# UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	) WOGE KENNELLY
Plaintiff,	MACISTRATE NUDGE LEVIN
v.	) Case No:
KENNETH B. MACQUEEN, MACQUEEN CAPITAL MANAGEMENT,	030 1423
CORP. AND THE DIVIDEND REINVESTMENT FUND, L.L.C.,	DOCKETED = 7
Defendants.	FEB 2 7 2003 1 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3 3
COMPLA	· · · · · · · · · · · · · · · · · · ·

Plaintiff, the United States Securities and Exchange Commission ("Commission"), for its Complaint against Kenneth B. MacQueen ("MacQueen"), MacQueen Capital Management Corp. ("MCM") and the Dividend Reinvestment Fund, L.L.C. (the "DRIP" or "Fund"), alleges as follows:

#### INTRODUCTION

1. The Commission brings this action to halt an ongoing fraudulent scheme in connection with sales of investment interests in the Fund by defendants. Since 1993, MacQueen has raised at least \$1.325 million from five investors. MacQueen told investors that he ran the DRIP, a private investment company engaged solely in dividend reinvestment arbitrage. MacQueen held himself out as a principal of MCM, the Fund's investment advisor. Rather than use investor money for dividend reinvestment arbitrage, MacQueen misappropriated investor money for himself and is currently making payments to existing DRIP investors with money from new investors, as in a Ponzi scheme. MacQueen concealed his fraudulent scheme by,

among other things, sending quarterly statements to DRIP investors that falsely reflected annualized profits of approximately 25%. On December 18, 2002, MacQueen represented that he has over \$16 million under management, but throughout December 2002, there was less than \$60,000 in MCM's brokerage and bank accounts.

- 2. MacQueen, MCM and the DRIP, directly and indirectly, engaged in and, unless enjoined, will continue to engage in transactions, acts, practices and courses of business which violate Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)], and Rule 10b-5 promulgated thereunder [17 C.F.R. 240.10b-5]. MCM, aided and abetted by MacQueen, directly and indirectly engaged in and, unless enjoined, will continue to engage in transactions, acts, practices and courses of business which violate Sections 206(1) and 206(2) of the Investment Advisers Act of 1940 ("Advisers Act") [15 U.S.C. §§ 80b-6(1) and 80b-6(2)].
- 3. The Commission brings this action to enjoin such transactions, acts, practices and courses of business and for other relief, pursuant to Sections 20(b) and 20(d) of the Securities Act [15 U.S.C. § 77t(b) and § 77t(d)], Sections 21(d) and 21(e) of the Exchange Act [15 U.S.C. § 78u(d)] and Sections 209(d) and 209(e) of the Advisers Act [15 U.S.C. § 80b-9(d) and § 80b-9(e)].

## **JURISDICTION**

4. This court has jurisdiction pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)], Section 27 of the Exchange Act [15 U.S.C. § 78aa] and Section 214 of the Advisers Act [15 U.S.C. § 80b-14].

- 5. Defendants, directly and indirectly, made use of the means and instrumentalities of interstate commerce and of the mails in connection with the transactions, acts, practices and courses of business alleged herein.
- 6. Defendants will, unless enjoined, continue to engage in the transactions, acts, practices, and courses of business set forth in this complaint and transactions, acts, practices, and courses of business of similar purport and object.

# THE DEFENDANTS

- 7. MacQueen, age 45, is a resident of Orland Park, Illinois. He holds himself out as a principal of MCM, the DRIP's investment adviser. According to MacQueen, he has been an exchange specialist and market maker on the Chicago Stock Exchange and Chicago Board Options Exchange, as well as an arbitrage portfolio manager at two securities arbitrage firms. MacQueen started MCM and the DRIP in 1993.
- 8. MCM is an Illinois corporation. MCM holds itself out as a non-registered investment adviser with advisory authority over the DRIP, as well as one other private investment fund.
- 9. The DRIP holds itself out as an Illinois limited liability company ("L.L.C."), but the State of Illinois involuntarily dissolved the L.L.C. in September of 1997. According to the DRIP's prospectus, it is a private investment fund that engages solely in dividend reinvestment arbitrage.

