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Case Number 222,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRAD ANDREWS, EUGENIO BALLESTEROS, RICHARD BEDDOW, LOREN BENDER, DANIEL BROWN, NORBERT DEAN, DANIEL DECKER, HOWARD DEMSKY, ROI EWELL, THIRUNELLAI GANESHAN, STEVEN GLASHOWER, DAVID HAMMER, MICHAEL HARTMAN, SCOTT HELMSTEDTER, RONALD LOIDA, DONALD MILLS, TERRY PRATHER, ROY RIEVE, and CHARLES WETESNIK, Appellants Defendants Below, v. SEAWORLD ENTERTAINMENT, INC., Appellee, Plaintiff Above.	C.A. No. 222, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2020-0955-NAC

APPELLEE'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

In its May 19, 2023 letter opinion ("Opinion," cited as "Op."), the trial court correctly interpreted the relevant agreements and correctly granted SeaWorld Entertainment Inc.'s ("SeaWorld") motion to dismiss and motion for judgment on the pleadings. Appellants' reading of the relevant agreements is inconsistent with their plain and unambiguous language and the court below correctly rejected them, as well as Appellants' improper attempts to use alleged extrinsic evidence to establish non-existent ambiguity in the agreements. Appellants' arguments should similarly be rejected on appeal.[1] Thus, for the reasons set for the below, the Court of Chancery's opinion should be affirmed.

[1] The Court of Chancery also granted SeaWorld's dispositive motions with respect to Appellants' claims for conversion and unjust enrichment, but Appellants have not appealed the dismissal of those claims.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly concluded that the operative language in the Equity Agreements and Separation Agreements is clear and unambiguous and that SeaWorld's interpretation of that language is the only reasonable interpretation.[2] Appellants' attempt to establish ambiguity was correctly rejected by the court below.

2. Denied. Whether "all of the actively employed SeaWorld employees had their shares vested at 60%" is irrelevant to the vesting status of the Appellants' shares. As the Court of Chancery correctly held, nothing in the Plan or the Equity Agreements requires that all active employees be treated the same. To the contrary, the Plan expressly states that SeaWorld was not required to treat all employees the same. Had the parties agreed that Appellants would also receive the benefits of any amendments given to other employees in the future, they could easily have drafted language to memorialize that agreement. But no such language appears in the agreements.

3. Denied. There are no unresolved factual issues that bear on the interpretation of the agreements and the Court did not draw any factual inferences in SeaWorld's favor. No factual inferences needed to be drawn – and the Court of

[2] Capitalized terms in this section are defined in the following Statement of Facts section.

Chancery did not draw any – because the clear and unambiguous language of the relevant agreements applied to the undisputed facts supports the conclusion that SeaWorld was entitled to judgment on the pleadings and that Defendants' counterclaims should be dismissed.

4. Denied. The court correctly concluded that no extrinsic evidence was necessary to interpret the relevant contract language because that language is clear and unambiguous on its face.

STATEMENT OF FACTS

Appellants are former executives of SeaWorld Entertainment, Inc. (or, the "Company"). Op. 1. In 2013, the Company adopted an incentive compensation plan (the "Plan") which granted unvested equity awards of restricted stock (the "Unvested Awards") to Appellants and others (together, "Participants"). *Id.* The Unvested Awards are governed by two agreements, a Restricted Stock Grant Agreement and Acknowledgment, and a Restricted Stock Award (the "Equity Agreements"). *Id.* at 1-2. The restricted shares fall into three categories referred to as Tranche 1, Tranche 2, and Tranche 3 shares. Only Tranche 3 shares are at issue in this case.[3]

The Equity Agreements impose two conditions on the vesting of the Tranche 3 Unvested Awards. The Unvested Awards vest if (i) the Company's former controller sells its stock at a price yielding a specified rate of return (the "Performance Condition"); and (ii) the Participant remains employed by the Company at the time of the sale (the "Employment Condition"):

> The Unvested Restricted Shares (the "2.75x Performance Restricted Shares") . . . shall become Vested Shares at such time, prior to a Termination Date, that the Sponsor shall

[3] Tranche 1 shares would vest (and no longer be restricted) based upon the amount of time an employee was employed after SeaWorld's incentive plan was adopted and other factors. Tranche 2 shares would vest if SeaWorld's controlling stockholder was able to sell its shares and achieve a specific internal rate of return and return on invested capital in SeaWorld. The required return on the controlling stockholder's invested capital to vest Tranche 2 was 2.25x. *See, e.g.,* A-0354.

