Motion for Reconsideration for waiting for the DCCA to resolve the issue of whether to continue the abeyance posture this matter was in from October 2022 until at least June 7, 2023, and especially after the January 17, 2023 DCCA abeyance order.³ This Motion to Vacate is also in addition to the grounds set out in the Motion to Reconsider requesting a voluntary abeyance pending the outcome of the D.C. Circuit appeal—or, at the very least, a temporary one for four weeks to see how proceedings in the DCCA, U.S. District Court (initial stay request soon to be filed), and D.C. Circuit (likely follow-on stay request soon to be filed).⁴

CONCLUSION

Since the June 8, 2023 remand order (which again, has not yet been certified and mailed in accord with Section 1447(c)), the Chair has been setting fast deadlines and doing so during the Summer without soliciting information from Respondent’s counsel about

³ Indeed, Section 1447(c) affects not only proceedings before the Hearing Committee prior to the time at which jurisdiction actually resumes here but proceedings before the DCCA as well. Hence, the Section 1447(c) issue provides yet another reason for the DCCA to continue the abeyance posture that this matter has been in since October 2022.

⁴ Take a step back and realize that the current noncompliance with Section 1447(c) has already prejudiced Respondent and undersigned counsel by imposing risks on us if we did not move up our planned timetable for filing stay motions with the District Court and the D.C. Circuit. We should not have been leveraged in that way based on an inaccurate presumption that the District Court remand order was immediately effective and self-executing. It was not.

their availability. Despite this, undersigned counsel has been working as quickly as possible to meet the deadlines, despite our disagreement with the Chair that this matter can or should resume before the D.C. Circuit appeal as of right is first resolved. Consistent with the demands the June 16 and July 5 orders created for us, we are presenting this Motion to Vacate to you as expeditiously as we could research and write it.

In light of the foregoing, we request that the Chair vacate the June 16 and July 5 orders, and consistent with that relief, take the July 12, 2023 pre-hearing conference off calendar. Instead, the Chair should await both (1) the sending by the U.S. District Court clerk of the certified copy by mail to at least one of the DCCA or its adjunct forums' clerks; and (2) the receipt of that certified copy in the mail, the method of delivery specified by Section 1447(c), by one or more of the DCCA and its adjuncts' clerks.

Once both of those events are complete, but without prejudice to the separate and independent arguments presented in the pending Motion for Reconsideration, we would request that a pre-hearing status conference be reset for a date no sooner than two weeks after the completion of both events.

Respectfully submitted this 9th day of July 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served counsel for the opposing party with a copy of this *Motion to Vacate* by filing with the Court's electronic filing system which will cause service to be made upon opposing counsel, and by email addressed to:

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This this 9th day of July, 2023.

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U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:22-mc-00096-RC

IN RE: JEFFREY B. CLARK
Assigned to: Judge Rudolph Contreras
Case: [1:22-mc-00117-RC](#)
Related Case: [1:23-mc-00007-RC](#)
Case in other court: USCA for the DC Circuit, 23-07073
Cause: MS:NoticeR

Date Filed: 10/17/2022
Jury Demand: Defendant
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Defendant

In Re

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V.

