



IN THE SUPREME COURT OF THE STATE OF DELAWARE

F.A.M.E. LLC d/b/a Falk Associates)
Management Enterprises a/k/a FAME,)
) No. 230,2025
Appellant/)
Plaintiff-Below,) Court Below: Superior Court of the
) State of Delaware
v.)
) C.A. No. N22C-12-003-PAW-
EMTURN LLC and EVAN TURNER,) CCLD
)
Appellee/) REDACTED - PUBLIC VERSION
Defendants-Below.) FILED OCTOBER 22, 2025

APPELLANT’S REPLY BRIEF ON APPEAL AND CROSS-APPELLEE’S ANSWERING BRIEF ON CROSS-APPEAL

Dated: October 7, 2025

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NATURE OF PROCEEDINGS

On appeal, FAME appealed the Trial Court's statute of limitations analysis, which determined that the Stock was commissionable at the time of vesting based on the parties' course of performance. Turner misinterprets the Trial Court's analysis and even reverses it to claim FAME waived an issue on appeal. Turner is wrong. The Trial Court found the FAME Agreement ambiguous as to when the Stock is commissionable. To determine that the Stock was commissionable at vesting, the Trial Court incorrectly interpreted the extrinsic evidence before it, the parties' course of performance. FAME appealed the Trial Court's determination regarding course of performance and the holding that FAME's breach of contract claims are barred by the statute of limitations.

On cross-appeal, Turner seeks to overturn the Trial Court's determination that the Stock was Marketing Income at all and claims the FAME Agreement was ambiguous on this. The Trial Court correctly decided that the FAME Agreement unambiguously applied to Stock, analyzing the plain terms of the Agreement. Turner was required to pay a commission on any compensation Turner received from any Marketing Contract. However, if, as Turner argues, the Agreement is ambiguous, that issue must be remanded for trial to let the jury decide.

SUMMARY OF ARGUMENT

As to Appeal:

1. The Trial Court incorrectly decided a disputed issue of material fact regarding the parties' course of performance when it ruled on summary judgment. This Court should vacate the Trial Court's determinations regarding course of performance and the application of the statute of limitations, and remand so that the parties can conduct a trial on the disputed facts.

As to Cross-Appeal:

2. Denied. This Court should affirm the Trial Court's ruling that the FAME Agreement unambiguously applies to the Li-Ning Stock. The plain language of the FAME Agreement show that the terms "marketing income" and "compensation", which are used interchangeably in the Agreement, clearly and unambiguously requires Turner to pay a commission on any compensation Turner received from any Marketing Contracts. If, as Turner appears to argue, the FAME Agreement is ambiguous on this issue, questions of fact exist regarding this issue, requiring the case be remanded for the jury to decide.

3. Denied. This Court should affirm the Trial Court's decision not to apply the *contra proferentem* doctrine because the FAME Agreement is not ambiguous with respect to whether marketing income includes the Li-Ning Stock.

Even if this Court determines the FAME Agreement is ambiguous in that respect, the *contra proferentem* doctrine is rarely applied and only in contracts of adhesion where one party had no bargaining power or ability to negotiate. Turner had significant bargaining power, negotiating with multiple agents, utilizing advisors, and even haggled intensely with Falk for four and a half months to reduce the fees in his rookie contract and the FAME Agreement. Setting that aside, the doctrine cannot be applied on summary judgment and must be left for the jury to decide.

STATEMENT OF FACTS ON CROSS-APPEAL

Appellant hereby respectfully incorporates by reference the Statement of Facts in the Opening Brief as if fully set forth herein.

ARGUMENT ON APPEAL

I. THE STOCK WAS MARKETING INCOME, COMMISSIONABLE WHEN INVOICED.

A. FAME Did Not Waive Appeal.

FAME did not waive an argument regarding the application of the statute of limitations.¹ Turner misconstrues the Opinion in an attempt to argue FAME failed to properly appeal the issue addressed by the Trial Court. In support, Turner makes two arguments. First, Turner argues that the Trial Court held that both the extrinsic evidence and the plain text of the FAME Agreement confirm the breach of contract claim accrued when the Stock vested and FAME failed to appeal the second point.² Second, Turner also claims that the Trial Court answered two questions: (i) when Marketing Income was received with respect to the Li-Ning Stock; and (ii) when payment is due to FAME.³ Neither argument holds.

