No. 21-122,162-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE EQUALIZATION APPEALS OF WALMART STORES, INC.; WALMART REAL ESTATE BUSINESS TRUST; SAM'S REAL ESTATE BUSINESS TRUST; AND TMM ROELAND PARK CENTER, L.L.C., FOR THE YEAR 2016 IN JOHNSON COUNTY; AND WALMART REAL ESTATE BUSINESS TRUST AND SAM'S REAL ESTATE BUSINESS TRUST FOR THE YEAR 2017 IN JOHNSON COUNTY.

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Appeal from the Board of Tax Appeals Dockets
2016-2691-EQ thru 2016-2693-EQ,
2016-2694-EQ thru 2016-2701-EQ
2016-2702-EQ thru 2016-2704-EQ,
2016-2705-EQ,
2017-4166EQ thru 2017-4173-EQ,
2017-4174-EQ & 2017-4175-EQ

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INTERESTS OF THE *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that involve issues of concern to the nation's business community.

SUMMARY OF ARGUMENT

All are "interested in maintaining the state and local governments," however it has long been recognized that any "rate of assessment and taxation [must] be uniform and equal throughout the jurisdiction levying the tax." *Wheeler v. Weightman*, 96 Kan. 50, 58 (1915). To that end, Kansas law requires all property taxes be assessed uniformly and based on the fair market value of the fee simple interest alone. Kansas law defines fair market value as "the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion." K.S.A. 79-503a. Kansas law explicitly excludes intangible interests, such as contract rights, and other potentially subjective variables, such as business reputation and success,

from inclusion in the fee simple assessment.[1] "The ultimate object of this exercise [is] to determine the true value of the real estate upon which to levy taxes and not to levy taxes based on the value of the business located on the real estate." *In re Equalization Appeal of ARC Sweet Life Rosehill*, No. 113,692, 2016 WL 3856666, at *15 (Kan. App. 2016).

The Kansas Legislature has further rejected appraisal methods that would attempt to utilize the value or reputation or success of the business operating on the land as a factor in assessment. It has provided both that "[v]aluation appeals before the board shall be decided upon a determination of the fair market value of the *fee simple* of the property"; and that "[c]ases before the board shall not be decided upon arguments concerning the shifting of the tax burden or upon any revenue loss or gain which may be experienced by the taxing district." K.S.A. 79-2433(g) (emphasis added). And it did so well after *In re Equalization Appeal of Prieb Properties*, 47 Kan. App. 2d 122, 275 P.3d 56 (2012), and other decisions of which the Legislature is presumed to be aware. *See State v. Clark*, 313 Kan. 556, 569, 486 P.3d 591 (2021) ("'The legislature's continued, long-term acquiescence is a strong indication' [that a Court] gave effect to the intent of the Legislature. . ." [*State v.*] *Quested*, 302 Kan. [262,] 279, 352 P.3d 553 [2015].").

Despite these express standards, a small number of appraisers—including Johnson County's—have unilaterally attempted to increase tax burdens on retailers like Walmart in contravention of the Kansas Legislature's statutory directives and at the expense of

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[1] Kansas law also excludes above-market rents derived from build-to-suit leases. Build-to-suit leases are initial construction financing arrangements that do not reflect market rental rates and thus have little, if any, relevance to determining market rents or the value of fee simple interests. Instead, such leases are designed to attract investors to finance construction projects with a guaranteed return that will pay off the original investment and may even include a substantial cash payout to buy land for the next construction project.

fairness. Walmart and similarly situated retailers already pay the amount of property taxes the Kansas Legislature has determined they should pay, and indeed they pay more than residential and agricultural property owners.

Appraisers must follow the law; if they wish to change it, the proper venue is the Kansas Legislature, not their own unilateral efforts, hoping to be upheld by Kansas courts.

