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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| BLACKROCK CREDIT ALLOCATION INCOME TRUST, BLACKROCK NEW YORK MUNICIPAL BOND TRUST, BLACKROCK ADVISORS, LLC, RICHARD E. CAVANAGH, KAREN P. ROBARDS, MICHAEL J. CASTELLANO, CYNTHIA L. EGAN, FRANK J. FABOZZI, HENRY GABBAY, R. GLENN HUBBARD, W. CARL KESTER, CATHERINE A. LYNCH, ROBERT FAIRBAIRN, and JOHN M. PERLOWSKI,<br><br>Defendants Below,<br>Appellants<br><br>v.<br><br>SABA CAPITAL MASTER FUND, LTD.,<br><br>Plaintiff Below,<br>Appellee | No. 297, 2019<br><br>Court Below:<br><br>Court of Chancery of the State of Delaware<br>C.A. No. 2019-0416-MTZ |

**REPLY BRIEF OF APPELLANTS BLACKROCK CREDIT ALLOCATION INCOME TRUST AND BLACKROCK NEW YORK MUNICIPAL BOND TRUST**

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## INTRODUCTION

As demonstrated in the Funds' Opening Brief, the only condition for the five business day deadline in Section 7(e)(ii) of the Bylaws to apply was that the Boards reasonably request information to determine whether the Saba Nominees satisfied the qualification requirements in the Bylaws. That condition was satisfied when the Boards made the April 22 Request and delivered the Questionnaire to Saba. Even though there is no dispute that Saba simply blew that deadline, the Court of Chancery committed error by concluding that Saba's nominees were nevertheless eligible for election to the Boards.

In its Opposition to the Funds' Opening Brief, Saba fails to explain how the Opinion comports with the plain and unambiguous language of the Bylaws and principles of Delaware law. Instead, Saba ignores its own obligations to comply with contractual and legal requirements and attempts to shift blame for its failings to Defendants. Saba's strategy here is emblematic of the disregard Saba has shown for its legal obligations throughout the Funds' elections and this case.

Indeed, after receiving the April 22 Request from the Boards, which was made expressly pursuant to Section 7 of the Bylaws, Saba ignored the five business day deadline in Section 7 for providing the requested information. After learning that, under the terms of the Bylaws, its nominees were therefore ineligible for election to

the Boards, Saba manufactured a host of excuses for why it should be exempt from the Bylaws' requirements—including that the Boards' information request was too broad—none of which are valid.

Having just failed to comply with its obligations under the Bylaws to timely provide information, resulting in the disqualification of its nominees, Saba apparently did not learn its lesson. Instead of moving with alacrity to seek judicial intervention, as Delaware law requires, it waited more than a month to commence this case. Again, Saba offers up another excuse illustrating its lack of diligence—it claims to have believed that it had plenty of time to commence litigation because it assumed the Funds' annual meetings would be held in late July 2019. Even if Saba held such a belief (there is no evidence it did, and any such belief would have been unreasonable), that would not excuse Saba's 35-day delay in seeking a mandatory injunction to substantially alter elections in which shareholders were already casting votes. Saba's failure to commence this action promptly in disregard of its legal obligations prejudiced Defendants and serves as an independent basis to overturn the Opinion of the Court below.

Accordingly, the Funds respectfully request that the Court reverse the Court of Chancery's Opinion, order that Saba's Motion for Preliminary Injunction be denied, and dissolve the mandatory injunction.

## ARGUMENT

### I. THE COURT OF CHANCERY ERRED BY ISSUING A MANDATORY INJUNCTION REQUIRING THE BOARDS TO COUNT VOTES FOR THE SABA NOMINEES, CONTRARY TO THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE BYLAWS.

Under the Bylaws, if a shareholder nominates trustees to the Boards, then: (i) the Boards may request information from the shareholder "to determine that [its nominees] ha[ve] met the director qualifications" in the Bylaws (A408 (BQH) & A434 (BTZ) Art. I § 7(e)(ii)); (ii) the shareholder must provide the requested information "not later than five (5) business days" after receiving the Boards' information request (*id*.); and (iii) if the shareholder misses that five business day deadline, its nominees "shall" not be eligible for election (A406, A409 (BQH) & A432, A434 (BTZ) §§ 7(a), 7(f)).

