Supreme Court of Ohio Clerk of Court - Filed January 26, 2015 - Case No. 2014-0738

IN THE SUPREME COURT OF OHIO

CITY OF AKRON, et. al.,	)	Case No. 2014-0738
	)	
Appellees,	)	
	)	On Appeal from the Franklin County
vs.	)	Court of Appeals, Tenth Appellate District
	)	
OHIO STATE DEPARTMENT OF INSURANCE et al.,	)	
	)	
	)	Court of Appeal Case Nos.
Appellants.	)	13-AP-473, 13-AP-484, 13-AP-496

REPLY BRIEF OF AMICUS CURIAE
FRATERNAL ORDER OF POLICE, AKRON LODGE #7
IN SUPPORT OF APPELLANTS OHIO STATE DEPARTMENT OF INSURANCE et al.,

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STATEMENT OF INTEREST

This Amicus Curiae Reply Brief is submitted by the Fraternal Order of Police, Akron Lodge #7 ("FOP") in support of the Appellants and for all public employees who are beneficiaries of non-ERISA, self-funded government insurance plans. This case holds great significance for public employees subject to a self-funded insurance plan offered by their state, city, municipal, county, township or school district employer. The Amicus Curiae urges this Supreme Court to reverse the ruling of the Tenth District Court of Appeals that the Superintendent of the Ohio Department of Insurance (hereinafter "ODI") has no jurisdiction over self-funded insurance plans, thus leaving these plans without state regulation. Were this ruling to stand, public employees and retirees subject to self-funded insurance plans would have no avenue to seek redress but for a lawsuit in one of Ohio's 88 common pleas courts to dispute any and all insurance claims.

The Court of Appeals' ruling must be overturned and ODI must be afforded jurisdiction to execute its statutory duties to regulate, adjudicate and enforce the insurance laws of this state under Title 39 ("Insurance"). Appellants' claim that there was a violation of coordination-of-benefits ("COB") laws falls under the exclusive jurisdiction of ODI, which has the statutory duty to regulate insurance acts and practices that are illegal, unfair or deceptive. There is no legal or practical reason to exempt the actions of self-funded insurance plans from the Superintendent of ODI's regulation. The FOP, on behalf of the Appellants, pray this Supreme Court to find the Superintendent of ODI has jurisdiction to regulate, adjudicate and enforce self-funded insurance plans.

STATEMENT OF THE CASE AND FACTS

To avoid unnecessary repetition, the Amicus Curiae hereby incorporate the facts of this matter laid out in its Brief filed on November 17, 2014. Since the submission of the Appellant's Merit Brief and Amicus Curiae Brief, the Appellees have submitted their own Merit Briefs on January 5 and January 6, 2015, respectively. The Amicus Curiae now submits this Reply Brief to respond to the Appellees' arguments presented to this Supreme Court.

The Appellees, the Ohio Police and Fire Pension Fund ("OP&F") submit that public employee beneficiaries of self-funded insurance plans have the collective bargaining process and the grievance procedure as a remedy to contest disputed insurance claims. This is wrong not only for the current Appellants who are retirees, but also for the vast majority of public employees that are either not covered by a collective bargaining agreement ("CBA") or ineligible for collective bargaining under Chapter 4117. Appellees, City of Akron ("City") and Medical Mutual of Ohio ("MMO"), contend that they are not subject to regulation by ODI because they are not a "person" under the general statutory definition found in R.C. §1.59(C) and therefore not a "third-party payer" under R.C. §3901.38(F). Appellees unjustifiably disregard the definition of "person" under R.C. §3901.04(A)(2) and its applicability to the specific powers of the Superintendent in Title 39. Further, the City and MMO argue that because the term "self-funded" is referenced elsewhere in Title 39, the absence of an explicit designation of ODI jurisdiction over self-funded insurance plans infers that such plans were meant to be excluded from ODI jurisdiction. This argument overlooks the plain reading of R.C. §3902.11 and ignores ODI's statutory authority over "uninsured agreements" that encompass self-funded insurance plans under Ohio Administrative Code ("O.A.C.") §3901-8-01.