> have received, in respect of any Class A Units held from time to time by the Sponsor, cash resulting in both (x) a 15% annual Rate of Return and (y) a 2.75x Multiple on Invested Capital.[4]

The Plan confers sole and complete discretion upon the Company to "amend any terms of" the Equity Agreements.[5] This discretion may be exercised discriminately, and Participants do not have to be treated uniformly:

> There is no obligation for uniformity of treatment of Participants . . . . The terms and conditions of [Unvested] Awards and the [Company's] determinations . . . with respect thereto need not be the same with respect to each Participant and may be made selectively among Participants, whether or not such Participants are similarly situated.[6]

Between 2015 and 2017, the Company terminated the Appellants' employment. The parties entered into separation agreements (the "Separation Agreements") that were substantially similar. Appellants state in their Corrected Opening Brief of Appellants ("Opening Brief" cited as "OB") that the Appellants' Separation Agreements "vary in form," (OB 9) but the language that is the focus of this appeal is the same.[7] As the Court of Chancery noted, the parties agree that for purposes of the legal analysis at issue, the Separation Agreements can be treated as one. Op. 2, n. 7; *see also* OB 10.

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4 Equity Agreements, Schedule A, pg. 2., (A-0073).
5 Plan §§ 4(d), 13(b) (A-0040, A-0055).
6 *Id.* § 14(e) (A-0057).
7 *See, e.g.*, "Separation Agreements" (A-0095-0096).

The Separation Agreements "amended" Appellants' Equity Agreements to remove the Employment Condition. Appellants state in their Specifically, the Separation Agreements provided that the Appellants' Unvested Awards:

> shall not be forfeited on the Termination Date and shall continue to be eligible to vest (as if the Participant had remained continuously employed with the Company) in accordance with the provisions of [the Equity Agreements.][8]

It is undisputed that the Amendments related solely to the Employment Condition and that the Performance Condition remained unaltered and in effect. In that regard, the Separation Agreements specifically stated that "all provisions of the Equity Agreements shall remain in full force and effect."[9] The Separation Agreements also state that the removal of the Employment Condition did not "expressly or impliedly waive, amend or supplement any [other] provision of the Equity Agreements."[10]

On March 24, 2017 (after Appellants ceased to be employed by the Company), the Company announced that its former controlling stockholder had agreed to sell its 21% interest in the Company to a third party pursuant to a stock

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8 *Id.* §§ 1–2. ("Amendment to the [Equity Agreements]") (A-0095-0096).

9 Separation Agreements § 3 (A-0096).

10 *Id.*

purchase agreement (the "Sale"). Op. 3; Compl. ¶ 15. It is undisputed that the Sale price was not sufficient to satisfy the Performance Condition. *Id.*

In connection with the Sale, the Company decided to compensate certain current employees and one former employee with Equity Interests pursuant to the Plan.[11] Specifically, the Company amended the Equity Agreements for those employees so that 60% of their unvested Equity Interests would vest as a result of the closing of the Stock Sale (the "60% Amendment" or "Amendment") even though the Performance Condition in the Equity Agreements had not been satisfied. Op. 3; Compl. ¶ 15. To accomplish that change, immediately after the language introducing the Employment and Performance Conditions in the Equity Agreements, the 60% Amendment added:

> Notwithstanding the foregoing, subject to Participant's continued employment with the Company through the Closing [of the Sale] . . . sixty percent (60%) of the [Unvested Awards] . . . shall [vest] upon the Closing.[12]

The 60% Amendment did not modify the Employment Conditions. Unlike Appellants, the employees that received the 60% Amendment had to remain employed through the closing of the Blackstone transaction in order to vest. The

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11 Compl. ¶ 15-16 (A-0026) (incorporating SeaWorld Ent., Inc., Current Report (Form 8-K) (Apr. 13, 2017) ("SeaWorld 8-K")).