In its Opposition, Saba does not dispute that on April 22, 2019, the Board requested information to determine whether the Saba Nominees satisfied the qualifications in the Bylaws, or that Saba failed to provide the requested information within five business days. (Opening Br. at 11, 14.) Nor does Saba provide any explanation for why it failed to meet the five business day deadline in Section 7(e)(ii), leaving Defendants and the Court with little choice but to assume it was due to Saba's negligence. (*Id*. at 25.) Under the plain and unambiguous language of the Bylaws, the Saba Nominees were not eligible for election, and the Boards were not required to count votes for the Saba Nominees at the Annual Meeting. (*Id*. at 23.)

The Court of Chancery's determination that, nonetheless, the deadline in Section 7(e)(ii) did not apply at all to the Boards' April 22 Request simply because the Questionnaire also included other questions not directly tied to director qualifications is contrary to the Bylaws (*id*.), the purpose that these types of bylaws serve (*id*. at 26), and Delaware law that bylaws will be enforced under circumstances like these (*id*. at 27-29).

Saba principally contends that Defendants' interpretation of the Bylaws should be rejected and this appeal should be denied because: (i) Defendants "omit" the words "reasonably requested" and "necessary" in their interpretation of the Bylaws (Opposition Br. at 23-24); (ii) the reason for Saba's failure to meet the deadline is "irrelevant" (*id*. at 25-26); (iii) the cases cited by the Funds concern advance notice bylaws and therefore are inapplicable here, and Defendants ignore "controlling precedent" that supports the Court of Chancery's Opinion (*id*. at 27-28); and (iv) the Boards are not empowered to ask for any information beyond that which is necessary to determine whether the Saba Nominees meet the qualifications in Article II, Section 1 of the Bylaws (*id*. at 28).

None of Saba's arguments withstand scrutiny, nor do they explain how the Court of Chancery's decision to invalidate the five business day deadline based only on the scope of the Questionnaire comports with the plain and unambiguous language in the Bylaws and Delaware law.

Saba misconstrues the Funds' arguments when it claims that the Funds read the words "reasonably requested" out of the Bylaws. (*Id*. at 23-24.) The April 22 Request and Questionnaire were entirely reasonable, and the fact that the Boards also asked for information not directly tied to a director qualification in the Bylaws does not render the Questionnaire unreasonable or otherwise ineffective in triggering the five business day deadline in Section 7(e)(ii). (A234; Opening Br. at 24.) Indeed, those additional questions are straightforward and not burdensome, and they pertain to issues critical to the Funds, including whether the Saba Nominees satisfy the legal requirements for serving as a trustee on the Boards. (Opening Br. at 4, 16.) Nothing in the Bylaws gives a shareholder the option of ignoring an information request made expressly pursuant to Section 7 simply because the Board also requested other information not tied to a qualification in a Bylaw.

Saba also is incorrect that the Funds ignore the word "necessary" in Section 7(e)(ii). (Opposition Br. at 23-24.) As the Funds argued before the Court of Chancery, the term "necessary" in the introductory language of Section 7(e) means that ***a shareholder*** must update and supplement their Nomination Notice if doing so is "necessary" to satisfy ***the shareholder's obligations*** under either or both of the two separate subparts of Section 7(e)—that is, if the information becomes stale as of the record date ***or*** if the Board asks for information. (A237-38.) The word "necessary" does not place any requirement or restriction on the Boards. The only

condition for the five business day deadline in Section 7(e)(ii) to apply is that the Boards "reasonably request[]" information from a shareholder "'to determine that [the shareholder's nominees] ha[ve] met the director qualifications' in the Bylaws." (Opening Br. at 23.) That condition was satisfied here. In any event, the only reason the Court of Chancery found that the April 22 Request was not necessary "as a whole" was that the Questionnaire also included questions that were not directly tied to a director qualification in the Bylaws. (Op. at 16-17.) That finding is insufficient to invalidate the five business day deadline. (Opening Br. at 24-25.)