If the appraisal methods at issue here are permitted (which include explicit reliance on a subjective judgment about a retailer's success and reputation) the affected taxpayers will actually be double- or even triple-taxed for their business operations in Kansas. Retailers such as Walmart pay sales taxes, incomes taxes on their profits, and property taxes. The way the County's appraisers seek to assess Walmart's property taxes necessarily inflates those taxes based on the sales and income taxes Walmart already is paying. That is multiple taxation, in violation of Kansas law which requires that tax laws be construed in favor of the taxpayer. *See In re Tax Appeal of River Rock Energy Co.*, 313 Kan. 936, 944, 492 P.3d 1157 (2021) (recognizing that statutes imposing tax must be interpreted strictly in favor of the taxpayer).

ARGUMENTS AND AUTHORITIES

This case involves consolidated tax assessment appeals for tax years 2016 and 2017. In those years, the County's appraisers used methodologies that would have doubled – in a single year – the property tax assessments of a targeted segment of retailers in the County by relying on "build-to-suit" lease contracts and so-called subjective assignments of "investment classes" of retailers as a basis for determining the

market value of fee simple property, contrary to a decade of precedent and to accepted practice in the appraisal industry. Indeed, no credible authority in the appraisal industry considers build-to-suit leases representative of market value absent significant adjustments and much deeper evaluation.

After a lengthy evidentiary proceeding in which both sides presented their experts and evidence as well as legal arguments, the Board of Tax Appeals ("BOTA") rejected the County appraisers' methodologies, both under Kansas law and on the evidence and experts presented. The Kansas Court of Appeals majority affirmed, carefully applying well-settled Kansas cases and statutory law and noting that property for taxation purposes is to be valued in fee simple and at market value. While leases may be relevant to determining market value, consistent with a long line of Kansas cases, the majority held that build-to-suit leases are well-established construction-financing mechanisms and not market-based rental leases, so considering them requires additional analysis, which the appraisers failed to do. One judge dissented, arguing in direct conflict with the plain language of K.S.A. 74-2433(g) that the result was wrong because the County would lose potential tax revenue and might have to impose higher taxes on other commercial taxpayers, even though it is not apparent under what authority the County could do so.

I. The County Appraisers' Proposed Method of Valuation Would Violate the Uniformity Clause of the Kansas Constitution, the Equal Protection Clause of the U.S. Constitution, Kansas Statutes, and Longstanding Kansas Case Law.

The County appraisers' methodologies applying a "value-in-use approach," which considers build-to-suit leases as evidence of fair market value, would alter decades of law in Kansas, without any corresponding change in law by the Kansas Legislature. Further,

it would introduce disparate treatment and variability into assessments by incorporating subjective factors such as occupancy, reputation, income, and business success (or lack thereof) of the present occupant of a premises, resulting in properties with the same fee simple value being assessed very differently. Such a methodology necessarily would result in violations of the Uniformity and Equal Protection Clauses of the Kansas and U.S. Constitutions, as well as Kansas statutory requirements.

A. The Kansas and U.S. Constitutions Require Uniform and Equal Taxation.

The Kansas Constitution directs the Legislature to establish a "uniform and equal basis of valuation and rate of taxation of all property subject to taxation." Kan. Const. Art. 11, § 1. Further, various subclasses of property must be "assessed uniformly." *Id.* This Court has explained, "Uniformity in taxing implies equality in the burden of taxation, and this equality cannot exist without uniformity in the basis of assessment as well as in the rate of taxation. The duty to assess at full value is not supreme but yields to the duty to avoid discrimination." *Addington v. Bd. of County Commr's*, 191 Kan. 528, 531-32, 382 P.2d 315 (1963) (citations omitted).

This Court has repeatedly recognized that "[t]he right to equal treatment in matters of taxation" is also a "federally protected right under the equal protection clause of the Fourteenth Amendment to the United States Constitution." *Northern Nat. Gas Co. v. Williams*, 208 Kan. 407, 412 Syl. ¶3, 493 P.2d 568 (1972). The United States Supreme Court has squarely held that the Equal Protection Clause of the Fourteenth Amendment protects "the individual from state action which selects him out for discriminatory

treatment by subjecting him to taxes not imposed on others of the same class." *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345-346 (1989) (citation omitted).