12 Ex. 10.1 to SeaWorld 8-K ("60% Amendment") (A-1006-1007). Appellants reference and rely on the Company's public filings. *See* Countercls. ¶ 21-22 (*see, e.g.,* A-0461); *see also* Oral Argument Transcript at 36:23–24 (A-0971-0972).

plain language of the 60% Amendment also did not modify the Appellants' Separation Agreements and did not otherwise name or involve the Appellants as parties. Op. 4.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT SEAWORLD'S INTERPRETATION OF THE CONTRACTUAL PROVISIONS IS THE ONLY REASONABLE INTERPRETATION.

A. Question Presented.

Whether the Amendment entitled Appellants to the benefits of any future amendments made for other employees of SeaWorld that had been issued Tranche 3 shares? This argument was raised before the Court of Chancery (A-0873-0876, A-0926-0930) and was resolved by the Court (Op. 8-18).

B. Standard of Review.

The Court of Chancery granted Appellee's motions for judgment on the pleadings and to dismiss, determining that the agreements at issue were unambiguous and that SeaWorld's interpretation is the only reasonable one. The Court of Chancery's legal determinations are subject to *de novo* review. *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of the Argument.

As the Court of Chancery correctly held, under the plain and unambiguous language of their Separation Agreements and Amendments, Appellants are not entitled to 60% of their Unvested Awards.

1. The Performance Condition Remained Intact and Was Not Satisfied.

Under the Equity Agreements, "remain[ing] continuously employed" was only one of the two necessary pre-conditions to vesting. Even if Appellants were treated as if they had remained employed (or even if they had in fact remained employed), the Performance Condition still had to be satisfied for the Equity Interests to vest. Nothing in any of the Agreements or Appellants' Amendments affected the Performance Condition, which remained in Appellants' agreements unaltered, and which Appellants concede was not satisfied. Based on the unambiguous language of the agreements, the Court of Chancery correctly held that the "only reasonable interpretation" of the Separation Agreements is that "[Appellants] are not entitled to any percentage of the Unvested Awards because the Separation Agreements removed the Employment Condition, not the Performance Condition, and the Sale indisputably did not satisfy the Performance Condition." Op. 7-8. The Court of Chancery's conclusion should be affirmed.

The Separation Agreements state that Appellants' Unvested Awards: "shall not be forfeited on the Termination Date and shall continue to be eligible to vest (as if the Participant had remained continuously employed with the Company) in accordance with the provisions of [the Equity Agreements]." The Court of Chancery correctly interpreted this language, concluding that: "[Appellants'] Unvested Awards are 'eligible to vest' under their Equity Agreements as if

[Appellants] had remained continuously employed—i.e., as if they had not been terminated." Op. 9. The court further explained that, read as a whole and together with all the parties' contracts, the Separation Agreements were designed solely to remove the Employment Condition. *Id.* The court's conclusion that the Performance Condition was not removed or altered is supported by the very next provision in the Separation Agreements which provides that, other than the Employment Condition, "all provisions of the Equity Agreements shall remain in full force and effect."[13] The Separation Agreements further state that the removal of the Employment Condition did not "expressly or impliedly waive, amend or supplement any [other] provision of the Equity Agreements[.]"[14] Op. 9. Thus, the plain language leaves no doubt that the requirement of satisfying the Performance Condition remained intact, or as Opinion stated, "[n]o other condition was removed." Op. 9.