# FACTUAL BACKGROUND

# Representations Regarding the DRIP

10. MacQueen has been privately soliciting investments in the DRIP from friends and acquaintances since approximately 1993. He told prospective investors the DRIP was a private

PROPERTY LINE

investment fund that engaged in dividend reinvestment arbitrage. The DRIP was to generate a profit for its investors by purchasing shares of public companies at a discount via dividend reinvestment plans, while simultaneously selling shares in the same companies short to lock in a profit on the discount. According to MacQueen, this was a low risk strategy that, nonetheless, generated annual returns of around 25%.

- 11. MacQueen often showed prospective investors copies of previously issued quarterly statements reflecting annualized profits of 22% to 30%.
- 12. MacQueen and MCM typically provided a written prospectus to potential investors.

  According to a prospectus provided to an investor on or about June 2001:

Dividend Reinvestment Fund, L.L.C. ("The Fund") is a Limited Liability Company that engages in DRIP-Arbitrage.

\* \* \*

Since its inception in 1993, the Fund has generated average returns of 28.29% on an annualized basis. This is *net* of all trading expenses (stock commissions and interest charges) and the manager's performance fee. There are no monthly management, load or redemption fees. Remember, this is a pure arbitrage program – securities are bought at a discount to the market price, and simultaneously sold at their full market price – no additional risks or trading in other types of securities takes place. This makes the strategy extremely low risk, and management intends to keep running the program exactly this way.

\* \* \*

Each member in the company receives a quarterly account statement summarizing all profits to date. . . . [T]he majority of our members choose to reinvest quarterly profit distributions back into their account. This statement should be received 15 days after the quarter ends.

\* \* \*

Although draws from member's equity capital are not prohibited, we ask that members limit withdrawals to a maximum of once or twice a year. . . . [I]f you need to make an equity capital withdrawal, we request that you give us advance notice of thirty (30)

business days. Should you decide to withdraw from membership entirely, fourty-five [sic] (45) days advance written notice is required.

- 13. MacQueen held himself out as a principal of MCM, the DRIP's investment advisor. He told prospective investors that MCM's "performance fee" was one-third of the DRIP's profits, net of expenses. In other words, MCM and MacQueen would receive no compensation unless the DRIP earned a profit for its investors.
- 14. MacQueen asked investors to send their money for investment in the Fund to MCM. MCM has a bank account at Lakeside Bank ("Lakeside"). MCM maintains a brokerage account on behalf of the Fund at Regal Discount Securities ("Regal"). Upon information and belief, the DRIP does not have a bank account or brokerage account in its own name.
- 15. MacQueen has raised over \$1.325 million for the Fund from at least 5 investors and, on information and belief, has raised millions more from other investors. MacQueen claims to have over \$16 million under management from nearly 100 investors.

## **Defendants Misrepresented and Omitted Material Facts**

- 16. Defendants misrepresented to investors how their money would be used. Contrary to defendants' oral and written representations that investor money would be used by the Fund solely for dividend reinvestment arbitrage, MacQueen has been misappropriating investor funds for his own personal use.
- 17. Since March of 2002, MacQueen has withdrawn \$ 255,500 from MCM's brokerage account at Regal. MacQueen has in turn withdrawn \$378,000 from MCM's bank account at Lakeside. MacQueen's withdrawals far exceed any possible "performance fee" because the Fund has only generated capital gains of \$46,697.80 since March of 2002.

- 18. MacQueen used a portion of the money he withdrew to purchase a vacation home in South Haven, Michigan, in May 2002. MacQueen used \$92,000 from the Regal brokerage account and \$286,264.10 from the Lakeside bank account to purchase the home. After that purchase, virtually no assets remained in either account.
- 19. Upon information and belief, MacQueen has been misappropriating investor money since the Fund's inception. Defendants never told investors that their money would be used for any purpose other than the Fund's dividend reinvestment arbitrage investment strategy.
- 20. Defendants also misrepresented the value of investor interests in the Fund.