"[A] valuation contrary to the principles of the Constitution is an illegal or void valuation." *Bd. of Johnson County Comm'rs v. Greenhaw*, 241 Kan. 119, 121, 734 P.2d 1125 (1987). This constitutionally mandated requirement of uniform and equal taxation "does not permit a systematic, arbitrary or intentional valuation of the property of one or a few taxpayers at a substantially higher valuation than that placed on other property within the same taxing district." *Addington*, 191 Kan. at 528, Syl. ¶4. Thus, valuing a commercial property in Kansas on a discriminatory basis—for example the name of the retailer on the door or the type of lease in the file—will contravene the uniform and equal taxation requirements of both the Kansas and U.S. Constitutions.

B. Uniform and Equal Taxation Requires Valuation of Only the Fee Simple Interest.

To fulfill the constitutional mandate that it establish "a uniform and equal basis of valuation and rate of taxation of all property subject to taxation," *see* Kan. Const. Art. 11, § 1, the Kansas Legislature requires that all real property must be "appraised uniformly and equally as to class" and "appraised at its fair market value" as of January 1 of each year. *See* K.S.A. 79-1439(a). The Legislature's objective is "to reach the actual fair market value in the market place as opposed to a fictional, unrealistic, or arbitrary determination." *State ex rel. Stephan v. Martin*, 230 Kan. 747, 755, 641 P.2d 1011 (1982). "Fair market value" is defined objectively: it is "the amount in terms of money

that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market." K.S.A. 79-503a.

In determining fair market value, Kansas law is clear—only the fee simple interest is to be appraised. *Prieb*, 47 Kan. App. 2d at 130 ("it is clear that the legislative intent underlying the statutory scheme of ad valorem taxation in our State has always been to appraise the property as if in fee simple"); *see also In re Equalization Appeal of Kansas Star Casino, L.L.C.*, 52 Kan. App. 2d 50, 51, Syl. ¶7, 362 P.3d 1109 (2015) ("Kansas law requires the fee simple interest in a property be valued for the purpose of ad valorem taxation.") (citing *Prieb*, 47 Kan. App. 2d at 132). The value of real estate for tax purposes does not include intangible contract rights. *Compare* K.S.A. 79-501 (directing the appraisal of real property "at its fair market value in money, the value thereof to be determined by the appraiser from actual view and inspection of the property") *with* K.S.A 79-5a04 (providing for the valuation of "public utility property, both real and personal, tangible and intangible, of every public utility").

The fee simple interest is "equivalent to ownership of the complete bundle of property rights that can be privately owned." *Prieb*, 47 Kan. App. 2d at 122, Syl. ¶5. This interest is "absolute ownership unencumbered by another interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat." *Prieb*, 47 Kan. App. 2d at 122, Syl. ¶5. Absolute ownership permits an owner to sell, lease, occupy, mortgage, gift, or do nothing with the property. *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 565, 186 P.3d 183 (2008).

Under Kansas law, the fair market value of real estate for tax purposes must be based upon the utility and desirability of the property to the market as a whole, not the good fortune or business acumen of the current owner or tenant. *See In re Equalization Appeal of ARC Sweet Life Rosehill, L.L.C.*, 2016 WL 3856666, at *15 (Kan. App. 2016) (holding that an expert had appropriately valued the property at issue "by excluding the intangible value of the ongoing senior housing business being operated," as the "ultimate object of this exercise was to determine the true value of the real estate upon which to levy taxes and not to levy taxes based on the value of the business located on the real estate").

This objective standard for valuation of property—fair market value of a fee simple interest—ensures that Kansas' taxes are ultimately applied on a uniform and equal basis. Valuing property based on the reputation or creditworthiness of the owner or tenant would lead to the non-uniform result that identical real estate will be valued differently based solely on who occupies it, a clear violation of the Kansas Constitution.

C. The Kansas Court of Appeals has Consistently Applied the Correct Principles of Law, Affirming that Properties Must be Assessed Based Solely on the Fee Simple Interest.

