SD36906

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

FOUR STAR ENTERPRISES EQUIPMENT, INC., and RGH, LLC,

Plaintiffs / Appellant-Respondents,

vs.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Defendant / Respondent-Appellant.

On Appeal from the Circuit Court of Greene County
Honorable Jason R. Brown, Circuit Judge
Case Nos. 31106CC3828 and 31106CC3828-01

REPLY BRIEF OF THE RESPONDENT-APPELLANT

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A. Summary

EMC brings four points on cross-appeal from the trial court's judgment for Four Star (Brief of the Respondent-Appellant ["EMC Br."] 42-75).

EMC's first two points challenge Four Star's standing or capacity to sue it in this case. First, EMC explained it was entitled to summary judgment against Four Star, because Four Star lacked standing or capacity to sue EMC in 2006, as Four Star had ceased to exist by merger into U.S. Rentals in 1999 (EMC Br. 47-55). Second, EMC explained this also was true because in 1999, Four Star had assigned its claims from the 2005 judgment against T&T to RGH (EMC Br. 56-58).

EMC's third point explained alternatively that if Four Star did have standing to sue it in 2006, then under the language of its bond it was not liable for any interest T&T owed Four Star (EMC Br. 59-63).

Finally, and as an alternative to its third point, EMC explained that a genuine dispute of material fact precluded any summary judgment holding it liable for the 2005 judgment against T&T (EMC Br. 64-75). It explained that fraud and collusion are defenses to the plaintiffs' attempt to hold it liable for the judgment against T&T (EMC Br. 65-70). It showed that viewing the record most favorably to it, there is a genuine dispute whether Four Star's judgment against T&T was the product of fraud and collusion, as the trial court held it was in the prior 2012 judgment in this case (EMC Br. 71-75).

In their only six pages of response, the plaintiffs barely address the merits of any of these points. They offer no response to the merits of EMC's

challenge to Four Star's standing or capacity at all (Reply Brief of the Appellant-Respondent ["Plt. Reply Br."] 13-17[1]), except only to say, citing no authority, that EMC misreads the merger-survival statute and one case (Plt. Reply Br. 15-16). They offer no explanation how Four Star could sue EMC after assigning its claim against EMC to RGH (Plt. Reply Br. 16-17). They offer no explanation, which EMC did not already refute, how EMC was obligated to pay interest T&T owed Four Star (Plt. Reply Br. 17-18). They do not contest that fraud is a defense to an action to hold a surety liable on a previous judgment against a principal, nor do they address any of EMC's facts or show how there was no genuine dispute (Plt. Reply 18-19).

Instead, the plaintiffs' arguments are all procedural. They argue the doctrines of *res judicata*, collateral estoppel, and "law of the case" from Four Star's judgment against T&T somehow bar EMC's arguments, and EMC first had to pursue a Rule 74.06(b) action to set aside the judgment in order to make them. They argue EMC's standing, capacity, and fraud defenses were not timely or properly raised below. They argue EMC did not state its fraud defense in opposition to their summary judgment motion.

The plaintiffs' arguments are without merit. First, EMC timely and properly raised its standing, capacity, and fraud defenses below, either in their answer or in a pretrial motion, the plaintiffs consented to trial of these

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[1] The page numbering of the plaintiffs' reply brief violates Rule 84.06(a)(2), which requires "all pages, including the cover page," to be "consecutively paginated using Arabic numbers." Arabic numbers do not begin until their second page. In referring to their brief, this brief uses their misnumbering. The plaintiffs' opening brief also contained this deficiency, which they continue despite EMC already having pointed it out (EMC Br. 25 n.1).

defenses in the 2011 trial, and EMC raised them without objection in opposition to the plaintiff's motion for summary judgment and in its own motion for summary judgment. The law of Missouri is that the plaintiffs cannot now for the first time on appeal argue EMC did not properly raise these defenses.