Respondent

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Date Filed	#	Docket Text
10/17/2022	1	<p>NOTICE OF REMOVAL from DC Court of Appeals (Board of Professional Responsibility), case number 22-BD-039 filed by Jeffrey B Clark. (Attachments: # 1 Exhibit Bar Docket Sheet, # 2 Exhibit Specification of Charges, # 3 Exhibit Affidavit of Service, # 4 Exhibit Motion for Extension, # 5 Exhibit Motion for Leave to File Under Seal, # 6 Exhibit Opposition to Extension, # 7 Exhibit Motion to File Reply Under Seal, # 8 Exhibit Motion to File Under Seal, # 9 Exhibit Reply in Support of Motion for Extension, # 10 Exhibit Hearing Committee Order, # 11 Exhibit Board Order, # 12 Exhibit Opposition to Motion to Redact, # 13 Exhibit Motion to Recuse, # 14 Exhibit Sealed Response, # 15 Exhibit Notice and Motion to Seal, # 16 Exhibit Request for Deferral, # 17 Exhibit Hearing Committee Order, # 18 Exhibit Opposition to Request to Defer, # 19 Exhibit Motion to Seal, # 20 Exhibit Motion to Dismiss, # 21 Exhibit Answer, # 22 Exhibit Motion to File Answer Under Seal, # 23 Exhibit Motion to File Under Seal, # 24 Exhibit Board Order on Redactions, # 25 Exhibit Redacted Opposition, # 26 Exhibit Redacted Response, # 27 Exhibit Redacted Motion for Extension, # 28 Exhibit Redacted Board Order, # 29 Exhibit Opposition to Sealed Response, # 30 Exhibit Omnibus Response, # 31 Exhibit Redacted Omnibus Response, # 32 Exhibit Redacted Motion to File Answer Under Seal, # 33 Exhibit Redacted Answer, # 34 Exhibit Redacted Motion to Defer, # 35 Exhibit Redacted Motion to File Motion to Defer Under Seal, # 36 Exhibit Redacted Notice and Incorporated Motion to Seal, # 37 Exhibit Redacted Motion to Dismiss, # 38 Exhibit Redacted Motion to File Motion to Dismiss Under Seal, # 39 Exhibit Redacted Sealed Response, # 40 Exhibit Redacted Sealed Response, # 41 Exhibit Redacted Response in Support of Motion to Dismiss, # 42 Exhibit Reply Brief in Support of Motion to Dismiss, # 43 Exhibit Report and Rec, # 44 Exhibit Board Order Unsealing, # 45 Exhibit DCCA Order, # 46 Exhibit Motion Regarding Publicly Available Filings, # 47 Exhibit Board Order, # 48 Exhibit Withdrawal of Motion, # 49 Exhibit Board Order Denying Deferral, # 50 Exhibit Hearing Committee Conference, # 51 Exhibit Statement on Hearing Dates, # 52 Exhibit Hearing Committee Order, # 53 Exhibit Prehearing Transcript, # 54 Exhibit Subpoena, # 55 Exhibit Hearing Committee Order, # 56 Exhibit Subpoena to D. Smith, # 57 Exhibit Senator Durbin Letter, # 58 Exhibit Letter 1 to Phil Fox re Subpoena, # 59 Exhibit Letter 2 to Phil Fox, # 60 Exhibit Fox Letter to H. Macdougald, # 61 Exhibit DCCA Docket Sheet, # 62 Exhibit Motion to Enforce, # 63 Exhibit Appearance of Counsel, # 64 Exhibit Time Extension Motion, # 65 Exhibit Order Granting Motion for Extension, # 66 Exhibit Motion to Exceed Page Limitations, # 67 Exhibit Response to Motion to Compel, # 68 Exhibit ODC Reply Motion to Quash, # 69 Exhibit Reply in Support of Cross Motion to Quash, # 70 Exhibit Consent Motion to Supplement the Record, # 71 Exhibit Response to Motion to Supplement the Record, # 72 Exhibit Lodged Protective Motion to Quash, # 73 Exhibit Motion for Leave to Respond, # 74 Exhibit Motion to Unseal, # 75 Exhibit Response to Motion to Unseal, # 76 Exhibit ODC Opp to Cross Motion to Stay, # 77 Exhibit Reply Brief in Support of Cross Motion to Stay, # 78 Exhibit Letter Supplemental Authority, # 79 Exhibit Fox Email re Jurisdiction, # 80 Exhibit Fox Email re No Comparable Cases, # 81 Exhibit Key to Exhibits A and B)(Burnham, Charles) Modified on 10/19/2022 to remove incorrect filing fee information (zsl). (Entered: 10/17/2022)</p>
10/18/2022		<p>NOTICE OF ERROR re 1 Notice of Removal; emailed to charles@burnhamgorokhov.com, cc'd -1 associated attorneys -- The PDF file you docketed contained errors: 1. Filing fee for miscellaneous case not paid. Please remit filing fee payment via check or money order. In the future, do not file these kinds of cases</p>