The Kansas Court of Appeals has consistently recognized the need for valuation based on fair market value of a fee simple interest, most prominently in *Prieb* and in many cases since then. Indeed, numerous panels of the Court of Appeals have followed and applied *Prieb* in thoughtful and careful decisions, including a judge who now sits on this Court. *See e.g., In re Matter of Protest of Arciterra BP Olathe KS, L.L.C.*, No. 121,438, 2021 WL 1228104 (Kan. App. 2021) (Per curiam) (Gardner, Schroeder,

Walker); *In re Equalization of Walgreen Co.*, No. 119,684, 2021 WL 4929099 (Kan. App. 2021) (Bruns, Gardner, Cline); *In re Equalization of CVS Pharmacy, L.L.C.*, No. 119,683, 2021 WL 4929096 (Kan. App. 2021) (Bruns, Gardner, Cline); *In re Equalization of Kansas Star Casinos L.L.C.*, No. 119,438, 2022 WL 2296977 (Kan. App. 2020) (Bruns, Malone and Gardner), *rev. denied* (Sept. 29, 2020); *Matter of Kansas Star Casino, L.L.C.*, No. 121,469, 2021 WL 2021829 (Kan. App. 2021) (Powell, Green and Hill), *rev. denied* (Sept. 27, 2021); *In re Krueger*, No. 114,003, 2016 WL 2942414 (Kan. App. 2016) (Per curiam) (Powell, Arnold-Burger, Burgess); *In re Camp Timberlake LLC*, No. 111,273, 2015 WL 249846 (Kan. App. 2015) (Powell, Leben, Hebert); *In re Mumbo Jumbo L.L.C.*, No. 110,793, 2014 WL 4435905 (Kan. App. 2014) (Per curiam) (Arnold-Burger, Standridge, Schroeder).

Earlier this year, in *In re Equalization of Kansas Star Casino, L.L.C.*, No. 122,201, 2022 WL 262407, at *1 (Kan. App. 2022), the Court of Appeals considered "the most recent in a continuous succession of property tax disputes." The Court yet again reiterated that "the fair market value statute values property rights, not contract rights." *In re Equalization of Kansas Star Casino, L.L.C.*, 2022 WL 262407, at *6. Valuing property in fee simple guarantees equal and uniform treatment. It ensures that all real estate will be appraised based solely upon its class and characteristics, without regard for the individual owner's or current tenant's reputation, creditworthiness, or retail success. The "ultimate object of this exercise [is] to determine the true value of the real estate upon which to levy taxes and not to levy taxes based on the value of the business located on the real

estate." *In re Equalization Appeal of ARC Sweet Life Rosehill*, 2016 WL 3856666, at *15.

D. Fee-Simple Value Does Not Include Contract Rights.

Courts in other states have likewise concluded that the fair market value of real estate for tax assessment purposes should be determined based on the fee simple interest and not leases or contractual arrangements that do not reflect fair market value. This includes both build-to-suit leases that are likely to represent much higher value than market rent, and leases that may reflect below-market rent due to various economic conditions. *See Menard, Inc. v. County of Clay*, 2016 Minn. Tax. LEXIS 5, at * 14 (Jan. 29, 2016) ("[F]ocusing on a property's value exclusively to its current owner can improperly yield value-in-use, rather than market value. Courts thus recognize that it is improper to value a big box store solely for use by its current owner-occupant.") (citations omitted); *Wynwood Apartments, Inc. v. Bd. of Revision of Cuyahoga County,* 59 Ohio St. 2d 34, 35, 391 N.E.2d 346 (Ohio 1979) (holding that Board of Tax Appeals may consider "economic rent", *i.e.*, market rates, rather than "real" or "contract" rent in determining fair market value of property when the former is higher, collecting cases).