Second, none of EMC's arguments implicate *res judicata*, collateral estoppel, or the law of the case. Four Star has a judgment against T&T. EMC is not impugning that. But to hold *EMC* liable on that judgment, Four Star must engage in the proper procedures to do so. By merging into U.S. Rentals and assigning its claim to RGH, it lacks standing and capacity to do so. And the law of Missouri is that EMC is not liable for the interest portion of the judgment, just as the trial court held – and the plaintiffs do not contest – EMC was not liable for the attorney fee portion of the judgment, either. Finally, the law allows EMC in this separate proceeding to defend being held liable for the 2005 judgment against T&T by showing it was the product of fraud and collusion, which it properly has done.

None of the plaintiffs' arguments refute any of the facts or law addressed in EMC's cross-appeal. Four Star lacked standing or capacity to sue EMC in 2006. Alternatively, the trial court's judgment should be limited to $18,873.18. Alternatively still, the Court should reverse the trial court's judgment and remand this case for trial.

B. EMC properly raised Four Star's lack of standing and capacity and its defense of fraud below, which are preserved for appeal.

1. Standing and capacity

In response to EMC's first and second points challenging Four Star's standing and capacity to sue, the plaintiffs argue EMC failed to present these defenses below (Plt. Reply Br. 14-17). The plaintiffs appear to mean that EMC did not allege *in its answer* either that the merger or assignment of Four Star's claim impacted its ability to sue EMC in 2006 (Plt. Reply Br. 14-17). But they also say, "EMC did not plead this defense in general or by 'specific negative averment' *at any time*" (Plt. Reply Br. 15) (emphasis added).

This is without merit. If anything is untimely, it is the plaintiffs' argument that EMC's challenges to Four Star's standing or capacity were not properly raised below, which it makes for the first time on appeal.

First, EMC's arguments go to Four Star's *standing* to sue, which can be raised at any time. Standing is a threshold issue reviewed *de novo* that cannot be waived. *Trenton Farms RE, LLC v. Hickory Neighbors United, Inc.*, 603 S.W.3d 286, 290-91 (Mo. banc 2020); *Schweich v. Nixon*, 408 S.W.3d 769, 773-74, 774 n.5 (Mo. banc 2013); *Eaton v. Doe*, 563 S.W.3d 745 (Mo. App. 2018). Four Star no longer has a legally protectable interest in the 2005 judgment against T&T, and therefore no standing to enforce that judgment, because it merged into U.S. Rentals in 1999, making the judgment U.S. Rentals', *Jourdan v. Mo. Valley Inv. Co.*, 651 S.W.2d 169, 172-73 (Mo. App. 1983), or it assigned that claim to RGH, making it RGH's. *Jacobs v. Fodde*, 458 S.W.2d 588, 592 (Mo. App. 1970). Both *Jourdan* and *Jacobs* discuss this in terms of *standing*, as it goes to the identity of the real party in interest.

Second, the plaintiffs are wrong that EMC did not plead these defenses below "at any time." Before the 2011 trial, EMC moved to dismiss Four Star's claims or for judgment on the pleadings, stating both these defenses. First, EMC argued Four Star could not sue it because Four Star had assigned its whole claim to RGH (D90 p. 4; D92 pp. 3-4). Second, EMC argued Four Star also could not sue it because Four Star ceased to exist in 1999 when it merged into U.S. Rentals (D92 p. 4), attaching the Secretary of State's certified records of this (D92 pp. 10-53).

It is well established that "a motion to dismiss is a responsive pleading, and a party desiring to raise the issue of the capacity of any party to be sued may do so in a responsive pleading." *Jordan v. Greene*, 903 S.W.3d 252, 257 (Mo. App. 1995) (affirming grant of motion to dismiss for lack of capacity well into litigation, when the plaintiff never argued this was improper). Indeed, Rule 55.27(a) specifically provides that a defense "[t]hat plaintiff does not have legal capacity to sue" may "be made by motion."