		electronically., 2. COMPLIANCE DEADLINE is by close of business today. This case will not proceed any further until all errors are satisfied. (zsb,) (Entered: 10/18/2022)
10/18/2022		Case Assigned to Judge Rudolph Contreras. (zsb) (Entered: 10/18/2022)
10/18/2022	2	MOTION to Stay <i>Subpoena Response Deadline and Other Deadlines</i> by JEFFREY B. CLARK. (Burnham, Charles) (Entered: 10/18/2022)
10/18/2022	3	CIVIL COVER SHEET by JEFFREY B. CLARK filed by JEFFREY B. CLARK. (Burnham, Charles) (Entered: 10/18/2022)
10/19/2022		Filing fee received: \$ 49, receipt number: 203251. (zsl) (Entered: 10/19/2022)
10/19/2022	4	MOTION to Quash by JEFFREY B. CLARK. (Burnham, Charles) (Entered: 10/19/2022)
10/21/2022	5	MOTION to Remand to State Court /DC Court of Appeals' Board on Profession Responsibility by Hamilton Phil Fox, III. (Attachments: # 1 Exhibit 10.07.2021 Senator Judiciary Report, # 2 Exhibit 10.18.2021 BLetter with subpoena but not report, # 3 Exhibit 11.22.2021 BLetter with subpoena but not report, # 4 Exhibit 01.10.2022 ODC's response to Respondent, # 5 Exhibit 01.02.2022 Corrected letter from Respondent, # 6 Text of Proposed Order Proposed Order to Remand)(Fox, Hamilton) (Entered: 10/21/2022)
10/21/2022	6	Memorandum in opposition to re 4 Motion to Quash, 2 Motion to Stay <i>Subpoena Response Deadline and other Deadlines</i> filed by Hamilton Phil Fox, III. (Attachments: # 1 Exhibit 10.07.2021 Senate Judiciary Report, # 2 Exhibit 10.18.2021 BLetter with subpoena but not report, # 3 Exhibit 11.22.2021 BLetter with subpoena but not report, # 4 Exhibit 01.10.2022 ODC's response to Respondent, # 5 Exhibit 01.02.2022 Respondent's Counsel letter, # 6 Text of Proposed Order to deny Motion to Quash and Motion to Stay)(Fox, Hamilton) (Entered: 10/21/2022)
10/21/2022	7	ERRATA (<i>correcting exhibit B-3 to Notice of Removal</i>) by JEFFREY B. CLARK re 1 Notice of Removal,,,,,,,,,,,,,. (Attachments: # 1 Exhibit corrected exhibit B-3)(Burnham, Charles) (Entered: 10/21/2022)
10/24/2022	8	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Harry W. MacDougald, Filing fee \$ 100, receipt number ADCDC-9620359. Fee Status: Fee Paid. by JEFFREY B. CLARK. (Attachments: # 1 Declaration, # 2 Exhibit Certificate of Good Standing) (Burnham, Charles) (Entered: 10/24/2022)
10/25/2022		MINUTE ORDER granting 8 Motion for Leave to Appear <i>Pro Hac Vice</i> : Pursuant to Local Civil Rule 83.2, it is hereby ORDERED that Harry W. MacDougald is admitted to represent JEFFREY B. CLARK <i>pro hac vice</i> in this case. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions . SO ORDERED. Signed by Judge Rudolph Contreras on 10-25-2022. (lcrc3) (Entered: 10/25/2022)
10/27/2022	9	NOTICE of Appearance by Harry W. MacDougald on behalf of JEFFREY B. CLARK (MacDougald, Harry) (Entered: 10/27/2022)
10/28/2022	10	REPLY to opposition to motion re 4 MOTION to Quash filed by JEFFREY B. CLARK. (Burnham, Charles) (Entered: 10/28/2022)
10/28/2022	11	Supplemental MOTION to Quash (<i>supplementing ECF 4</i>) by JEFFREY B. CLARK. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit)(Burnham, Charles) (Entered: 10/28/2022)
11/04/2022	12	ENTERED IN ERROR.....RESPONSE re 5 MOTION to Remand to State Court /DC Court of Appeals' Board on Profession Responsibility filed by JEFFREY B. CLARK.