Saba's concession that the scope of the Questionnaire did not cause it to miss the deadline is also highly relevant, contrary to Saba's assertions. (*See* Opposition Br. at 10, 25-26.) As the Court of Chancery explained in *Bay Capital Finance, LLC v. Barnes and Noble Education, Inc.*, Delaware law does not support giving shareholders a free pass for carelessly missing deadlines in bylaws. C.A. No. 2019-0539-KSJM (Del. Ch. Aug. 14, 2019) (Transcript) (Ex. 1). In the *Bay Capital* case, the Court of Chancery found that "Bay Capital blew the deadline" in a bylaw and "then made up excuses for doing so," and that "[n]o record evidence suggests that the company is in any way at fault for that mistake." *Id*. at 23-24. That is precisely what occurred here. Saba's complaints about the scope of the Questionnaire are nothing more than after-the-fact excuses that have nothing to do with why Saba missed the deadline. In the words of the *Bay Capital* Court, if the Funds were

required "to accept [Saba's] nomination in these circumstances, advance notice requirements would have little meaning under Delaware law." *Id*. at 24.

Saba does not and cannot explain how the Opinion of the Court below comports with the holding in *Bay Capital*. Saba suggests that *Bay Capital*'s holding is limited to whether a shareholder is a record holder (Opposition Br. at 32), but nothing in the *Bay Capital* decision supports that reading. Instead, the decision confirms that if a shareholder misses a deadline in a bylaw, as Saba has done here, Delaware courts should not waive the deadline based on lawyer-crafted excuses that have nothing to do with why the shareholder missed the deadline in the first place.[1]

Saba also fails to distinguish other cases cited in the Funds' Opening Brief that similarly make clear that deadlines in bylaws are strictly enforced under Delaware law.[2] Saba claims that those cases all concern advance notice bylaws

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[1] *See Openwave Sys., Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007) (holding that plaintiff's claimed confusion about the bylaws did not excuse its noncompliance, where the plaintiff failed to offer any evidence that its "failure to comply was caused in any way by such confusion").

[2] *See Accipiter Life Sciences Fund, L.P. v. Helfer*, 905 A.2d 115 (Del. Ch. 2006); *AB Value Partners, L.P. v. Kreisler Mfg. Corp.*, 2014 WL 7150465 (Del. Ch. Dec. 16, 2014); *Goggin v. Vermillion, Inc.*, 2011 WL 2347704 (Del. Ch. June 3, 2011); *Openwave*, 924 A.2d at 228. Saba also does not address at all *PR Acquisitions, LLC v. Midland Funding LLC*, 2018 WL 2041521 (Del. Ch. Apr. 30, 2018), and *Heartland Delaware Inc. v. Rehoboth Mall Ltd. P'ship*, 57 A.3d 917, 925 (Del. Ch. 2012), both of which are cited in the Opening Brief for the proposition that negligence does not excuse a failure to comply with contracts like bylaws. (Opening Br. at 25-26.)

(Opposition Br. at 31 n.15), but Saba fails to explain why Section 7(e)(ii) should be treated differently than the advance notice bylaws in those cases. It should not be. Section 7(e)(ii) and its five business day deadline serve the same purpose as other advance notice bylaws: "to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations." (Opening Br. at 26 (quoting *Openwave*, 924 A.2d at 238-39).) Saba does not dispute this.

*Hill International, Inc. v. Opportunity Partners, L.P.*, is not controlling precedent, as Saba claims, nor does it support the Court of Chancery's Opinion. 119 A.3d 30 (Del. 2015). To be sure, the Court of Chancery did not even rely on *Hill* in finding that Defendants breached the Bylaws. The *Hill* case concerned whether a "prior public disclosure of the date" of a 2015 annual meeting was either: (i) an April 30, 2014 disclosure that the meeting would be held "on or about June 10, 2015;" or (ii) the disclosure one year later, on April 30, 2015, that the meeting would actually be held on June 9, 2015. *Id*. at 35. The Delaware Supreme Court rightly held that the phrase "the date" means a "specific day," and therefore only the 2015 disclosure constituted a "prior public disclosure of the date" of the annual meeting. *Id*. at 39. *Hill*, therefore, stands for the proposition that a Delaware court should interpret and enforce bylaws as they are written. It does not suggest that Delaware

courts may waive a deadline in a bylaw to give a careless shareholder a second chance.