Finally, the OP&F Merit Brief presents a case that is unrelated to the Propositions of Law before this Court. OP&F substantiates its jurisdictional independence from ODI, neglecting to respond to the issue of ODI's jurisdiction regarding self-funded insurance plans. The OP&F Merit Brief, is for the most part, irrelevant and deserves little consideration but for certain points addressed herein.

ARGUMENT

I. APPELLANTS DO NOT HAVE AN ADEQUATE REMEDY THROUGH THE COLLECTIVE BARGAINING PROCESS.

The Court of Appeals ruled the Appellants do not have a cause of action with ODI to enforce the COB provision in their health plans because the COB laws are inapplicable to self-funded insurance plans. *Akron v. Ohio Dept. of Ins.*, 2014-Ohio-96, ¶ 44 (10th Dist.) The Court of Appeals determined that the "method to enforce the COB laws against Akron and OP&F" is "by filing grievances under their respective collective bargaining agreements." *Id.* The Court of Appeals reasoned that Akron Police Officers and Akron Firefighters are members of a collective bargaining unit and thus may utilize the grievance procedure in their CBA to enforce the COB provision against the City or to negotiate for new terms in their CBA. *Id.* The Appellees' Merit Briefs champion this misguided proposition from the Court of Appeals' ruling that the Appellants have a remedy to enforce Ohio's COB laws against Akron and OP&F through the collective bargaining process. *Id.*

What the Appellees' assertion neglects to consider is that the vast majority of public employees are either ineligible for collective bargaining or do not have a collective bargaining unit certified by the State Employment Relations Board ("SERB") in their workplace. Even for the public employees that are represented by a union, the self-funded health insurance plan may not be included in their CBA or may not be subject to the grievance procedure. This is

particularly true for retirees. The Court of Appeals and the Appellees' proposed remedy is shortsighted and leaves most public employees, as well as retirees, with no remedy except for a lawsuit in one of Ohio's 88 common pleas courts to dispute any and all insurance claims.

The Court of Appeals' holding and the Appellees' support thereof, fail to understand and appreciate the broader consequences of eliminating ODI jurisdiction of self-funded insurance plans and relegating self-funded insurance disputes to the collective bargaining process. OP&F argues that Metcalfe and Biasella – as retirees – could file grievances to "vindicate any contract rights they had," while conceding that its applicability to retirees "depends on the facts." (OP&F Br. p. 35). OP&F cites to *Carter v. Trotwood-Madison City Bd. of Educ.*, 181 Ohio App. 3d 764, 2009-Ohio-1769 ¶¶ 31, 46 (2nd Dist.) as evidence that retirees, in very limited circumstances, may be able to bring a grievance under a CBA. (OP&F Br. p. 35-36).

In fact, the retirees in *Carter* were not subject to the grievance procedure because they were not named in the CBA. *Id.* at ¶¶41, 45, 46. *Carter* concluded that the grievance procedure did not apply to retirees unless they are specifically named in the CBA as persons who are entitled to bring grievances. *Id.* at ¶45. *Carter* reaffirmed that the union, in that case, had no duty of fair representation to the retirees, since retirees are no longer part of the collective bargaining unit. *Id.* at ¶31, (citing) *Rutledge v. Dayton Malleable, Inc.* 20 Ohio App.3d 229, 485 N.E.2d 757 (10th Dist.1984). OP&F also relied upon *Carter* to highlight various cases which retirees could sue for breach of the CBA in court. (OP&F Br. 36). However, this assumption depends on whether the cause of action "relates back to the time when the individuals had the status of bargaining unit employees, and it therefore arises out of the relationship, and out of the collective bargaining agreement." *Carter*, 181 Ohio App.3d 764, 485 N.E.2d 757 ¶40, (citing) *Summit Cty. Children's Serv. Bd. v. Local No. 4546, Communications Workers of Am.*, 9th Dist. Summit No.

21184, 2003-Ohio-726, ¶20. OP&F's assumption that "many retirees" will have "remedy through a grievance procedure" is simply incorrect. (OP&F Br. p. 35).

