IN THE SUPREME COURT OF OHIO

RICHARD GIBBS, RANDALL JOY and DONNA JOY, *et al*.,	:	Case No. _____
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
vs.	:	
	:	Court of Appeals Case No. CA-20-109929
FIREFIGHTERS COMMUNITY CREDIT UNION,	:	
Defendant-Appellant.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT FIREFIGHTERS COMMUNITY CREDIT UNION

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INTRODUCTION

Firefighters Community Credit Union (FCCU) adopted and then delivered to its member-owners, including Plaintiffs Richard Gibbs, Randall Joy, and Donna Joy, a one-page document containing the full text of three new provisions for its Membership Agreement. One of those three new sections was an Arbitration Provision. The Arbitration Provision included a paragraph clearly and unambiguously explaining to Plaintiffs how they could easily "opt-out" if they did not want to arbitrate. Plaintiffs did not opt out.

The Court of Appeals, Eighth District, ruled that Plaintiffs did not need to opt out of arbitration and did not need to arbitrate any disputes either. Indeed, the Eighth District ruled as a matter of law that Plaintiffs did not even need to read the Arbitration Provision they indisputably received. Instead, the Eighth District adopted out of whole cloth an entirely new rule: *as a matter of law*, a party is not bound by any contracts or amendments if the cover letter attaching the amendments does not mention the specific topics covered by the attached document, *regardless* of whether in truth that party *actually* went ahead and read and understood the amendments anyway. In other words, where, as here, the amendment is an arbitration provision, the mere lack of the word "arbitration" in the cover letter constitutes a legal "Get Out of Arbitration Free Card" because, according to the Eighth District, it legally precludes any court from even considering as an issue of fact whether the party actually read the attached arbitration provision anyway and thus could be bound by it. The possibility that Plaintiffs or anyone else *might* have been "lulled" into not reading the Arbitration Provision they were given was enough by itself to render the Arbitration Provision unenforceable as a matter of law.

The application of the Eighth District's ruling is not limited to the context of arbitration. To the contrary, its new rule is generally applicable to all contract amendments, and indeed even

to new contracts. According to the Eighth District, any party to a contract can avoid the obligation to read the contract or an amendment and thus not be bound by those contract terms as a matter of law if the other party's actions or words could conceivably "lull" someone into not reading the contract or amendment. The parties are left to later decide whether to accept the contract terms if they are of benefit, and to assert there was no valid offer if the terms turn out to be unattractive.

But the Eighth District's ruling is unsupported by any existing legal doctrine and indeed is in direct conflict with fundamental contract law that Ohio's courts have always recognized as necessary to protect the integrity of *all* contracts (including but not limited to the axiom that a party cannot use the opposing party's actions or alleged misrepresentation as an excuse for not reading the contract). Even now, the Eighth District's ruling is also already in conflict with a decision from the Second District on an identical issue only one month earlier in *Rudolph v. Wright Patt Credit Union*, 2021-Ohio-2215, -- N.E.3d --, 2021 WL 2709491.

In its ruling, the Eighth District has rendered arbitration agreements and indeed all contracts worth little more than the paper they are printed on or the bytes on which they are stored. If an attorney can proclaim or a judge can imagine that some language in a cover letter might conceivably "lull" the offeree into not making the minimal effort – such as turning the page or opening an email attachment – to actually read the entire arbitration agreement or any other contract term so as to render those terms unenforceable, then all contracts are worthless.

Accordingly, this Court's intervention is necessary to preserve the integrity of all contracts and not just arbitration agreements. This Court should accept jurisdiction and reverse the Eighth District decision pursuant to long-standing and well-established law so as to ensure that the stability, predictability and enforceability offered by such axioms continue for all written

agreements. The Court's involvement is also necessary to reaffirm Ohio's strong policy favoring arbitration, to provide clarity and guidance to the marketplace and consumers in the enforceability of arbitration provisions and to provide the necessary direction to the courts in determining how to handle the spate of litigation involving the validity of arbitration clauses and class action waivers, and to reinforce the axiom that court decisions must be based on evidence rather than mere argument or speculation.