Accordingly, as the Court of Chancery correctly held, "only one reasonable construction emerges: the Separation Agreements removed the Employment Condition from Defendants' Equity Agreements and could have, but did not, remove the Performance Condition." Op. 10. Because it is undisputed that the Performance Condition was not met, Appellants did not meet the conditions necessary for vesting of the Unvested Awards. The analysis could end here.

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13 Separation Agreements § 3 (A-0096).

14 *Id.*

2. Appellants are Not Entitled to Benefits Given to Other Current Employees.

Unable to argue that the Performance Condition was altered, removed or satisfied, Appellants raise a host of arguments as to why the Separation Agreements should be interpreted as entitling them to the benefits of any and all amendments made for other employees in the future.[15] OB 21-22. Appellants then argue that, because the Performance Condition was, after their departure, amended for other *active* employees so that 60% of their shares would vest, the Performance Conditions in their Equity Agreements should be treated as if they were amended as well. The Court of Chancery correctly rejected Appellants' arguments and they should be rejected on appeal.

Appellants first argue that the Court of Chancery improperly started its contract interpretation analysis with Plan instead of Separation Agreement and that the court's "mis-sequencing led the Court astray . . . ." OB 16. However, as the Court of Chancery correctly concluded, the Plan and the Separation Agreements are integrated contracts that must be read together. Op. 9-10. To do as Appellants suggest and read the language in the Separation Agreements in isolation is contrary

[15] As set forth above, the parenthetical in question (the "Parenthetical") follows the language in the Separation Agreements stating that the unvested Tranche 3 shares "shall not be forfeited on the Termination Date and shall continue to be eligible to vest (*as if the Participant had remained continuously employed with the Company*) in accordance with the provisions of [the Equity Agreements.]" §§ 1–2 (A-0094-0096) (emphasis added).

to well-established rules of contact interpretation under Delaware law. *See, e.g.*, *In re P3 Health Gp. Hldgs.*, 282 A.3d 1054, 1066–67 (Del. Ch. 2022); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001). Indeed, as the Court of Chancery correctly recognized, "[w]ords do not exist in isolation. So, contracts cannot be construed in isolation either. Quite the opposite: 'In upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein.'" Op. 11 (citing *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

Moreover, even if read in isolation, the language in the Separation Agreement does not support Appellants' position. It is not reasonable to interpret the "eligible to vest" language Appellants argue the Court of Chancery should have focused on as providing that the Appellants "were entitled to receive . . . the vesting of their shares." OB 17. "Eligible" does not mean "entitled." "Eligible" simply means "qualified to participate or be chosen." *Eligible*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/eligible (last visited Oct. 16, 2023).[16] And that is the exact meaning the Court of Chancery gave to it. Under SeaWorld's and the Court of Chancery's reading, the Appellants

[16] Even Appellants' preferred definition of "eligible" does not support Appellants' argument that they were entitled to vesting. OB 17. Rather, it only supports the notion that they "qualified" or were "fit" to potentially be vested.

remained *eligible* to vest – i.e., capable of vesting – even though they would not be able to satisfy the Employment Condition. But that did not *entitle* Appellants to vesting if other employees vested because the Performance Condition still remained in effect for them.

Appellants next argue that the Court of Chancery's "conclusion that the parenthetical clause is 'redundant' but, nonetheless, consistent with its conclusion that the language only removes the Employment Condition, is an interpretative error." OB 19. Appellants are wrong. As the Court of Chancery correctly held, the "grammatically natural reading of the Parenthetical Clause is that it modifies 'shall continue to be eligible to vest.'" Op. 12. Contrary to Appellants' arguments, the Parenthetical did not create a new right to Unvested Awards that did not previously exist. It simply explained that the Appellants would continue to be eligible to vest "as if the Participant had remained continuously employed with the Company." The fact that SeaWorld potentially could have achieved the same result using different drafting techniques does not change the meaning of the contract's plain and unambiguous language.

Appellants' argument that the Court of Chancery's "own interpretation would provide for vesting if every actively employed SeaWorld employee was vested" similarly fails. As the Court of Chancery correctly noted, "[a] Participant's 'selection' for a grant of an Unvested Award does not establish 'any claim or right .