Saba's claim that Defendants would have Saba return "incomplete responses to the Questionnaires" and provide answers only to "the questions that related to Article I, Section 1" (Opposition Br. at 29-30) is inaccurate. It also is not what this case is about. The issue before the Court of Chancery was not whether Saba correctly identified and timely answered only those questions that were subject to the five business day deadline. It was undisputed in the Court below that Saba did not respond at all to the April 22 Request within five business days, and therefore all the Court of Chancery had to resolve was whether, under the terms of the Bylaws, the Board made a request to Saba for information to determine whether the Saba Nominees complied with the director qualifications in the Bylaws. (Op. at 16-17.) It found that the Board did make such a request (*id*. at 1, 12), which this Court can confirm by reference to the demonstrative the Funds submitted to the Court of Chancery showing that more than two thirds of the questions in the Questionnaire sought information directly tied to one or more director qualifications in the Bylaws. (A1088-1105.) Saba's supposed concerns about having to determine which questions are subject to the deadline is the type of after-the-fact, lawyer-created excuse that does not absolve a shareholder of failing to comply with bylaws. *See*

*Bay Capital*, C.A. No. 2019-0539-KSJM, Tr. at 24 (Del. Ch. Aug. 14, 2019); *Openwave*, 924 A.2d at 238-39.

In addition, Saba is wrong that the Boards are somehow restricted from asking shareholders for any information other than what is necessary to determine whether a nominee satisfies an express qualification in the Bylaws. (Opposition Br. at 28.) The trustees are empowered to ask for any information that they, in the exercise of their business judgment, deem appropriate in order to fulfill their fiduciary obligations. (Opening Br. at 12, 24.) And Saba has not identified any authority that supports rendering deadlines in valid bylaws ineffective simply because a board asked for information that it is fully empowered to request.[3]

Contrary to Saba's assertions, Defendants did not argue in the case below that Section 7(e)(ii) is the only source of the Boards' power to ask for information from a shareholder. (Opposition Br. at 29.) Rather, in the portion of the record to which Saba cites, the Funds were responding to Saba's argument that the Boards could not ask for information pursuant to Section 7(e)(ii) unless and until a shareholder updated or supplemented their Nomination Notice after the record date pursuant to Section 7(e)(i). The Funds correctly pointed out that this tortured interpretation

[3] Nor does Saba address the cases the Funds cited establishing that the Court of Chancery cannot write into the Bylaws new provisions that do not exist in order to circumscribe the powers of the Boards. (Opening Br. at 24-25 (citing *Gentile v. SinglePoint Fin., Inc.*, 788 A.2d 111 (Del. 2001) and *Judah v. Shanghai Power Co.*, 546 A.2d 981 (Del. 1988).)

would lead to the absurd result that, if a shareholder never updated or supplemented its Nomination Notice, the Boards could never seek additional information ***pursuant to Section 7(e)(ii) on a five business day deadline***. (A236-37.) Similarly, the portion of the Court of Chancery's Opinion to which Saba cites refers to the Funds' argument about Section 7(e)(ii) in the context of Saba's arguments about Section 7(e)(i). (Op. at 11.) Moreover, the Funds plainly argued in the Court below that the Boards were empowered to seek information concerning the Saba Nominees beyond the constraints of Section 7(e)(ii). (A218, A233-34.)