The holes in the OP&F argument represent the very problem with the Appellees' contention that the grievance procedure in a CBA is the appropriate method to enforce a COB provision found in a public employee's self-funded insurance plan. Under the Appellees' scenario, a public employee beneficiary of a self-funded insurance plan must jump through several hoops in order to enforce a COB provision. First, the public employee must be an active (i.e. not retired) employee and must be eligible for collective bargaining. R.C. §4117.01(C) identifies seventeen (17) different categories of public employees, including public officials, supervisors, managers, confidential employees etc., that are exempt from collective bargaining. Next, if the public employee is eligible for collective bargaining, they must be in a collective bargaining unit certified by SERB and be bound by a CBA with their public employer. The CBA must include the self-funded insurance plan and the plan must be subject to the grievance procedure for the public employee to pursue any remedy by filing a grievance.

The Court of Appeals and Appellees' casual suggestion that the collective bargaining process provides public employee beneficiaries a remedy is entirely insufficient. Under this formula, the majority of public employees would be unable to enforce the COB provisions in their self-funded insurance plan because they are not eligible for the collective bargaining process. Assuming public employees are not excluded from collective bargaining under R.C. §4117.01(C), are part of a collective bargaining unit certified by SERB and subject to a CBA, there is no guarantee that their self-funded plan is in the CBA or subject to the grievance procedure. And, of course, almost all retirees would be excluded. The collective bargaining process is an inadequate remedy for public employees.

If a former public employee is a retiree, such as Metcalfe and Biasella, the CBA must expressly state that the CBA and the grievance procedure are applicable to retirees. *Carter*, 181 Ohio App. 3d 764, 2009-Ohio-1769 ¶45. In retirement, retirees are no longer part of their collective bargaining unit and are not subject to their former CBA. Therefore, to bring a grievance under the CBA after the employment relationship has ended, retirees must be specifically included in the CBA as entitled to bring grievances against their former public employer.

The Appellants' action to enforce the COB provision, regarding retiree benefits provided under the City's self-funded insurance plan, arose after their employment relationship ended with the City. In the present case, there is no language in either of the Appellants' CBAs that state the CBA and the grievance procedure are applicable to retirees. Under *Carter*, without language that expressly entitles retirees to bring grievances under the CBA, the Appellants are unable to file a grievance under the CBA. *Id.* at ¶45. As such, the collective bargaining process does not provide the Appellants in this case with any method to enforce the COB provision against the City by filing a grievance. The collective bargaining process is insufficient for retirees and does not provide the Appellants any recourse or remedy.

OP&F proposes that if the beneficiaries of its Fund are denied benefits, they will have a specific mandamus remedy under R.C. §742.46. (OP&F Br. p. 35). While that may be true of beneficiaries receiving insurance through OP&F, this proposition does not speak to the lack of remedy for beneficiaries of self-funded insurance plans administered by other public employers. The litigation at hand centers on the principle of whether the Appellants, as retired public employee beneficiaries of a self-funded health insurance plan, can pursue a remedy through ODI for a violation of the COB laws under Title 39. The analysis of a mandamus action under R.C.

§742.46 for an alleged violation of Chapter 742 is completely unrelated to the Appellants' action. Accordingly, the discussion of a mandamus remedy through OP&F is entirely immaterial and deserves no consideration.

Lastly, MMO and the City suggest that due process is achieved by advancing a claim under state common law, but argue that there is no private right of action under the COB laws for deceptive practices. (MMO Br. p. 5; City Br. p. 20). MMO contends that "Ohio courts have very clearly stated that COB provisions in insurance policies are subject to normal contract interpretation, just like any other contract term." (MMO Br. p. 4-5). MMO follows up by noting that COB provisions are often treated as contract provisions subject to typical contract litigation. (MMO Br. p. 9). MMO cites to *Qualchoice, Inc. v. Nationwide Insurance Co.* 11 Dist. Lake No. 2007-L172, 2008-Ohio-6979, *PP36-37, remarking that "the court applied standard rules of contract construction in evaluating import of coordination of benefits provision." (MMO Br. p.4-5). However, *Qualchoice* regarded a subrogation action between two insurance providers, Qualchoice and Nationwide, and did not implicate the relationship or rights between the plan and its beneficiary. *QualChoice, Inc. v. Nationwide Ins. Co.*, 2008-Ohio-6979, ¶ 45 (11th Dist.). *Qualchoice* does not stand for the principle that common law contract interpretation applies when a beneficiary brings a COB action against their health plan.