The point is that the intangibles—the leases, expected revenue stream, quality of the tenant, and so forth—standing alone are not inherently reliable indicators of fair market value. *Shelby Cty. Assessor v. CVS Pharmacy, Inc. #6637-02*, 994 N.E.2d 350, 354 (Ind. Tax Ct. 2013) (finding that contract rent based on a sale-leaseback transaction valued more than the real property where the lease was used to generate business capital from investors); *Walgreen Co. v. City of Madison*, 2008 WI 80, 311 Wis. 2d 158, 186,

191–92, 752 N.W.2d 687, 703 (holding that "a lessor may be more than fully compensated for an encumbrance through above market rent in cases such as the present one, but that does not transform the lease from an encumbrance to part of the 'bundle of rights' appertaining to a property, nor does it transform the rent payments into anything more than compensation for an encumbrance."). But if a taxing authority can demonstrate that data upon which it relies is a reliable indicator of fair market value, then such data can be used to value the fee simple interest. *J.E. Robert Co. v. Signature Properties, LLC*, 320 Conn. 91, 100, 128 A.3d 471 (2016) ("Implicit in our statement is the understanding that, when contract rents are at market rates, they do not impact the fair market value of the property. It follows, then, that, because a leased fee interest is valued using contract rents for leased space and market rents for vacant space, and a fee simple interest is valued using market rents for all rental space, when contract rents are at market rates, the leased fee and fee simple value will be equal.").

Build-to-suit leases, standing alone, do not provide reliable indicia of a property's fee simple value. *See* Stephen W. Grant, *Who's Afraid of the Dark?: Shedding Light on the Practicality and Future of the Dark Store Theory in Big-Box Property Taxation*, 38 Va. Tax. Rev. 445 (Spring 2019). Grant explains that build-to-suit leases generally are financing arrangements that do not "represent the fee simple market value":

> Plainly, **the actual sales and rents** of occupied big-box properties on the net lease market **overstate their true property value** by factoring the supplementary value of nontaxable assets, such as long-term leases with AAA-retailers like Lowe's, Walmart, or Costco. These valuable leaseholds have a positive effect on the property, often increasing the purchase price due to the above-market value of the lease itself. **Adding the value of these intangible leases into property valuations overlooks long-standing**

> **generally accepted appraisal practices and ultimately leads to non-uniform taxation**, oftentimes in violation of state constitutions. Real estate appraisers should not confuse the artificially stimulated prices seen in the net lease market with what the fee simple market has determined the market sales and rents of big-box properties to be.

Grant, 38 Va. Tax. Rev. 445, at 477 (citations omitted and emphasis added).

Considering the value as-vacant of commercial property is effective at "separat[ing]" the "value of the property itself from the value of the business being conducted on it." *Matter of Target Corp.*, 55 Kan. App. 2d 234, Syl. ¶7, 241, 410 P.3d 939 (Kan. App. 2017). Critics of excluding the value of the business being conducted on the property—such as the County's appraisers—have tried to engender support for alternative, unsupported theories by giving the predominant approach a menacing name: the "dark store theory." These critics hyperbolize that valuing a property without considering the value of its tenant requires an assessor to pretend the tenant's business has failed. Not so. What the dominant (and Kansas) approach does is require the assessment of the market value of the fee simple interest of the property, plain and simple. *E.g.*, *In re Matter of Protest of Arciterra*, 2021 WL 1228104, at *12 (noting the difference between Kansas law and the so-called dark theory).

II. The County Appraisers' Methodology Results in Improper Multiple Taxation for Certain Retailers, Creating an Uneven Playing Field for Business Enterprises and Penalizing Market Creativity.

Fundamentally, the County's appraisers disagree with all of this—with the requirements enacted by the Legislature, with the decisions of the Court of Appeals explicating those requirements, and with the many other states that have adopted a similar approach. They argue that *Prieb* was wrong in 2012, and implicitly argue that every

decision relying on *Prieb* was likewise wrong, despite the Legislature's decision in 2016 to amend the law to make explicit that assessments are to be based on "the fair market value of the fee simple of the property," consistent with *Prieb* itself. K.S.A. 79-2433(g). And they seek to transform Kansas law, first through alternative appraisal methods and now through litigation. But that effort must fail.