. . to be selected for a grant of any other' Unvested Award." Op. 13. Indeed, the Plan expressly permitted SeaWorld to treat Participants differently. The Plan explicitly stated that SeaWorld had "no obligation" to apply its amendments "uniformly" to all Participants. Plan §14(e) (A-0057). Thus, the Court of Chancery was correct to conclude that, even if Appellants had remained actively employed, they would not have been automatically entitled to the 60% Amendment. For this reason, it does not matter if the Separation Agreements created a "legal fiction" that "the [Appellants] remain 'continuously employed' as if they were current employees for the limited purpose of Tranche 3." OB 21. Even if they were actual active employees, they would not have been entitled to the 60% Amendment. SeaWorld was free to give the 60% Amendment to some, but not all, employees.

Finally, Appellants have no response to the argument raised below that, had the parties intended to give Appellants a form of "most favored nations clause" that entitled them to the benefits of future amendments for other employees, they easily could have drafted language to that effect. *See Ince & Co. v. Silgan Corp.*, 1994 WL 728799, at *2 (Del. Ch. Dec. 8, 1994) (declining defendant's request that

the Court read beyond the plain language of the agreement to make inferences about the supposed purpose of a Most Favored Nations clause).[17]

3. The Court of Chancery Did Not Improperly Focus on the Purpose of the Plan.

Appellants take issue with the Court of Chancery's statements regarding the "purpose" of the Plan. OB 22. Specifically, Appellants claim that the Court of Chancery "unnecessarily focused on the purpose of the Plan," without spending enough time discussing what Appellants contend was the purpose of the Separation Agreements. OB 22. Appellants are incorrect on both points.

It is well-established under Delaware law that the court is permitted to, and should, consider the purpose of contract when that purpose can be determined from the four corners of the contract. *See, e.g., Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014) ("When interpreting a contract, this Court 'will give priority to the parties' intentions as reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions"); *Geier v. Mozido, LLC*, 2016 WL 5462437, at *6 (Del. Ch. Sept. 29, 2016) ("Contract provisions should be interpreted consistently with the general purpose of the contract."). Here, Section 1 of the Plan clearly and unambiguously states that its purpose is to offer incentive

[17] Although the Court of Chancery did not rely on it, it noted that SeaWorld had included a form of a "most favored nations" clause in the amendment for one employee. Op. n. 71.

compensation to Company personnel. (A-0033); Op. 8. The Court of Chancery correctly noted that the fact that the Equity Agreements tied vesting to employment status was consistent with that stated purpose. *Id.* Appellants have not identified anything improper about that conclusion. Nor could they as it did not factor into the Court's analysis of the relevant language.

Instead, Appellants argue that it is "illogical that *missing* the Tranche 3 target would result in partial vesting for current employees that missed the target, but *no* vesting for the former employees that spent years building the company until shortly before the April 2017 sale." OB 23. But there is nothing illogical about that outcome and it is perfectly consistent with what Appellants claim was the purpose of the Separation Agreements (i.e., "to incentivize the [Appellants] to separate from SeaWorld in return for a release of claims…."). OB 22. To the contrary, the governing documents expressly permitted SeaWorld to treat employees differently (Plan §14(e), A-0057) and, unlike the employees that received the 60% amendment, SeaWorld had elected to terminate its relationship with the Appellants.

II. THE CONTRACTUAL LANGUAGE IS CLEAR AND UNAMBIGUOUS AND THE APPELLANTS ALLEGED FACTUAL DISPUTES ARE IRRELEVANT.

A. Question Presented.

Whether the court should have concluded that the agreements at issue are ambiguous and first resolved certain alleged factual disputes before interpreting the agreements? This question was raised below and considered by the Court. A-0926-0928; Op. 7-10.

B. Standard of Review.

Because this section concerns the interpretation of contract language and whether that language is unambiguous, it is also subject to *de novo* review. *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of the Argument.