Nevertheless, the idea that the Appellants' remedy for a COB violation should be pursued as a state law claim would indeed create chaos among the courts of this state. To bring a lawsuit in one of Ohio's 88 common pleas courts to dispute insurance claims would unnecessarily burden the courts with avoidable litigation that is best reserved for ODI. Unlike state common pleas courts that may yield inconsistent results, ODI has the expertise to efficiently administer, adjudicate and enforce its statutes. This was the intent of the General Assembly, memorialized

under Title 39, which granted ODI the authority to regulate the laws of this state relating to insurance. R.C. §3901.04(A). This authority includes the jurisdiction for ODI to hear claims and enforce Ohio's COB laws found in R.C. §3902.11 through R.C. §3902.14.

Under the Appellees' scenario, the majority of public employees that are not eligible to pursue a remedy through the collective bargaining process will have to incur costly litigation to seek redress. As previously discussed by the Amicus Curiae, the practical effect of the Appellees' argument will force public employees to balance whether their insurance claims are worth the time and expense to litigate in court. This cost-benefit analysis will most certainly deter public employee beneficiaries from pursing claims that don't meet a certain financial threshold to justify filing a lawsuit. This feeds the motivation for administrators of self-funded insurance plans to deny claims, or worse, flout the insurance laws which public employee beneficiaries will be unable or unlikely to contest.

The Appellants and the Amicus Curiae FOP have established that ODI has the statutory authority to adjudicate and enforce the insurance laws of this state under Title 39. Under this premise, ODI is the appropriate channel for public employee beneficiaries of self-funded insurance plans to pursue a remedy for violations of Title 39.

II. THE TERM "PERSON" FOR THE PURPOSES OF TITLE 39 IS NOT DEFINED BY R.C. §1.59(C).

The Court of Appeals' analysis found the Appellees were not subject to ODI jurisdiction as a "person" and thus not a "third-party payer" by conveniently and inappropriately interjecting the general statutory definition of "person" under R.C. §1.59(C) to disqualify each Appellee under R.C. §3901.38(F)(8). *Akron*, 2014-Ohio-96, ¶36. The Appellees all but hide behind the reasoning set forth by the Court of Appeals in order to ignore the relevant definition of "person" for Title 39, found in R.C. §3901.04(A)(2) and defined by R.C. §3901.19. The Appellees'

interpretation disregards the clear link between R.C. §3901.04(A)(2) and R.C. §3901.19 that subjects the Appellees to ODI regulation as "third-party payers" under R.C. §3901.38(F)(8).

The City's argument would frustrate the intent of the General Assembly by supplanting the definition of "person" found in R.C. §3901.04(A) with the general statutory definition of "person" found in R.C. §1.59(C). Again, R.C. §1.59(C) is a general definition for the term "person" that is applicable to any statute "unless another definition is provided in that statute or a related statute." R.C. §1.59(C) (emphasis added). Another definition of "person" is provided in Title 39 in R.C. §3901.04(A)(2). There is no justifiable reason to use the term "person" under R.C. §1.59(C) other than to avoid the application of "person" in R.C. §3901.04(A)(2), as defined by R.C. §3901.19. The Appellees are all "legal entities" and fit the definition of "person" under R.C. §3901.04(A)(2), as defined by R.C. §3901.19. When using the appropriate definition of "person" in R.C. §3901.04(A)(2) and R.C. §3901.19 to give meaning to the undefined "person" in R.C. §3901.38(F)(8), each Appellee qualifies as a "third-party payer" and thus, subject to the jurisdiction of ODI.

MMO argues that there is "no indication" that the definition of "person" in R.C. §3901.04(A)(2) was meant to apply to all of Title 39. (MMO Br. p. 17). MMO relies on the designation in R.C. §3901.19 that the definitions contained in R.C. §3901.19 only pertain to "sections 3901.19 to 3901.26." (MMO Br. p. 17). Meanwhile, the City proffers that because the term "third-party payer" was used instead of "person" in the COB statutes, the General Assembly obviously intended the more restrictive definition of "third-party payer" under R.C. §3901.38(F). (City Br. p. 6). The City argues that the use of an expansive definition would frustrate the intent of the General Assembly. (City Br. p. 6).