STATEMENT OF THE FACTS AND CASE

In August 2019, Firefighters Community Credit Union ("FCCU"), a not-for-profit, member-owned cooperative and financial institution, amended the terms of its membership agreement ("Membership Agreement") to add three new sections, including an "Arbitration and Waiver of Class Action Relief" provision (the "Arbitration Provision"). Ex. 1 at ¶ 3. Under the terms of the Membership Agreement, which all members acknowledged and accepted upon becoming FCCU members, FCCU was free to "amend [the Membership Agreement] at any time" and could do so without notice to the members, unless such notice was required by law or regulation.

On August 28, 2019, FCCU alerted all of its members it was adding the Arbitration Provision. Specifically, FCCU e-mailed to its members at the e-mail address they had on file a notice with the subject line "We've updated our terms and services" ("Notice"). Ex. 1 at ¶ 4. The body of the Notice advised members, "We're writing to let you know that we've updated our terms of service." FCCU also advised its members, including the Plaintiffs here in this case, of the changes in terms that would apply to all members, that the member's continued use of their account constituted acceptance of the Arbitration Provision, and attached the full text of the Arbitration Provision:

> "The changes in terms are attached to this email. We recommend that you familiarize yourself with these updated agreements. As you continue to use FFCCU for your banking needs, you agree to these updated terms. If you have any questions, please don't hesitate to contact us at 21-6621-4644 or visit www.ffcommunity.com. *Id*.

The full Arbitration Provision, which was attached to the email itself and thus could be easily opened with a click, informed all members that they could reject FCCU's Arbitration Provision by writing to FCCU and stating their intention to opt-out within 30 days. *Id.* at ¶ 5. It is undisputed in this case that FCCU sent the full Arbitration Provision in August 2019 to the Plaintiffs in this case and Plaintiffs offered no evidence whatsoever in opposition to the motion to compel arbitration.

Despite receiving and having notice of the Arbitration Provision, the Plaintiffs filed on December 26, 2019 their breach of contract complaint that challenges FCCU's assessment of certain overdraft and non-sufficient funds fees. *Complaint*. at ¶ 2.

Because Plaintiffs accepted the Arbitration Provision through their continued use of their FCCU accounts and never elected to opt-out of the Arbitration Provision, FCCU moved to compel arbitration on an individual basis or, in the alternative, to stay the action pending arbitration (the "Motion"). *Id*. at ¶ 3. To support its Motion, FCCU relied on a sworn affidavit to demonstrate that it provided notice via e-mail to Plaintiffs. *Id*. In their opposition to the Motion ("Opposition"), Plaintiffs did not contest receipt of the Notice and conceded that they took no measures to opt-out of the Arbitration Provision.

In attempting to invalidate the Arbitration Provision in their Opposition and at oral argument on the Motion, Plaintiffs offered only argument of counsel, and did not offer ***any*** authenticated or admissible evidence or any testimony or sworn affidavit. Rather, they relied solely on non-evidence: inaccurate assertions presented only in their legal brief.

On August 11, 2020, the trial court issued a Journal Entry denying FCCU's motion. Ex. 2. The trial court cited as the sole basis for its ruling that the August 2019 email notice supposedly "implie[d] that all members have already agreed to the updated terms" (even though the notice itself advised all members – including Plaintiffs – that they could easily opt out of any requirement to arbitrate, and even though Plaintiffs did not offer any evidence suggesting they believed they could not opt out of arbitration). *Id*. at 1.

FCCU appealed this decision, which the Eighth District affirmed. Ex. 1 at ¶ 1. The Eighth District, still unsupported by any evidence, held: "the record fails to demonstrate sufficient notice was sent such that there was a 'meeting of the minds' or an agreement as to the inclusion of the subject provision. There is nothing to show that an arbitration provision was included in the original account agreement, and the content of the email notice that was purportedly sent to appellees did not provide any indication that the changes to the account agreement involved the addition of the Arbitration and Waiver of Class Action Relief provision." *Id*. at ¶ 17. In so ruling, the Court of Appeals ignored its earlier acknowledgement that the full Arbitration Provision was sent to and received by Plaintiffs in August 2019 as an email attachment.