Addressing Turner's second argument first, with respect to the statute of limitations analysis, the Opinion addressed one question: when did the Stock first

¹ See AB at 11-13. Appellees' Answering Brief on Appeal and Opening Brief on Cross-Appeal is cited herein as "AB at ___".

² AB 12.

³ AB at 18.

become commissionable.⁴ Indeed, that’s the only issue the parties briefed or discussed at oral argument.⁵ Further, there is no indication in the Opinion that the Trial Court was addressing two separate questions. There is no support for Turner’s claim that the Trial Court was answering two separate questions.

With respect to Turner’s first argument, contrary to Turner’s claim, the Trial Court did not first analyze the plain language of the FAME Agreement to “determine when the Li-Ning stock was ‘marketing income’ to Turner[.]”⁶ and then find the FAME Agreement ambiguous as to when payment is due.⁷ The Trial Court analyzed when the Stock was commissionable: (i) at vesting or (ii) at the time of sale.⁸ First in its analysis, the Trial Court found that the FAME Agreement was ambiguous as to when the Stock was commissionable and, thus, had to look at extrinsic evidence to interpret the Agreement.⁹ Then, the Court analyzed the extrinsic evidence. The sole extrinsic evidence the Trial Court relied on in answering the question was the

⁴ Op. at 16. The Court’s Memorandum Opinion and Order attached as Exhibit A to Appellant’s Corrected Opening Brief is cited herein as “Op. at ___”.

⁵ See A645, A650-51; A698-701; AR21-25; AR25-39; *see generally* A828-887.

⁶ AB at 14.

⁷ AB at 18.

⁸ Op. at 17. The parties agreed that a third possible time event exists when the Stock could be commissionable, at issuance, but the Court did not address that time event. *Id.*

⁹ Op. at 19.

parties' course of performance. The Trial Court erroneously determined the parties' course of performance showed the Stock was commissionable at the time of vesting.¹⁰ Finally, the Trial Court analyzed FAME's argument that the Stock was commissionable at the time of sale.¹¹ The Trial Court determined that "FAME's choice to invoice the Stock Marketing Fee at the time of sale was inconsistent with its past practice."¹² In other words, it was inconsistent with the parties' course of performance. Thus, the Trial Court found that FAME's argument that the Stock was commissionable at the time of sale was incorrect based on the parties' course of performance.¹³

In the course of analyzing the statute of limitations arguments, after having already found the FAME Agreement was ambiguous as to when the Stock was commissionable, the Trial Court relied, in part, on the plain language of the FAME Agreement it had already found ambiguous.¹⁴ Such reliance on the plain language is necessarily erroneous and must be ignored because the contract is ambiguous on this issue. *See GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36

¹⁰ Op. at 19-20.

¹¹ Op. at 20-21.

¹² Op. at 21.

¹³ Op. at 21.

¹⁴ Op. at 20-21.

A.3d 776, 780 (Del. 2012) (“Where a contract is ambiguous, ‘the interpreting court *must* look beyond the language of the contract to ascertain the parties’ intentions.”); *id.* at 783 (“But, where reasonable minds could differ as to the contract’s meaning, a factual dispute results and the fact-finder must consider admissible extrinsic evidence. In those cases, summary judgment is improper.”); *id.* at 783 n.27 (“When, in contrast, contractual texts are deemed ambiguous, the resolution of the ambiguity becomes a trial issue for the jury.”); *see also Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3rd Cir. 1994) (“If the contract is determined to be ambiguous, then the interpretation of the contract is left to the factfinder, to resolve the ambiguity in light of extrinsic evidence.”). Turner’s argument rests on this improper reliance and, therefore, fails.

B. The Commission On the Stock Is Due On Invoicing.

FAME’s position is that the commission on Marketing Income is due *when invoiced*, and that FAME’s invoices are due contemporaneous to Turner’s receipt of cash and on the amount of cash received by Turner (*i.e.*, at the time the Stock was sold).¹⁵ Cash Marketing Income was invoiced immediately, because the commission could be reserved and paid from the received cash.¹⁶ A cash commission could not

¹⁵ OB at 20-23. Appellant’s Corrected Opening Brief is cited herein as “OB at ___”.

¹⁶ OB at 8-9.

be reserved or paid from non-cash Marketing Income. Therefore, FAME invoiced commissions for non-cash Marketing Income when that type of compensation was converted to cash.¹⁷ FAME's appeal issue is when the commission on that Marketing Income was reduced to a sum certain and came due—when the statute of limitations started to run.