  MacQueen repeatedly sent false quarterly account statements to the DRIP's investors reflecting annualized returns of approximately 25%. MacQueen prepared the statements to conceal his misappropriation and to create the illusion that the Fund was profitable.
- 21. For example, in September 2002, MacQueen sent account statements to at least three investors. Those statements reflect a combined value of \$1.7 million, even though the assets in MCM's brokerage and bank accounts never exceeded \$119,000 during the relevant time.
- 22. Some investors gave MacQueen and MCM additional money for investment in the Fund based on the positive quarterly and annual returns reflected in their account statements.
- 23. MacQueen recently sent other false documents to at least two investors with overdue withdrawal and liquidation requests. In October and December of 2002, MacQueen sent false brokerage statements to those investors indicating that MCM had \$14 million and \$16 million in assets under management at Regal under account number 82096313. In fact, the assets in Regal account number 82096313 have not exceeded \$60,000 since September 30, 2002.

24. Defendants also misrepresented that investors can withdraw funds upon 30 or 45 days written notice. MCM has failed to timely pay withdrawal and liquidation requests to at least 4 investors. Currently, over \$800,000 in overdue withdrawal and distribution requests are pending and another \$400,000 distribution is due on March 1, 2003. The only investor who has been paid in full received his money from the proceeds of a mortgage that MacQueen took on the South Haven summer home.

25. Upon information and belief, MCM and the DRIP do not have enough money to make the pending withdrawal and distribution payments, even though MacQueen has repeatedly told investors that they will get paid.

## The DRIP is now a Ponzi Scheme

26. Currently, defendants are making payments to existing investors with money from other investors. On November 21, 2002, an existing investor received two cashier's checks from MCM for \$35,000 and \$30,000, dated November 20, 2002 and November 18, 2002, respectively, in response to a distribution request. On November 8, 2002, MCM's bank account at Lakeside had a balance of \$7,668.25. On November 13, 2002, another investor deposited two \$50,000 checks into MCM's account. MacQueen used that \$100,000 investment to make the subsequent \$30,000 and \$35,000 distribution payments.

27. Another existing investor with a pending \$130,000 distribution request received a \$40,000 wire transfer from MCM on January 15, 2003. MCM's bank account at Lakeside had a balance of \$4,473.84 on January 7, 2003. The following day MacQueen deposited \$100,000 from a corporate investor into the account. MacQueen used that \$100,000 investment to make

the subsequent \$40,000 distribution payment. By January 21, 2003, MCM's account balance had dwindled to \$2,248.84 after a variety of other unknown withdrawals.

## **COUNT I**

## Violations of Section 17(a)(1) of the Securities Act

- 28. Paragraphs 1 through 27 are realleged and incorporated by reference as though fully set forth herein.
- 29. By engaging in the conduct described above, MacQueen, MCM and the DRIP, in the offer and sale of securities, by the use of the means and instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly, have employed devices, schemes and artifices to defraud.
- 30. MacQueen, MCM and the DRIP intentionally or recklessly made the untrue statements and omissions and engaged in the devices, schemes, artifices, transactions, acts, practices and courses of business described above.
- 31. By reason of the foregoing, MacQueen, MCM and the DRIP have violated and, unless enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. §77q(a)(1)].