In addition, the Court should not simply ignore the statements of the Circuit Court for Baltimore City, as Saba contends. (Opposition Br. at 26-27.) Under nearly identical facts, the Maryland court declined to follow the Court of Chancery's determination that the Questionnaire as a whole was not "reasonably requested" and therefore a breach of the Bylaws. (Opening Br. at 24 n.7.) Instead, the Maryland court stated: "I cannot find anything unreasonable in the directors looking for more information." (A1327:13-14.) In other words, the additional questions in the Questionnaire did not make the April 22 Request unreasonable or the five business day deadline inoperative. Saba also contends that the Maryland court's reasoning was based on some unique feature of Maryland's statutory business judgment rule. (Opposition Br. at 26-27). That is not accurate. The Maryland court's reasoning simply acknowledges that, in determining whether the April 22 Request was

reasonable under the Bylaws, the court should not ignore that the decision to make the request is a business judgment entitled to deference absent bad faith. It explained:

> I understand from the Delaware decision that the findings were that the bylaws were breached, that the defendant's questionnaire was held to exceed permissible inquiry, and that the shareholder nominations were not invalidated as to those funds.
>
> I am confused, at least concerned, as to how and why sitting here in the Circuit Court for Baltimore City, focusing on the application of the Maryland statutory law and instructions. Including statutory instructions about advanced notice, including the statutory premise of the business judgment rule.
>
> And looking at the preliminary injunction rule . . . why is it that I should be sitting here today prepared on those limited documents that were incorporated in the complaint without discovery to determine how and why the bylaws were breached, ***skipping past altogether what the statutes and the bylaws otherwise would appear to instruct about the process that directors are expecting to follow***.

(A1227:4-24 (emphasis added); *see also* A1315:22-25 ("Well, back up and tell me why I don't – I'm not permitted to attach a standard of conduct in the bylaws interpretation that talks about a rule of reason?").) Saba fails to adequately explain why Delaware law requires a different conclusion.

Saba also ignores the Funds' argument that the Court of Chancery's decision unreasonably constrains the Boards. (Opening Br. at 29.) The Boards must be permitted to diligence nominees and inform shareholders if the Boards determine, in

the exercise of their business judgment, that electing those nominees would not be in the best interests of the Funds. (*Id*.) The Court of Chancery's Opinion forces the Boards to choose between (i) having an effective deadline and (ii) requesting additional information about a shareholder's nominees. That is unreasonable, and Saba fails to cite any authority to the contrary.

Finally, this Court should reject Saba's arguments that, even if the five business day deadline were triggered (it was), its failure to comply with the deadline should be excused. (*See* Opposition Br. at 32-33.) The Funds already established in the Court below that Saba's arguments about the role of the Chairperson of the annual meeting (A215-16, A242) and the supposed immateriality of Saba's failure to comply with the deadline (A246-48) are without merit. And, as Saba concedes (Opposition Br. at 33), the Court of Chancery rejected Saba's arguments about the interplay of Sections 7(e)(i) and (ii). Saba failed to cross-appeal the Court of Chancery's interpretation of the Bylaws, and therefore it is foreclosed from making that argument here.

## II. THE COURT OF CHANCERY ERRED IN HOLDING THAT SABA'S CLAIMS FOR EQUITABLE RELIEF WERE NOT BARRED BY THE DOCTRINE OF LACHES.

Saba does not dispute that it knew of its claims as of May 1, 2019, when it received the Disqualification Notices from the Funds, or that after receiving the Disqualification Notices, it waited 35 days to commence this case and to seek injunctive relief. (Opening Br. at 31.) Saba also does not dispute that, because of Saba's delay, nearly two months passed during which shareholders cast votes (or did not vote at all) based on several disclosures that the Saba Nominees were ineligible for election, and, once the injunction was issued, there was little time for the Funds to solicit votes. (*Id*. at 32.) Nor does Saba dispute the Court of Chancery's finding that Saba "could have brought its claims weeks before it did" (Op. at 19), or that Saba's assumptions about when the BTZ annual meeting would occur are irrelevant to the laches analysis (Opening Br. at 34-35). Under these circumstances, Plaintiff's claims should never have gotten out of the gate—they should have been barred by the doctrine of laches. *See Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009) (stating that the doctrine of laches bars relief where the plaintiff knew or should have known of its claim and unreasonably delayed in bringing suit, and the delay prejudiced the defendant).

In its Opposition Brief, Saba argues that its delay in commencing this action and the resulting prejudice to Defendants should be excused because they are

somehow Defendants' own fault. Saba's failure to take any responsibility for its own failings and its attempts to pin blame on Defendants should be rejected.