In affirming, the Eighth District declined to follow recent appellate decisions from other districts, *Qualls v. Wright Patt Credit Union*, 2d Dist. Greene No. 2020-CA-48, 2021-Ohio-2055, and *Rudolph v. Wright Patt Credit Union*, 2d Dist. Greene No. 2020-CA-50, 2021-Ohio-2215, which similarly involved amendments to a credit union's membership agreement to add an arbitration clause and class action provision. *Id*. at ¶¶ 19-21. Rejecting those relevant Ohio opinions from the Ohio Second District Court of Appeals, the Eighth District decided instead to rely on an unreported opinion from a District Court in Alaska, *Coleman v. Alaska USA Fed. Credit Union*, D. Alaska, No. 3:19-cv-0229-HRH.

FCCU now timely seeks this Court's review.

THE CASE PRESENTS A QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

This case is of great public and general interest because the Eighth District's ruling – including its significant tension with the *Rudolph* decision from the Second District – will sow confusion and uncertainty into the trial courts and the marketplace regarding the enforceability of arbitration agreements, and indeed all contracts. The Eighth District's holding that a cover letter to which a contract or amendment is attached will, as a matter of law, render the contract unenforceable because it might somehow conceivably "lull" someone into not reading the attached contract terms is not only novel but is actually contrary to well-established and axiomatic contract law. The chaos resulting from such disruption of the law of contracts – as well the actual negotiating of contracts – is inevitable. As just one isolated example, should parties to contracts consider the risks posed by the Eighth District's holding and either not use a cover letter at all, or should they make the cover letter essentially a repeat of the contract terms themselves so as to avoid missing any details, particularly given that it does not matter according to the Eight District whether or not the other party actually reads the contract or amendment?

Moreover, the implications of the Eighth District's holding are drastic and far-reaching as it leaves the validity and enforceability of change-of-terms provisions, arbitration clauses and class action waivers, and evidentiary principles in unknown territory. Resolution of these propositions is important not just because this case turns on them, but precisely because both the scenario in general and the particular provisions at issue in FCCU's Membership Agreement are not unique to FCCU. Nor are they unique to Ohio's more than 500 credit unions. In fact, such provisions are so ubiquitous that litigation regarding them has not only become commonplace, but they are common in many other contexts as well. *See, e.g.*, Dollar Bank Deposit Agreement,

available at https://dollar.bank/legal/deposit-agreement (permitting unilateral amendments to agreement with bank).

A. The Eighth District's holding is directly contrary to axiomatic contract law which is necessary to preserve the integrity, stability, enforceability and predictability of all contracts.

Long ago, Ohio courts adopted fundamental contract law necessary to protect the integrity of contracts by ensuring the stability, enforceability, and predictability of all written agreements. The most basic axiom violated by the Eighth District here is that a party agreeing to a contract is "bound to its terms, assumes any risks attendant to" the failure to read the contract, "and cannot avoid its consequences by asserting detrimental reliance upon the representations (or presumably the misrepresentations as well) of others" regarding the contract terms. *Bender v. Logan*, 2016-Ohio-5317, 76 N.E.3d 336, 353 (4th Dist. 2016).

By allowing Plaintiffs to avoid their obligation to arbitrate any disputes with FCCU merely because Plaintiffs could not be bothered to open the attachment to an email it is undisputed they received, the Eighth District only demonstrated the truth of well-established Ohio law: "If this were permitted, contracts would not be worth the paper on which they are written." *McAdams v. McAdams*, 80 Ohio St. 232, 88 N.E. 542, quoting from *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875); *Gartrell v. Gartrell*, 181 Ohio.App.3d 311, 317 (5th Dist. 2009).

"A party entering a contract has a responsibility to learn the terms of the contract prior to agreeing to its terms." *Smith v. Nationwide Mutual Ins. Co.*, 2018-Ohio-3758, 120 N.E.3d 72, 80-81 (10th Dist. 2018). One who agrees to a contract without first making a reasonable effort to learn what is in it may not in the absence of fraud, or mutual mistake, avoid the effect of such

contract. *Gartrell v. Gartrell*, 181 Ohio.App.3d 311, 316 (5th Dist. 2009). The failure to read the terms of a contract is not a defense to the enforcement of the contract. *Id.* at 317.