Second, the parties tried these defenses by consent in the 2011 trial, and the plaintiffs never revoked that consent, nor have they even once objected to EMC challenging Four Star's standing or capacity at any time until now. Under Rule 55.33(b), an un-pleaded defense is tried by consent where the defendant raises it before trial and argues it at trial, and the plaintiff does not object. *See, e.g., Dumler v. Nationstar Mortg., LLC*, 585 S.W.3d 343, 348-49 (Mo. App. 2019) (where defendant raised statute of limitations defense in brief before trial and argued it at trial, and plaintiff did not object, it "was tried with [the plaintiff]'s implied consent"); *Damon Pursell*

Constr. Co. v. Mo. Hwy. & Transp. Comm'n, 192 S.W.3d 461, 475 (Mo. App. 2006) (Breckenridge, J.) (same re: defense of accord and satisfaction).

The arguments EMC raised in its motions before the 2011 trial were front and center at that trial (D37 pp. 10-14). The plaintiffs did not argue EMC's defenses were untimely or improper, or ask the court to strike them (D37 pp. 10-14). And in its December 2012 judgment, the trial court indeed found Four Star lacked standing to sue EMC in 2006 because in 1999 it had merged into U.S. Rentals and also had conveyed RGH all its interest in its cause of action against T&T (D114 pp. 5-6; D115 p. 16). Therefore, the plaintiffs consented to these defenses being at issue in this case. *Dumler*, 585 S.W.3d at 348-49; *Damon Pursell*, 192 S.W.3d at 475.

Finally, the plaintiffs waived any argument that a deficiency in the pleadings disallows EMC's standing and capacity defenses when they did not object to EMC's opposition to their motion for summary judgment or EMC's motion for summary judgment by making that argument. It is well-established that where a plaintiff responds to a motion for summary judgment on the merits, without arguing that the motion raises an un-pleaded defense, the plaintiff waives the pleading issue. *See Hanff v. Hanff*, 987 S.W.2d 352, 357 (Mo. App. 1998) (joined by Teitelman, J.) (where plaintiff failed to object to summary judgment motion on the basis that it raised an un-pleaded defense, but instead "chose to address the substantive merits of the argument," "the issue ... must be treated as though it had been raised in the pleadings"; citations omitted); *Harms v. Harms*, 496 S.W.3d 534, 538 n.4 (Mo. App. 2016) (same); *Rose v. City of Riverside*, 827 S.W.2d 737, 739 (Mo.

App. 1992) (same). The plaintiff cannot object to the presentation of a defense for the first time on appeal. *Id.*

This makes sense, because the plaintiff's failure to object in the summary judgment proceedings is a form of trial by consent. *Id.* (citing Rule 55.33(b)). "'A trial is a judicial examination and determination of issues between the parties to an action, whether they be issues of law or fact, before a court that has jurisdiction,'" and "[f]or purposes of the rules, a summary judgment proceeding is a trial because it results in '[a] judicial examination and determination of the issues between the parties.'" *Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390, 392-93 (Mo. banc 1993) (citations omitted).

EMC raised its arguments about Four Star's lack of standing and capacity from the merger and assignment both in opposition to the plaintiffs' motion for summary judgment (D36 pp. 15-16) and in its own motion for summary judgment (D55 pp. 5-6). The plaintiffs did not make any reply argument in support of their own motion for summary judgment (D1 pp. 36-38), let alone arguing that EMC's defenses were untimely, and then responded to these issues in EMC's motion for summary judgment on the merits, without arguing EMC's defenses were untimely (D82 pp. 1-2, n.1).

Instead, the first time in 15 years of litigation that the plaintiffs ever have objected to EMC's standing and capacity defenses as not being properly pleaded is now, on appeal. The law of Missouri is this is too late.

EMC timely and properly raised its arguments below that Four Star lacked standing and capacity to sue EMC in 2006. Those arguments are preserved for appeal.

2. Fraud

The plaintiffs' belated objection to EMC's fraud defense is equally untenable.

The plaintiffs concede that in EMC's answer, it raised as a defense that Four Star's judgment against T&T was the product of fraud (Plt. Reply Br. 19). And EMC plainly did so. Its answer denied T&T ever performed any work on the Project, and alleged instead that the alleged debt, Mr. Townlian's affidavit, and the alleged invoices were false and fraudulent (D119 pp. 3-7).