		(Attachments: # 1 Exhibit)(Burnham, Charles); Modified on 11/7/2022; said pleading refiled as docket entry 13 (ztth). (Entered: 11/04/2022)
11/07/2022	13	RESPONSE re 5 MOTION to Remand to State Court /DC Court of Appeals' Board on Profession Responsibility CORRECTED filed by JEFFREY B. CLARK. (Attachments: # 1 Exhibit)(Burnham, Charles) (Entered: 11/07/2022)
11/07/2022		NOTICE OF ERROR regarding 12 Response to motion,. The following error(s) need correction: Incorrect court header/case caption/case number. (ztth) (Entered: 11/07/2022)
11/08/2022	14	REPLY to opposition to 5 motion to Remand filed by Hamilton Phil Fox, III. (Fox, Hamilton); Modified to add docket entry relationship on 11/8/2022 (ztth). (Entered: 11/08/2022)
12/12/2022	15	MOTION to Consolidate Cases and Response to Second Motion to Remand in Related Case by JEFFREY B. CLARK. (Burnham, Charles) (Entered: 12/12/2022)
12/19/2022	16	REPLY to opposition to motion To Consolidate Cases filed by JEFFREY B. CLARK. (Attachments: # 1 Exhibit exhibits)(Burnham, Charles) (Entered: 12/19/2022)
02/22/2023	17	RESPONSE re 5 MOTION to Remand to State Court /DC Court of Appeals' Board on Profession Responsibility filed by JEFFREY B. CLARK. (Burnham, Charles) (Entered: 02/22/2023)
02/22/2023	18	MOTION to Consolidate Cases by JEFFREY B. CLARK. (See Docket Entry 17 to view document.) (ztth) (Entered: 02/24/2023)
06/08/2023	19	ORDER granting 5 the D.C. Office of Disciplinary Counsel's Motion to Remand and denying as moot 2 Mr. Clark's Motion to Stay and 4 Mr. Clark's Motion to Quash. See document for details. Signed by Judge Rudolph Contreras on 6/8/23. (lcrc2) (Entered: 06/08/2023)
06/08/2023	20	MEMORANDUM OPINION granting 5 the D.C. Office of Disciplinary Counsel's Motion to Remand and denying as moot 2 Mr. Clark's Motion to Stay and 4 Mr. Clark's Motion to Quash. See document for details. Signed by Judge Rudolph Contreras on 6/8/23. (lcrc2) (Entered: 06/08/2023)
06/11/2023	21	NOTICE OF APPEAL TO DC CIRCUIT COURT by JEFFREY B. CLARK, JEFFREY B. CLARK. Fee Status: No Fee Paid. Parties have been notified. (Burnham, Charles) (Entered: 06/11/2023)
06/12/2023	22	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The fee remains to be paid and another notice will be transmitted when the fee has been paid in the District Court or motion to proceed In Forma Pauperis has been decided re 21 Notice of Appeal to DC Circuit Court. (ztth) (Entered: 06/12/2023)
06/14/2023		USCA Case Number 23-7073 for 21 Notice of Appeal to DC Circuit Court filed by JEFFREY B. CLARK. (ztth) (Entered: 06/14/2023)
07/07/2023		Payment for 21 Notice of Appeal to DC Circuit Court. (\$505; Receipt number ADCDC-10188997). (Burnham, Charles) (Entered: 07/07/2023)

PACER Service Center

Transaction Receipt

07/09/2023 22:37:08

PACER Login:	cburnham123	Client Code:	
Description:	Docket Report	Search Criteria:	1:22-mc-00096-RC
Billable Pages:	4	Cost:	0.40
Exempt flag:	Not Exempt	Exempt reason:	Not Exempt