For example, in *Logan*, the Court of Appeals rejected the defendant's suggestion that she should not be bound by the terms of a contract she agreed to because the plaintiff allegedly lied to her and concealed the text of the contract. *Id*. at 354. The Court noted that the defendant failed to offer any admissible evidence that she would not have been permitted to read the contract had she asked. *Id*. "We believe that under the circumstances of this case, it would be unreasonable to find that [defendant] justifiably relied upon any of [the plaintiff's] representations when she could have discovered the contents of the documents simply by reading them." *Id*. See also *Moore v. Houses on the Move, Inc.*, 177 Ohio.App.3d 585, 592 (8th Dist. 2008).

Similarly, in *Brazzese v. Chesapeake Exloration, LLC,* 998 F.Supp.2d 663, 674 (S.D. Ohio 2014), the parties opposed a breach of contract action on the basis that an essential term regarding surrender was located in a lease that had been provided to them and was incorporated in but not mentioned in a separate agreement they signed. The court rejected the defense because the evidence demonstrated that the terms of the lease were "made available" to the parties before they signed. "That the Alberys chose not to read the lease and thus held a subjective belief" that no surrender was possible "does not mean that the parties failed to reach an objective meeting of the minds." *Id*.

Where, as here, the Arbitration Provision itself is clear and unambiguous, either sides' subjective understanding is irrelevant because an objective standard applies to the determination of whether there was a meeting of the minds. *Brazzes*, at 673. "Ohio law does not require contracting parties to share a subjective meeting of the minds to establish a valid contract; otherwise, no matter how clearly the parties wrote their contract, one party could escape its

requirements simply by contending that it did not understand them at the time. What the law does require is that the terms of the agreement establish an objective meeting of the minds, which is to say that the contract was clear and unambiguous." *Id*. "The 'mental reservation of a party to a bargain does not impair the obligation he purports to undertake.'" *Id*. at 673.

The Eighth District turned contract law upside down, eliminating any certainty or predictability as to the enforceability of contracts by not only ignoring the presumption that a party is presumed to have read the contract, but by holding as a matter of law that a party is not bound by an arbitration agreement when the cover letter fails to mention the words "arbitration" or "opt out."

First, the Eighth District's conclusion is illogical and contrary to ordinary experience. If someone is advised that they are now bound by new contract terms, the only reasonable reaction is not to ignore the notice but to immediately find out exactly what new terms one has to comply with and any corresponding consequence. Here, that was easy: just click on the attachment and read one page.

Second, the Eighth District's contention that the cover letter "implied" that members had already agreed to the new terms is irrelevant. One of those new terms was that all members – including the Plaintiffs – could opt-out of arbitration. So if someone went on to actually read the attached Arbitration Provision, one would have learned how to avoid arbitration. There simply is no basis for the Eighth District to ignore axiomatic law requiring due diligence and instead encouraging ignorance and laziness.

Finally, the Eighth District's ruling finding that the cover letter somehow rendered the Arbitration Provision unenforceable as a matter of law has no foundation in the law. By ruling as a matter of law, the Eighth District unfairly and unwisely precluded FCCU members from

exercising their right to fully consent to the Arbitration Provision. At the very least, the Eighth District should have required the Plaintiffs to submit sworn testimony as to whether or not they actually read the Arbitration Provision.

B. The Eighth District's holding is a vastly overbroad and unwise judge-made rule which will undermine the stability of contracts because it unfairly imposes the burden of proving a negative as to what is in the mind of another and will render long-established defenses to contract meaningless and unnecessary.

The Eighth Circuit's ruling is not only directly contrary to axiomatic contract law, it is unsupported by any existing legal doctrine or defense, such as fraudulent inducement, fraud in the factum, negligent misrepresentation, or procedural unconscionability. The primary reason no such defense could even possibly apply here is because Plaintiffs would have the burden of proof on all of them and, as even the Eighth District acknowledged, Plaintiffs offered no proof whatsoever. See, e.g., *Bender v. Logan*, 2016-Ohio-5317, 76 N.E.3d 336, 352-53 (4th Dist. 2016) (no fraudulent inducement); *Smith v. Nationwide Mutual Ins. Co.*, 2018-Ohio-3758, 120 N.E.3d 72, 80-81 (10th Dist. 2018) (no procedural unconscionability); *McCuskey v. Budnick*, 165 Ohio St. 533, 535 (1956) (no fraud in the factum); *Aftermath, Inc. v. Buffington*, 2010-Ohio-19, 2010 WL 28883, ¶ 11 (no unilateral mistake). *See also Gartrell v. Gartrell*, 181 Ohio.App.3d 311, 316 (5th Dist. 2009) (proof of these defenses must be by clear and convincing proof).