MMO's argument fails because the term "person" in R.C. §3901.04(A)(2) is clearly meant to apply to all of Title 39. The General Assembly's placement of the definition of "person" is significant because it is located in the section that defines the powers of the Superintendent of Insurance with regards to "laws of this state relating to insurance." R.C. §3901.04(A)(1), (2). This placement is not an accident and represents the General Assembly's intent to use the definition of "person" in R.C. §3901.19 to give meaning to the term "person" throughout the insurance laws of Title 39. MMO's attempt to restrict the definition of "person" in R.C. §3901.19 to "sections 3901.19 to 3901.26" neglects the statute's direct link to R.C. §3901.04(A)(2) that populates the definition to the "laws of this state relating to insurance." R.C. §3901.04(A)(1), (2). As such, the term "person" defined in R.C. §3901.19, is not limited to R.C. §3901.19 to §3901.26. Applying the definition of "person" found in R.C. §3901.04(A)(2), as defined by R.C. §3901.19, to give meaning to an otherwise undefined "person" in Title 39, would fulfill, not frustrate, the intent of the General Assembly.

The fact that "person" is defined elsewhere in Title 39 does not diminish the impact and applicability of the definition of "person" found in R.C. §3901.04(A), as defined by R.C. §3901.19. Clearly, the General Assembly chose the definition of "person" to be defined by R.C. §3901.19 and applied to the powers of the Superintendent of ODI. Specific definitions of the term "person" provided throughout Title 39, such as the one found in R.C. §3901.32, may modify the definition of "person" to fit the content of those particular statutes. (See, R.C. §3901.32(F), applicable to sections 3901.32 to 3901.37). This does not interfere with the applicability of the general definition of "person" in R.C. §3901.04(A)(2) as it is applied to statutes throughout Title 39. In statutes without a customized definition of "person," such as R.C.

§3901.38(F), the general definition of "person" found in R.C. §3901.04(A)(2), as defined by R.C. §3901.19, would apply.

III. SELF-FUNDED INSURANCE IS A "PLAN OF HEALTH COVERAGE" UNDER R.C. §3902.11 AND A "PLAN" UNDER O.A.C. §3901-8-01(C)(11).

The Appellees reassert the Court of Appeals' argument that ODI may not exercise powers beyond those that are conferred upon it by the Ohio General Assembly. *Akron*, 2014-Ohio-96, ¶30, (citing) *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, 827 N.E.2d 766, ¶32. Notably, the Appellees argue that since self-funded insurance does not meet the technical definition of insurance, ODI has no statutory authority over such plans. (City Br. p. 10-16; MMO Br. p. 3-5). Appellees and the Court of Appeals focus their analysis solely on the fact that self-funded insurance plans do not meet the definition of "insurance." *Akron*, 2014-Ohio-96, ¶¶22-27, 40-42, (City Br. p. 8-15; MMO Br. p. 2-4, 7-9). The Appellees' arguments ignore the plain reading of R.C. §3902.11 and overlook the fact that ODI has authority over "plans" that include uninsured agreements with which coordination is allowed. O.A.C. §3901-8-01(C)(11).

ODI's regulation of the City's self-funded insurance plan is within its powers vested by the General Assembly. The Superintendent of ODI has a mandatory duty to execute and enforce the laws relating to insurance. *Strack v. Westfield Cos.,* 33 Ohio App.3d 336, 338, 515 N.E.2d 1005 (9th Dist.1986). R.C. §3901.04 authorizes the Superintendent to regulate the "laws of this state relating to insurance" including, but not limited to Title 39. R.C. §3901.04(A)(1). The General Assembly directed the Superintendent to adopt, amend and rescind rules and make adjudications necessary to discharge the duties and exercise the powers vested by the statute under Title 39 of the Revised Code. R.C. §3901.041. The COB statutes, R.C. §3902.11 through

R.C. §3902.14 and O.A.C. §3901-8-01, were established pursuant to the authority vested in ODI by the General Assembly to execute and enforce plans with COB language.

A plain reading of the COB statutes is all that is required to determine the self-funded insurance plan provided by the City is encompassed within the statutory scheme set forth in Title 39. In R.C. §3902.11, the language covers the City's self-funded insurance plan as an "individual or group policy or agreement under which a third-party payer provides for hospital, dental, surgical, or medical services." R.C. §3902.11(B)(3). As established above and in the Appellants' Merit Brief, the City is a "third-party payer" under R.C. §3901.38(F)(8) and it is undisputed that the City's self-funded insurance plan provided hospital, dental and medical services to its beneficiaries. The analysis is straight forward and conclusive. It is hardly unreasonable, contrary to the Court of Appeals and Appellees' argument, to find self-funded insurance plans with a COB provision, such as the City's plan, subject to ODI's regulatory authority.