#### **COUNT II**

# Violations of Sections 17(a)(2) and (3) of the Securities Act

- 32. Paragraphs 1 through 27 are realleged and incorporated by reference as though fully set forth herein.
- 33. By engaging in the conduct described above, MacQueen, MCM and the DRIP, in the offer and sale of securities, by the use of the means and instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly, have:

- a. obtained money or property by means of untrue statements of material fact or by
  omitting to state material facts necessary in order to make the statements made, in
  light of the circumstances under which they were made, not misleading; and
- engaged in transactions, practices, or courses of business that operated or would
  operate as a fraud or deceit upon the purchasers of such securities.
- 34. MacQueen, MCM and the DRIP made the untrue statements and omissions of material fact and engaged in the devices, schemes, artifices, transactions, acts, practices and courses of business described above.
- 35. By reason of the foregoing, MacQueen, MCM and the DRIP have violated and, unless enjoined, will continue to violate Sections 17(a)(2) and (3) of the Securities Act [15 U.S.C. §77q(a)(2), (3)].

#### **COUNT III**

# Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder

- 36. Paragraphs 1 through 27 are realleged and incorporated by reference as though fully set forth herein.
- 37. By engaging in the conduct described above, MacQueen, MCM and the DRIP, in connection with the purchase and sale of securities, by the use of means or instrumentalities of interstate commerce and of the mails, directly or indirectly, have:
  - a. employed devices, schemes, and artifices to defraud;
  - made untrue statements of material facts and omitted to state material facts
     necessary in order to make the statements made, in the light of the circumstances
     under which they were made, not misleading; and

- c. engaged in acts, practices or courses of business which would and did operate as a fraud or deceit upon the purchasers and sellers of such securities.
- 38. MacQueen, MCM and the DRIP intentionally or recklessly made the untrue statements and omissions and engaged in the devices, schemes, artifices, transactions, acts, practices and courses of business described above.
- 39. By reason of the foregoing, MacQueen, MCM and DRIP violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)] and Rule 10b-5 thereunder [17 C.F.R. 240.10b-5].

# COUNT IV Violations of Sections 206(1) and (2) of the Advisers Act

- 40. Paragraphs 1 through 27 are realleged and incorporated by reference as though fully set forth herein.
- 41. By engaging in the conduct described above, MCM, while acting as an investment adviser, by use of the mails and the means and instrumentalities of interstate commerce, directly or indirectly, has:
  - employed devices, schemes or artifices to defraud advisory clients and prospective advisory clients; and
  - b. engaged in transactions, practices or courses of business which operated as a fraud or deceit upon advisory clients or prospective advisory clients.
- 42. MCM intentionally or recklessly employed the devices, schemes and artifices and engaged in the transactions, practices or courses of business described above.

43. By reason of the foregoing, MCM violated and, unless enjoined, will continue to violate Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §80b-6(1) and (2)].

### **COUNT V**

# Aiding and Abetting Violations of Sections 206(1) and (2) of the Advisors Act Against MacQueen

- 44. Paragraphs 1 through 27 are realleged and incorporated by reference as though fully set forth herein.
- 45. As described above, MCM violated Sections 206(1) and (2) of the Advisors Act.

  MacQueen aided and abetted MCM's violations of Sections 206(1) and (2) of the Advisors Act.

  MacQueen, as an associated person of an investments advisor, was aware that his actions involving MCM and the Fund were part of an overall scheme to defraud investors. MacQueen provided knowing and substantial assistance to MCM and the Fund by forming the business entities, creating the offering documents, personally soliciting investments, administering various accounts, preparing the quarterly statements and communicating with investors about the scheme.
- 46. By reason of the foregoing, MacQueen aided and abetted unless enjoined will continue to aid and abet MCM's violations of Sections 206(1) and (2) of the Advisors Act.

#### RELIEF REQUESTED

WHEREFORE, the Commission requests that the Court:

I.

Find that defendants MacQueen, MCM and the DRIP committed the violations charged and alleged herein.

II.