The Eighth District's ruling will give one side an unfair advantage over the other. Parties opposing contract terms will no longer need to prove affirmative defenses with clear and convincing proof. Instead, they will only need to have their attorneys invent some interpretation of a cover letter that would raise a specter of "lulling" them into not actually reading a contract accessible at the click of a mouse. The party seeking to enforce the contract, on the other hand, will not be able to respond with any facts, because the Eighth District's ruling applies as a matter of law if there is any possibility of "lulling." Even assuming they were given the opportunity to

prove a negative as to what was in the mind of the opponent at the time of receiving the contract – were they possibly "lulled" into not reading further? – there is no way of meeting that burden.

C. The Eighth Circuit's decision is in substantial tension with the Second District's *Rudolph* decision, resulting in confusion and uncertainty in the lower courts and the marketplace.

Equally important, the Eighth District's holding in this case is in direct conflict with the Second District's recent decision in *Rudolph v. Wright-Patt Credit Union,* 2021-Ohio-2215, 2021 WL 2709491. The Second District in *Rudolph* held that almost identical language as contained in FCCU's Membership Agreement entitled Wright Patt Credit Union to add an arbitration provision to its membership agreement and render it binding, even without first giving notice to its members. *Id*., ¶¶ 20-40. (The Second District also offered other reasons for affirming the motion to compel arbitration, but they were all independent from its holding that the credit union could add a binding arbitration provision without notice.) Here, the Eighth District, without offering any reason, declined to follow *Rudolph*, instead preferring an unreported trial court decision from Alaska. This is the only Court that can resolve this conflict on an issue which will continue to remain at issue in numerous cases.

ARGUMENT

A. Appellant's Proposition of Law No. 1:

Notice of a contractual amendment to add an arbitration clause and class action waiver, if required, is sufficient when it directs the party to the provision and the notice does not have to explicitly state that an arbitration clause and class action waiver are being added or otherwise advise the consumer of all potential implications.

Even if notice of a contractual amendment made under a change-in-terms provision is required, which it is not, the holdings of the Eighth District set forth obligations that far exceed any potential duty of a commercial entity. The trial court and Eighth District found that FCCU's Notice was insufficient because it did not afford Plaintiffs the opportunity to make an informed

decision. The implications of these collective opinions require FCCU (and any entity desiring to add an arbitration clause and class action waiver) to undertake an arduous task of essentially advising all consumers of all legal implications of the added provision. Further, the imposed requirements are not only unsupported by law, but are in conflict with recent appellate opinions.

Herrington v. Union Planters Bank, N.A., 113 F.Supp.2d 1026 (S.D. Miss. 2000) is directly on point. In *Herrington*, the bank advised its accountholders in a cover letter that the accompanying "revised Deposit Account Agreement" contained "important information about" the depositor's accounts. The cover letter did not mention arbitration but the revised Agreement included a new arbitration provision. The Court held that the letter and accompanying Agreement "sufficiently notified" the plaintiffs that the terms and conditions were changing and would include an arbitration clause. "The plaintiffs' apparent failure to read the revisions to their accounts is irrelevant to the issue of whether they agreed to arbitrate or are subject to those changes." *Id*. at 1031. *See also Sacchi v. Verizon Online, LLC*, 2015 WL 765940, *8 (S.D.N.Y. 2015) (notice of the terms of an agreement is sufficient where the offeree is given "adequate notice of the existence of additional documents" that contain those terms).