While the Amicus Curiae and the Appellants have conceded that self-funded insurance does not meet the technical definition of insurance, this fact does not affect ODI's jurisdiction over the City's plan. What is significant is the language in O.A.C. §3901-8-01(C)(11) that sets forth a "plan" as a form of coverage with which coordination is allowed. O.A.C. §3901-8-01(C)(11)(a). The "plan" includes an *uninsured* arrangement of group or group type coverage, such as the City's self-funded insurance plan. O.A.C. §3901-8-01(C)(11)(c)(ii) (emphasis added). The City's self-funded insurance plan is covered under Title 39 either as an uninsured "plan" under O.A.C. §3901-8-01(C)(11)(c)(ii) or as a "plan of health coverage" under R.C. §3902.11. Each section indicates that the City's self-funded insurance plan falls within Title 39 and consequently, ODI has the authority to regulate the plan according to the powers conferred upon it by the Ohio General Assembly.

CONCLUSION

The Appellees further the same misguided arguments put forth by the Tenth District Court of Appeals and artfully misconstrue Title 39 to exclude self-funded insurance plans from ODI's jurisdiction. These arguments fail to establish that the Ohio General Assembly intended to exclude self-funded insurance plans from ODI regulation. ODI is vested with broad authority over the statutory scheme to regulate the laws of this state relating to insurance, without exception for self-funded insurance plans. The self-funded insurance plans provided by the Appellees contain COB language that falls within the exclusive jurisdiction of ODI.

The unjust remedy of the collective bargaining process offered by the Appellees would exclude the majority of public employees, including Metcalfe and Biasella. The Appellees' remedy would provide no redress to non-collective bargaining unit public employee beneficiaries of a self-funded insurance plan. This inequity illuminates how the collective bargaining process is inappropriate and contrary to the General Assembly's purpose for ODI to regulate and enforce the insurance laws of this state. Each Appellee, as a legal entity, meets the definition of a "person" and "third-party payer" subject to ODI's regulation under the COB statutes. Finally, the Appellees' self-funded insurance plans with COB language fall within the COB statutes, whether the self-funded plan qualifies as a "plan" under O.A.C. §3901-8-01 or a "plan of health coverage" under R.C. §3902.11.

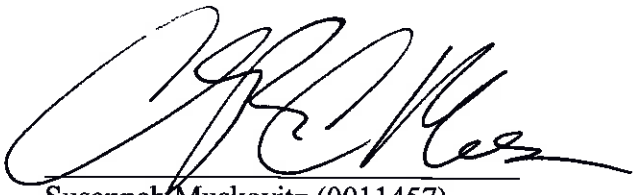
If the Honorable Supreme Court were to accept the Appellees' argument and affirm the Tenth District Court of Appeals, it would thereby exclude self-funded health insurance plans from ODI regulation. The consequence of this result would subject the State of Ohio to a mass of unregulated self-funded insurance providers and unregulated self-funded insurance plans providing health insurance coverage to public employees. Public employee beneficiaries will

have no other option but to sue in one of Ohio's 88 common pleas courts to dispute claims under their self-funded insurance plans. Public employee beneficiaries will be caught between two detrimental choices; paying out of pocket for a disputed and potentially expensive medical bill, or engaging in costly litigation over the claim in common pleas court. Both options have overwhelming and unfair financial consequences for public employees.

The Fraternal Order of Police, Akron Lodge #7 prays this Supreme Court to find the Superintendent of ODI has jurisdiction to regulate, adjudicate and enforce self-funded insurance plans with COB language that commit unfair or deceptive insurance acts and practices.

Respectfully submitted,

MUSKOVITZ & LEMMERBROCK, LLC



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The undersigned hereby certifies that a true copy of the foregoing Reply Brief of Amicus Curiae in Support of Appellants Ohio State Department of Insurance, et. al. was served by electronic mail on January 26, 2015, upon:

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