Enter a temporary restraining order, and orders of preliminary and permanent injunction, in a form consistent with Rule 65(d) of the Federal Rules of Civil Procedure, restraining and enjoining defendants MacQueen, MCM and the Fund, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of the foregoing who receive actual notice of such order, by personal service or otherwise, and each of them, from directly or indirectly, engaging in the transactions, acts, practices or courses of business described above, or in conduct of similar purport and object, in violation of Sections 17(a)(1), 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §77q(a)(1), §77q(a)(2) and §77q(a)(3)], Section 10(b) of the Exchange Act [15 U.S.C. §78j(b)], Rule 10b-5 promulgated thereunder [17 C.F.R. 240.10b-5], and Sections 206(1) and 206(2) of the Advisers Act [15 U.S.C. §880b-6(1) and 80b-6(2)].

III.

Enter a temporary restraining order and orders of preliminary and permanent injunction, in a form consistent with Rule 65(d) of the Federal Rules of Civil Procedure, restraining and enjoining defendants MacQueen, MCM and the DRIP, and their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive

actual notice of such orders, by personal service or otherwise, and each of them from, directly or indirectly soliciting, accepting or receiving any funds from individuals or entities for the purpose of investment.

#### IV.

Enter a temporary restraining order and orders of preliminary and permanent injunction, in a form consistent with Rule 65(d) of the Federal Rules of Civil Procedure, restraining and enjoining defendants MacQueen, MCM and the DRIP, and their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of such orders, by personal service or otherwise, and each of them from, directly or indirectly:

- A. transferring, selling, assigning, pledging, dissipating, concealing or otherwise disposing of in any manner, any funds, assets, accounts or other property belonging to, or directly or indirectly, in the possession, custody or control of defendants MacQueen, MCM or the DRIP, or in which these defendants have a beneficial interest, wherever located;
- B. transferring, selling, assigning, pledging, dissipating, concealing or otherwise disposing of in any manner, any funds, assets, accounts or other property obtained or maintained with investor funds, or into which investor funds have been deposited; and
- C. destroying, mutilating, concealing, altering or disposing of, in any manner, any of the books, records, documents, correspondence, brochures, manuals, obligations, belonging to, or directly or indirectly in the possession, custody or control of defendants, in whatever form, including electronic, and wherever located.

V.

Enter an order requiring defendants MacQueen, MCM and the DRIP to:

- A. provide the Commission, within three days of the issuance of this Order, with an accounting of all of the funds received, directly or indirectly, from individuals or entities who gave MacQueen, MCM and the DRIP money for investment, which accounting shall include, without limitation, a schedule indicating: (1) the date of each investment, name of each investor, amount of each investment and any account into which such investments were deposited; (2) the uses to which such funds were put, including, but not limited to the nature and purpose of the use of the funds, the date and amount of the disbursement and the name of the individual or entity involved in the transaction; (3) amounts of any remaining funds and their location; and (4) a separate schedule and accounting of the assets and liabilities of MacQueen, MCM and the DRIP and their location as of February 24, 2003;
- B. produce to the Commission, within three days of the issuance of the temporary restraining order, all books, records and other documents supporting or underlying the accounting provided to the Commission pursuant to paragraph V.A. above; and
- C. produce to the Commission, within three days of the issuance of the temporary restraining order, all current accountant's reports, bank statements, documents indicating title to real or personal property, and any other indicia of ownership or interest in property of MacQueen, MCM and the DRIP, which indicia of ownership or interest are now in the defendants' actual or constructive possession; provided, however, that nothing in the order shall be construed to require defendants to abandon any constitutional or other legal privilege which they may have available to them.

VI.

Enter an order requiring defendants McQueen, MCM and the DRIP to disgorge the illgotten gains that they received as a result of their wrongful conduct, including prejudgment interest.

## VII.

Enter an order imposing upon defendants MacQueen, MCM and the DRIP appropriate civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. §77t(d)], Section 20(d)(3) of the Exchange Act [15 U.S.C. §78u(d)(3)] and Section 209(e) of the Advisers Act [15 U.S.C. §80b-9(e)].

### VIII.

Retain jurisdiction of this action in accordance with the principals of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

## IX.

Grant orders for such further relief as the Court deems appropriate.