In *Qualls* and *Rudolph*, the Second District affirmed the trial court's grant of the defendant-credit union's motion to compel arbitration pursuant to an arbitration provision added under a change-in-terms provision. As noted in *Rudolph*, the plaintiff there—much like the courts here—failed to point to any law requiring the specific type of notice at issue. *Rudolph*, 2021-Ohio-2215, ¶ 44. In *Qualls*, the Second District also rejected any requirement that the credit union notify members of potential litigation in order to provide proper notice of an arbitration agreement because no litigation existed at the time the Notice was provided. *Qualls*, 2021-Ohio-2055, ¶ 94. In *Rudolph*, the Second District found that the credit union's posting of

the arbitration provision to its website and the plaintiff's prior agreement to view account information online constituted adequate notice. *Rudolph*, 2021-Ohio-2215, ¶¶ 46, 49. These Second District opinions make clear that notice is sufficient simply by making a member aware of its existence even in the face of potential litigation.

The holdings of the Eighth District and the trial court serve to impose specific and unnecessary duties and obligations on commercial entities, for which clarification is needed to provide direction to entities to effectively amend their contracts to add an arbitration clause and class action waiver.

B. Appellant's Proposition of Law No. 2:
An entity is not required to provide notice when it subsequently adds an arbitration clause and class action waiver if the consumer previously agreed that the entity could make amendments and would only provide notice as required by law.

Ohio law is clear that contract terms are effective as long as the receiving party has the opportunity to review the terms and an unconditional right to cancel the contract if he disagrees with the terms. *Higgs v. Automotive Warranty Corp.*, 134 Fed. Appx. 828, 831-22 (6th Cir. 2005) (applying Ohio law). Contractual provisions reserving the right of the drafter to change the terms of a contract are no different. Such change-of-terms provisions are well-established as being valid and enforceable under Ohio law. *Stachurski v. DirecTV, Inc.*, 642 F.Supp.2d 758, 769-70 (N.D. Ohio 2009); *Englert v. Nutritional Sciences, LLC*, 2008 WL 4416597, 2018 Ohio 5062 (Ohio App. 2018). The dispositive factors in finding a unilateral change of terms provision valid are "unambiguous language, notice to the other party that the terms of the contract could be changed … and acceptance by that party of the risk involved" by agreeing to the unilateral reservation of rights provision. *Englert*, 2018 Ohio 5062, ¶ 19. When parties agree in advance to permit unilateral modifications, subsequent modifications are binding without additional notice,

unless required by law. *Rudolph*, 2021-Ohio-2215 ¶ 44 (credit union was not required to give advance notice of amendments to contract because member already agreed that credit union could amend terms at any time and member would comply); *Qualls*, 2021-Ohio-2055, ¶ 89. There is no federal or Ohio law that requires separate notice of the addition of an arbitration provision and class action waiver to effectuate such provision. As such, there is no Ohio precedent that conditions the validity of terms added via a change-in-terms provision on whether the drafter provided notice of the specific amendment.

Such is the case here. Plaintiffs entered into a contract that explicitly gave FCCU the right to modify the agreement at any time and without notice, unless notice was required by law. Plaintiffs accepted the change-in-terms provision that explicitly authorized FCCU to amend the Membership Agreement at any time without notice unless required by law or regulation. The Membership Agreement further afforded either party the ability to terminate the Membership Agreement at any time by providing written notice to the other party. Thus, FCCU's Membership Agreement included a valid unilateral change-in-terms provision. Thus, long before the Arbitration Provision was added in August 2019, Plaintiffs agreed that their continued use of their FCCU accounts would communicate assent to the most recent version of the Membership Agreement, regardless of whether FCCU provided additional notice.

The basic principles regarding the enforcement of an arbitration clause and class action waiver via a change-in-terms provision are not undermined by the holding in *Maestle*, despite many litigants' attempts to broaden the scope of that limited holding. *Maestl*e does not stand for the proposition that the addition of an arbitration clause and class action waiver under a change-in-terms provision negates the enforceability of such a provision. Rather, the change-in-terms provision in *Maestle* was already narrowly limited to permit a change in only those terms related

to payments, charges, fees, and interest. *2005-Ohio-4120,* at ¶ 28. *Maestle* does not impact the enforceability of a broad change-in-terms provision, like those commonly used by many commercial entities, which permits "amendments" "at any time."

CONCLUSION

The Court should accept jurisdiction and reverse the judgment of the Eighth District.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following, via electronic mail, on September 20, 2021:

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APPENDIX