The plaintiffs' objection now appears to be that this was not pleaded with sufficient "particularity" (Plt. Reply Br. 19). But the plaintiffs never moved for a more definite statement or otherwise challenged EMC's pleadings. "By failing to make such a motion, parties are deemed, pursuant to Rule 55.27(f), to have waived any objection as to the particularity of the averments." *In re K.L.*, 561 S.W.3d 12, 19 (Mo. App. 2018) (citing *Clark v. Olson*, 726 S.W.2d 718, 719 (Mo. banc 1987)). EMC timely and properly raised the defense of fraud in its answer, which is all it had to do. Rule 55.08.

Moreover, as with EMC's defenses of Four Star's lack of standing and capacity, the plaintiffs also failed to object at trial in 2011 to EMC arguing its defense of fraud or presenting evidence that Four Star's judgment was the product of fraud. Instead, the plaintiffs engaged this defense on the merits (D37 pp. 24, 179, 198, 205). And of course, the trial court in the December 2012 judgment found the plaintiffs' claim underlying the default judgment against T&T and the documents on which they based that claim "were fraudulent" (D116 p. 13). The plaintiffs consented to this defense being at

issue in this case. *Dumler*, 585 S.W.3d at 348-49; *Damon Pursell*, 192 S.W.3d at 475.

Finally, EMC raised the argument in its fourth point in response to the plaintiffs' motion for summary judgment. It argued that a genuine dispute of material fact precluded summary judgment for Four Star because, viewing the record most favorably to EMC, Four Star's judgment against T&T was the product of fraud, and for all the reasons EMC now argues (D36 pp. 19-22). As with EMC's defenses of Four Star's lack of standing and capacity, the plaintiffs filed no reply argument (D1 pp. 36-38), let alone one arguing the defense of fraud was somehow untimely or stated improperly. Therefore, regardless, "the issue ... must be treated as though it had been raised in the pleadings." *Hanff*, 987 S.W.2d at 357; *Harms*, 496 S.W.3d at 538 n.4; *Rose*, 827 S.W.2d at 739.

The plaintiffs also briefly argue "EMC needed to show material facts of each element necessary to support a properly pleaded affirmative defense of fraud" in its opposition to their motion for summary judgment and "did not do so" (Plt. Reply Br. 19). This is untrue. EMC's response to the plaintiffs' motion for summary judgment went through all the elements of fraud and showed how the material facts fit each one (D36 pp. 20-22). At no time, either below where they filed no reply argument, or in their brief, where they only make this conclusory statement that EMC "did not" show this, have the plaintiffs ever shown this was insufficient. Viewing the evidence in the light most favorable to EMC, Four Star's judgment against T&T was the product of fraud, which is a complete defense to EMC's liability (EMC Br. 65-75).

C. EMC was not required to pursue a Rule 74.06(b) action to set aside Four Star's judgment against T&T in order to raise its defenses of Four Star's lack of standing and capacity, its non-obligation to pay interest T&T owed Four Star, or its defense of fraud, none of which implicate any preclusive doctrine.

In response to EMC's standing and capacity points and its point concerning its fraud defense, the plaintiffs suggest that to bring these claims, EMC first was required to move to set aside Four Star's 2005 judgment against T&T under Rule 74.06(b) (Plt. Reply Br. 13-14, 19). They argue failing to do so meant EMC's defenses are barred by *res judicata*, collateral estoppel, and the "law of the case" (Plt. Reply Br. 13-14, 19).

The plaintiffs' arguments are without merit. First, whether Four Star's merger or assignment in 1999 means it lacked standing or capacity to sue EMC in 2006 does not impugn Four Star's judgment against T&T, and has nothing to do with the merits of that judgment. All it would mean is the the judgment is valid, but only U.S. Rentals or RGH would have standing or capacity to bring a timely claim to collect on it, as with all the decisions about assignments EMC addressed in its opening brief (EMC Br. 57-58).

The plaintiffs' argument otherwise seems to be based on the notion that because it was named as a party in the 2005 judgment against T&T, it forever can sue to collect on that judgment, regardless of whether it stopped existing or assigned its claim away. Conspicuously, they cite no authority in which a party obtained a judgment, ceased to exist or assigned the judgment away, and nonetheless was allowed to collect on or enforce the judgment anyway under a theory of some form of preclusion or "law of the case." Indeed, the only case it cites in discussing preclusion is *Walton v. City of*

Berkeley, 223 S.W.3d 126, 128-29 (Mo. banc 2007) (Plt. Reply Br. 13), which did not involve a merger or assignment at all.