Respectfully submitted,

James G. Lundy, Illinois Bar No. 6231095 Thomas J. Meier, Illinois Bar No. 6225621

Attorneys for Plaintiff
Securities and Exchange Commission
175 W. Jackson Boulevard
Suite 900
Chicago, Illinois 60604-2615
(312) 353-7390

Dated: February 26, 2003

# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS

# Civil Cover Sheet

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is authorized for use only in the Northern District of Illinois.

Plaintiff(s): Securities and Exchange Commission

County of Residence:

Plaintiff's Attv:

James G. Lundy

Securities and Exchange - Commission

175 W. Jackson Blvd., Suite 900

Chicago, IL 60604 (312) 353-7390

Defendant(s): Kenneth B. MacQueen; MacQueen Capital Management Corp.; and The Dividend Reinvestment Fund L.L.C.

County of Residence: COOK

Defendant's Atty:





II. Basis of Jurisdiction:

1. U.S. Gov't Plaintiff

JUDGE KENNELL

MAGISTRATE JUDGE LEVI

III. Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff:-N/A

Defendant:- N/A

1. Original Proceeding

V. Nature of Suit:

IV. Origin:

850 Securities / Commodities / Exchange

VI.Cause of Action:

15 U.S.C. 77q(a), 78j(b), 80b-6(1) and 80b-6(2) Securities Fraud

VII. Requested in Complaint

Class Action:

Dollar Demand:

Jury Demand: No

<u>VIII.</u> This case <u>IS NOT</u> a refiling of a previously dismissed case.

Signature

Date:

If any of this information is incorrect, please go back to the Civil Cover Sheet Input form using the Back button in your browser and change it. Once correct, print this form, sign and date it and submit it with your new civil action. Note: You may need to adjust the font size in your browser display to make the form print properly. Revised: 06/28/00

Case: 1:03-cv-01423 Document #: 1 Filed: 02/26/03 Page 18 of 18 PageID #:18

# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS

DOCKETED

In the Matter of

Eastern Division

FEB 2 7 2003

SECURITIES AND EXCHANGE COMMISSION  V.  KENNETH B. MACQUEEN, ET AL.	Case Number:
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APPEARANCES ARE HEREBY FILED BY THE UNDERSIGNED AS ATTORNEY(S) FOR:

ATTEARANCES ARE HERED! FILED DI THE UNDER	SIGNED AS ATTORNET(S) FOR:
PLANTIFE	AND THE PROPERTY OF THE PROPER
	MAGISTMATE UNDER LEVIN
	MACISTRATIO
(A)	(B)
SIGNATURE	SIGNATURE MUMICLO
JAMES-G. LUNDY	THOMAS J. MEJER
SECURITIES AND EXCHANGE COMMISSION	SECURITIES AND EXCHANGE COMMISSION
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IDENTIFICATION NUMBER (SEE ITEM 4 ON REVERSE) 6231095	identification number (see item 4 on reverse) 6225621
MEMBER OF TRIAL BAR?  YES  NO	MEMBER OF TRIAL BAR?  YES NOC. V
TRIAL ATTORNEY?  YES  NO	TRIAL ATTORNEY? YES NO V
	DESIGNATED AS LOCAL COUNSEL?  YES  NO
(C)	(D)
SIGNATURE DEVEL J. medan	SIGNATURE
DAVID J. MEDOW	STEVEN J. LEVINE
SECURITIES AND EXCHANGE COMMISSION	SECURITIES AND EXCHANGE COMMISSION
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IDENTIFICATION NUMBER (SEE ITEM 4 ON REVERSE) 6192840	IDENTIFICATION NUMBER (SEC ITEM 4 ON REVERSE) 6226921
MEMBER OF TRIAL BAR?  YES NO	MEMBER OF TRIAL BAR?  YES NO
TRIAL ATTORNEY? YES NO	TRIAL ATTORNEY? YES NO V
DESIGNATED AS LOCAL COUNSEL?  YES NO	DESIGNATED AS LOCAL COUNSEL?  YES  NO