Even a brief summary of the County's approach reveals the problem. Their methodology includes at least two aspects that dramatically depart from focusing solely on the fee simple interest. First, they rely explicitly and heavily on build-to-suit lease data when such information is present. As discussed previously, these agreements are not true "leases" but long-term construction financing arrangements. When taken at face value as the County's appraisers seek to do, such "rents" over value actual market rent and both artificially and erroneously inflate the assessed fee simple value of the property.

Second, the County's appraisers assign each property to an "investment class," a subjective determination separate and apart from utilizing build-to-suit leases to determine fee simple value. (R. VI, 82-83.) The purported justification is that "stratifying properties into investment classes creates a logical hierarchy that reflects potential market participants' actions," and there are four recognized classes, A through D, with class A the highest class. (R. VI, 50-51.) Thus, "investment class A big-box retail properties *sell at the highest prices*" and "generate high retail sales per square foot, usually above the chain's national average." (R. VI, 50-51.) According to the County Appraiser's Office Commercial Real Estate Department 2016 Retail Buildings and Related Structure Mass Appraisal Summary Report – Income Approach, "[t]he investment class is a reflection

of" a property's "quality of tenants and rent levels." (R. VI, 82.) The problem with this approach is that a retailer like Walmart is already taxed in Kansas on (1) its sales (state and local sales taxes) and (2) its profits (state income taxes). But under the County appraisers' approach, Walmart gets a double whammy on its property tax assessment (and thus its property tax bill) because (1) it may have a build-to-suit lease on the property with an artificially high "rent" and (2) it is Investment Class A (based on its reputation, success, nature—not the fee simple value of its property). (R. VI, 82.)

The County appraisers' methodology thus subjects many retailers—especially those with build-to-suit leases and those the appraisers subjectively view as higher class operations—to multiple taxation for essentially the same activities, which contravenes the uniformity requirement and is contrary to a Court's duty to construe tax statutes in favor of the taxpayer. *See Greenhaw*, 241 Kan. at 127 ("Uniformity in taxation does not permit a systematic, arbitrary, or intentional higher valuation than that placed on other similar property within the same taxing district."). An appraisal methodology that results in double or multiple taxation for the same activity is obviously against a taxpayer's interest. *See Von Ruden v. Miller*, 231 Kan. 1, 14, 642 P.2d 91, 101 (1982) ("An exemption which is designed to prevent double taxation satisfies equal protection."); *Quivira Falls Cmty. Ass'n v. Johnson Cty.*, 230 Kan. 350, 354, 634 P.2d 1115 (1981) (considering whether assessment constituted improper double taxation).

Thus, "Class A" stores like Walmart are effectively paying a "premium" property tax in the County under the County appraisers' methodology based in significant part on other taxes they already are paying in Kansas, because they are successful, have a strong

reputation (a subjective measure), and may utilize sometimes creative market financing arrangements such as build-to-suit leases. This is double (or triple) taxation in violation of Kansas law which also as a policy manner penalizes legitimate success and creativity in the market and creates an uneven playing field for businesses. If any number of other retailers occupied the property, the assessment would be drastically different, even though the fee simple interest would be the same.

These unlawful outcomes are a result of the County's appraisers seeking to take into account subjective and improper factors that Kansas law does not permit to be part of the assessment. There is a simple solution: follow longstanding and clear Kansas law. Straying from the Kansas statutory requirements and the logic of *Prieb* necessarily opens a Pandora's box of complications and inequities.

CONCLUSION

The County appraisers' misguided assessment methodology improperly relies upon subjective variables and intangible contract rights that do not reflect market value or fee simple interests, all in contravention of Kansas statutes and longstanding Kansas case law. Such a methodology necessarily would inject unreliability and highly subjective determinations into property tax assessments, as well as result in multiple taxation of many retail property owners, especially the most successful, creative, and entrepreneurial. The end result would be a non-uniform system of taxation, a system that in the long run might disincentivize some business enterprises from operating in Kansas and in any event would violate the Kansas Constitution, Kansas statutes, and the U.S. Constitution.

Dated: April 8, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed electronically on this 8th day of April, 2022, which sent notification to all counsel of record. Additionally, a courtesy copy by personal service was sent via email to the following counsel of record:

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