1. The Court of Chancery Correctly Disregarded Appellants' Assertions as to What Extrinsic Evidence Might Show Because All of the Relevant Agreements are Clear and Unambiguous.

Appellants argue that "because the pertinent language is not unambiguously limited to removing the Employment Condition," the Court of Chancery should have considered certain unresolved factual issues before deciding SeaWorld's dispositive motions. OB 25. Appellants are wrong for several reasons.

First, it is well-established under Delaware law that, when an agreement is clear and unambiguous, the Court cannot consider extrinsic evidence of the contract's meaning. *Sunline Com. Carriers, Inc. v. CITGO Petro. Corp.*, 206 A.3d 836, 846 (Del. 2019) (holding when the terms of a contract are unambiguous, a court must enforce the contract "without resort to extrinsic evidence"); *Exelon Generation Acqs., LLC v. Deere & Co.*, 176 A.3d 1262, 1267 (Del. 2017) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity." (quoting *DeVilbiss Health Care, Inc. v. Eagle Indus., Inc.*, 702 A.2d at 1232)). Appellants do not dispute this rule of law, but instead contend that the agreements are ambiguous. For the reasons set forth above and in the Court of Chancery's opinion, Appellants are wrong. "Contract language is not ambiguous simply because the parties disagree on its meaning." *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997). Here, the Agreements are clear and unambiguous, and thus, no extrinsic evidenced was necessary or permitted. Op. 15.

Moreover, even if the Court of Chancery could have considered the extrinsic evidence proffered by Appellants, it would not change the analysis. In that regard, Appellants mischaracterize "SeaWorld's actual defense in this case as being "that not all actively employed SeaWorld employees in April 2017 received the 60% Amendment – that only certain of them did so, allowing SeaWorld to selectively

choose who received the 60% Amendment." OB 26. That is not SeaWorld's defense. As set forth above, SeaWorld's defense is that, under the clear and unambiguous language of the relevant agreements, Appellants did not vest.

With respect to Appellants' argument that all Participants employed as of April 2017 received the 60% Amendment, and therefore, Appellants should receive it too, SeaWorld's position is that it does not matter whether all of the currently employed employees received the 60% Amendment. Even if 100% of the individuals employed by SeaWorld at the time of the sale that had Tranche 3 restricted shares received the 60% Amendment, SeaWorld would have had no obligation to give the 60% Amendment to Appellants. To the contrary, and as explained above and in the Opinion, the Plan specifically permitted SeaWorld to treat certain employees differently than others. §14(e) (A-0057). Thus, even if the Court had assumed that all individuals employed as of April 2017 received the 60% Amendment, that still would not entitle Appellants to it.

In correctly declining to give credence to Appellants' fact-based arguments, the Court of Chancery rightly held "I must interpret the unambiguous terms of [Appellants'] contract, not someone else's contract. At bottom, the Company had discretion as to whom and in what way the 60% Amendment would apply." Op. 17. This Court should affirm the Court of Chancery's finding that Appellants' extrinsic evidence arguments fail, as Appellants have not "offered a

viable theory for inferring that the Separation Agreements do not mean what they say." Op. 17.

Finally, Appellants concede that they cannot use any alleged factual disputes to create an ambiguity. OB 27-28. A necessary corollary to that concession is that the alleged factual disputes Appellants rely so heavily upon have no bearing on this appeal where the only question before the Court is whether the Court of Chancery correctly concluded that the Agreements are clear and unambiguous and that SeaWorld's reading is the only reasonable one. Thus, Appellants' assertions about oral representations they claim to have received (OB 27) and other agreements some of them may have entered into (OB 27) are irrelevant for purposes of this appeal.

CONCLUSION

For the foregoing reasons, the Court of Chancery's well-reasoned Opinion granting SeaWorld's motion to dismiss and motion for judgment on the pleadings should be affirmed.

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October 18, 2023

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2023, the foregoing *Appellee's Answering Brief* was caused to be served upon the following counsel of record via File and Serve*Xpress*:

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