Four Star's lack of standing or capacity due to its merger into U.S. Rentals or its assignment of its claim to RGH does not make the judgment it obtained in 2005 invalid. Instead, it just means Four Star is no longer the real party in interest who can enjoy the fruits of that judgment. EMC does not need to set the judgment aside to make this argument, nor does Four Star cite any authority holding so.

Second, EMC already showed that fraud is a defense a surety may raise whenever a judgment creditor against its principal seeks to hold it liable for that judgment (EMC Br. 65-70). This is well-established in the law of Missouri, and is basic surety law throughout the United States (EMC Br. 65-70) (citing, among other things, *Bell v. W. Sur. Co.*, 524 S.W.3d 109, 114 (Mo. App. 2017); *Four Star Enters. Equip., Inc. v. Empl. Mut. Cas. Co.*, 451 S.W.3d 776, 781 n.7 (Mo. App. 2014); *Home Ins. Co. of N.Y. v. Savage*, 103 S.W.2d 900, 902 (Mo. App. 1937)).

The plaintiffs present no law otherwise (Plt. Reply Br. 19). No authority anywhere in America has required a surety to seek to set aside a default judgment against its principal in order to make a defense in a separate enforcement action that the default judgment is the product of fraud. EMC did not have to proceed under Rule 74.06(b) in order to raise its defense, but could do so in the action against it. The judgment was only prima facie proof of its liability, and EMC could rebut that prima facie proof

with evidence of fraud, as it did both at the 2011 trial and in its response to the plaintiffs' motion for summary judgment below.

Finally, the lack of applicability of preclusive doctrines to EMC's arguments is most glaring in EMC's third point, which explains it could not be require dot pay interest T&T owed Four Star (EMC Br. 59-63). Whether the law makes EMC liable for interest equally does not impugn Four Star's judgment against T&T itself, because this is a statutory and contractual question.

For example, the trial court held – and the plaintiffs do not challenge – that despite Four Star being awarded attorney fees against T&T, EMC could not be held liable for any attorney fees, because the language of its bond did not make it liable for them (D87 p. 3). *See Marcomb v. Hartford Fire Ins. Co.*, 934 S.W.2d 17, 19-20 (Mo. App. 1996); *Midwest Asbestos Abatement Corp. v. Brooks*, 90 S.W.3d 480, 486 (Mo. App. 2002); *Prudential Ins. Co. of Am. v. Goldsmith*, 192 S.W.2d 1, 3-4 (Mo. App. 1945).

That did not make Four Star's judgment against T&T any less valid. It simply limited as a matter of law the portions of T&T's debt that EMC could be made responsible to cover.

D. This Court's 2014 decision reversing the trial court's December 2012 judgment and generally remanding the case for a new trial has no effect on any of EMC's points.

Several times, and citing no authority, the plaintiffs suggest that when this Court reversed the trial court's December 2012 judgment, it somehow limited the issues EMC could litigate below on remand or now, on appeal. They argue, "Despite the T&T Judgment, the prior Opinion and Mandate of

this Court, and the trial court's findings, EMC *now* challenges the legal existence, capacity, or authority for the judgment in favor of Four Star" (Plt. Reply Br. 14) (emphasis in the original). They argue, "This Court was fully aware of the assignment" of Four Star's claim to RGH "when it reversed the prior judgment in this case" (Plt. Reply Br. 17).

The plaintiffs' suggestion that this Court's reversal and remand of the December 2012 judgment for a new trial in any way circumscribed the issues in this case on remand is without merit. Instead, the law of Missouri is that because the Court generally remanded the case due to what it held was an improper method of excluding evidence, all issues remained open on remand unless the Court expressly had decided them in its opinion. The Court did not rule on the standing, interest, or fraud issues at all, which then returned them to the trial court's purview.