As an initial matter, that Defendants did not oppose Saba's request for expedited proceedings on the preliminary injunction motion is irrelevant to whether Saba is guilty of laches for waiting more than a month to commence this action. In any event, Saba expressly agreed that Defendants did not waive any of their defenses in accepting service of Saba's complaint and entering into an expedited briefing schedule on its motion for a preliminary injunction. (B8.)

In addition, even if Saba's assumptions about the date of the BTZ annual meeting were relevant (they are not (Opening Br. at 34-35)), there is no evidence in the record supporting Saba's claim that it believed BTZ's annual meeting would be held in late July 2019, and that it delayed commencing litigation for that reason. In support of its argument, Saba refers only to: (i) the fact that the 2018 BTZ annual meeting was held on July 30, 2018, (ii) the fact that the BQH annual meeting was scheduled for July 18, 2019, and (iii) a letter Saba's counsel sent to the Court of Chancery requesting a more expedited schedule after learning that the BTZ annual meeting would be held on July 8, 2019. None of this adequately supports the Court of Chancery's findings about what Saba believed or why Saba was not guilty of laches.

First, Saba does not cite to any actual ***evidence*** in the record. All Saba does is make arguments pertaining to ***why*** Saba ***may*** have believed (unreasonably) that the BTZ meeting would occur in late July 2019. But Saba does not, because it cannot, cite to any testimonial or documentary evidence establishing what it actually believed, or that it waited 35 days to seek injunctive relief based on that belief.

Second, Saba does not dispute that under BTZ's Bylaws, its annual meeting could have been held on any date between July 5, 2019 and August 24, 2019, without impacting BTZ's advance notice deadline. (Opening Br. at 34.) Therefore, it was unreasonable for Saba to assume that BTZ would wait until the end of July to hold its annual meeting simply because that was when BTZ held its meeting in 2018.

Third, the timing of BQH's annual meeting has no bearing on BTZ's annual meeting. These are distinct funds with separate annual meetings, and nothing in the bylaws of either Fund indicates that their annual meetings will be scheduled for the same day.

Fourth, the letter from Saba's counsel to the Court of Chancery does not justify Saba's delay either. In that letter, Saba's counsel explained that it believed the BTZ annual meeting would be no earlier than July 18, because "BQH announced its July 18, 2019 annual meeting in its definitive proxy statement." (B3-B7.) Putting aside that this is irrelevant, the BQH definitive proxy statement was filed on ***May 24, 2019—more than three weeks*** after Saba became aware of its claims. (A226.)

Therefore, even if Saba believed that BTZ's annual meeting would be held in late July because of the May 24 BQH definitive proxy, that does not justify Saba sitting on its hands for weeks while voting in the BTZ election proceeded, instead of promptly seeking injunctive relief as Delaware law demands.

In addition, Saba is wrong that the Funds are precluded from arguing that the Court of Chancery's Opinion is not supported by evidence. In briefing before the Court below, Saba never argued that it reasonably believed the BTZ annual meeting would be held in late July 2019, and therefore its delay should be excused. Instead, Saba's counsel made that argument for the first time during oral argument on the preliminary injunction motion, which does not constitute sufficient evidence to support the Court of Chancery's Opinion. (Opening Br. at 33.)

Saba's other attempts to point fingers at Defendants also fail. In the context of a laches analysis, Defendants do not have to explain why BTZ chose July 8, 2019 as the date of its annual meeting, nor is it meaningful that Defendants have not cited cases concerning the amount of time between the commencement of an action and a subsequent shareholder meeting. (Opposition Br. at 38.) That is because, under Delaware law, the laches analysis focuses on the length of time between ***when the plaintiff knew of its claim and when it commenced an action***—not the time between the commencement of the action and some later event or the conduct of the defendants. *See Whittington*, 991 A.2d at 8.

## CONCLUSION

For the foregoing reasons, the Fund Appellants respectfully request that this Court reverse the Court of Chancery, order that Plaintiff-Appellees' Motion for Preliminary Injunction be denied, dissolve the mandatory injunction, and grant such other and further relief to which the Fund Appellants may be entitled.

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Dated: October 11, 2019

## CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, the foregoing was caused to be served upon the following counsel of record via File and Serve*Xpress*:

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