In the December 2012 judgment, the trial court previously found Four Star lacked standing to sue EMC and Four Star's judgment against T&T was the product of fraud. But this Court *did not* decide those issues in its 2014 decision. Instead, the Court held the proceedings that resulted in those determinations – all of which depended on evidence the parties produced at the 2011 trial – were an abuse of discretion because the trial court had "revers[ed] evidentiary rulings *sua sponte* after trial," and therefore required a new trial. *Four Star*, 451 S.W.3d at 780.

The Court stated, "Because all of Four Star's points involve in some manner documentary evidence that was admitted during the trial and then excluded from evidence after trial by the judgment, we begin our review with

Four Star's fifth point" challenging the reversal of evidentiary rulings after trial, "which we find dispositive of this appeal." *Id.*

This Court never held Four Star *had* standing to sue or the 2005 judgment against T&T *was not* the product of fraud. Instead, it held that excluding evidence for the first time in a judgment was improper "without giving Four Star an opportunity to offer other evidence in lieu of the subsequently excluded evidence." *Id.* at 782. It reversed the judgment and remanded the case to the trial court "for further proceedings consistent with this opinion." *Id.* It directed only a new trial: that "[i]f, on remand, the trial court determines that the proffered evidence was properly excluded, Four Star should be given a chance to offer additional evidence." *Id.* at 782-82. It expressly noted it was *not* deciding any other issues, including whether that evidence in fact was admissible. *Id.* at 781 n.8, 783 n.11.

The Court's 2014 decision plainly was a general remand. The case was remanded "for further proceedings consistent with this opinion," including to determine whether the proffered evidence was properly excluded, and then, if so, to give the parties' an opportunity to present additional evidence – i.e., a new trial. In an order in June 2015, the trial court did exactly that, stating, "Court determines that evidence received at bench trial should not have been admitted and therefore was properly excluded from the Court's judgment. … The Court, therefore, will permit [the plaintiff] to offer additional evidence in support of their claim as mandated upon such finding" (D9 p. 1). The case then remained pending a new trial for years, until the summary judgment proceedings below.

This means that all the issues remained open for the trial court's decision, including the standing, statute of limitations, and fraud issues it previously had decided in EMC's favor. "When an appellate court remands a case for a new trial, all issues are open to consideration, and pleadings may be amended and new evidence may be produced." *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 813 (Mo. banc 2011), *abrogated on other grounds by S.S.S. v. C.V.S.*, 529 S.W.3d 811, 815 (Mo. banc 2017).

This Court's decision reversing the trial court's 2014 judgment therefore "le[ft] all issues open to consideration in the new trial." *Guidry v. Charter Commc'ns, Inc.*, 308 S.W.3d 765, 768 (Mo. App. 2010). Because the Court did not decide the standing, statute of limitations, or fraud issues, but instead ordered further evidentiary proceedings, those issues remained open, and continue to remain open on *de novo* review of the summary judgment proceedings. *C.M.B.R.*, 332 S.W.3d at 813; *see, e.g.*, *Gerken v. Sherman*, 351 S.W.3d 1, 6 (Mo. App. 2011) (issue of statute of limitations remained open on reversal and remand for further proceedings).

The plaintiffs are wrong to suggest that this Court's 2014 decision in any way circumscribed the issues on remand or now before the Court.

None of the plaintiffs' arguments refute any of the facts or law addressed in EMC's cross-appeal. Four Star lacked standing or capacity to sue EMC in 2006. Alternatively, the trial court's judgment should be limited to $18,873.18. Alternatively still, the Court should reverse the trial court's judgment and remand this case for trial.

Conclusion

The Court should reverse the trial court's summary judgment in favor of Four Star and remand this case for judgment in EMC's favor against Four Star. Alternatively, the Court should modify the amount of the summary judgment in favor of Four Star (or RGH, should RGH prevail in its appeal) to $18,873.18. Alternatively still, the Court should reverse the trial court's judgment in favor of Four Star and remand this case for trial.

In all other respects, the Court should affirm the trial court's judgment.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 4,878 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P. C. per Rule 55.03(a), and that on September 8, 2021, I filed a true and accurate Adobe PDF copy of this brief of the respondent-appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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