Turner argues that if the Stock is Marketing Income, then a cash commission was due instantly upon receipt of the Stock by EmTurn, despite that the Stock was not cash that could support a cash commission. In arguing this, Turner claims that the term “Marketing Income” is unambiguous as a matter of plain language contract interpretation, via employment of various dictionary and tax law definitions.¹⁸

Turner's argument does not match the holding below. The Trial Court expressly found a contractual ambiguity, and then conducted a course of performance analysis to resolve it.¹⁹ It would have been plain error for the Trial Court to do a course of performance analysis upon an unambiguous contract term. *Benner v. Council of the Narrows Ass'n of Owners*, 2014 WL 7269740, at *8 (Del. Ch. Dec. 22, 2014) (“Only if the language of the contract is ambiguous may the

¹⁷ OB at 20-23.

¹⁸ AB at 14-16.

¹⁹ Op. at 19.

Court consider extrinsic evidence of the parties’ intent, including the parties’ course of performance.”) (citing *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997)). The Trial Court later doubled back in its analysis to hold that its extrinsic evidence interpretation of course of performance also best matched the dictionary meanings of the words “marketing” and “income”.²⁰ But that doubling back—which was improper—does not eliminate the prior and first holding that the contract is ambiguous.

The clear import of the Opinion below is that the FAME Agreement was ambiguous and required interpretation through extrinsic evidence, including course of performance. The Trial Court simply erred in deciding factual disputes around that course of performance evidence; it did not err by considering it.

Substantively, a time gap between a commission earned and an entitlement to commission payment is ordinary in Delaware law. Then-Vice Chancellor Hartnett explained:

In a case such as this, *there is a distinction as to when one has earned a commission and when one is entitled to receive payment of that commission*. The general rule is, absent an agreement to the contrary, a salesman’s commissions are deemed earned when orders are procured and accepted. However, *once earned, the entitlement to the commission is not affected by the fact that payment may be delayed....* The fact that Williamson was not entitled to receive payment of his commission until Tecot had been fully paid was merely a bookkeeping arrangement due

²⁰ See Op. at 18-22.

to the implementation of a computer system, and did not change the agreement as to when the commissions were actually earned.

Williamson v. Tecot Elec. Supply Co., 1978 WL 4977, at *1-2 (Del. Ch. Sept. 14, 1978) (internal citations omitted).

Frequently, the time delay between the earning of and the payment deadline for a commission is based upon an invoicing process, as occurred here. *See, e.g.*, *Data Logger Sols., LLC v. Digi SmartSense, LLC*, 2023 WL 5431072 (Del. Super. Aug. 22, 2023) (payment obligation triggered by invoicing with upcharge for third-party biller); *Hassler v. Valk Mfg. Co.*, 1984 WL 483440 (Del. Super. Dec. 12, 1984) (account summary was inadequate evidence because commissions were defined at variable rates for specific invoice payments).

It is normal for commissionable marketing income to be earned on Date #1, but become payable on much later Date #2, based upon receipt of cash or upon invoicing. *See id.* The plain text of the FAME Agreement does not determine this issue, hence the Trial Court's resort to extrinsic evidence to resolve the asserted time gap.

C. Because the Trial Court Found the FAME Agreement Ambiguous as to When the Stock Is Commissionable, the Jury Must Decide the Issue Based on Extrinsic Evidence Voiding the Trial Court's Further Analysis.

As discussed above, the Trial Court found the FAME Agreement ambiguous as to when the Stock was commissionable. At a minimum, there is a genuine issue of material fact with respect to the course of performance extrinsic evidence, meaning summary judgment was improper and the case should proceed to a jury trial.

As discussed at length in FAME's Opening Brief, from 2010 through 2016, FAME invoiced EmTurn when Turner actually received cash compensation, not before.²¹ Contrary to Turner's argument,²² in addition to the Stock, Turner received royalties that FAME did not invoice until Turner actually received the cash. Pursuant to the Li-Ning Contract, EmTurn was due royalties in each of 2010 through 2016 equal to 3.5% of Net Sales.²³ EmTurn did not immediately receive cash. Instead, EmTurn received Royalty Statements each year indicating the Royalty Payment due.²⁴ EmTurn would then "be paid semi-annually, *within 60 days of the*

²¹ OB at 8-9.

²² AB at 19.

²³ A745.

²⁴ A746.

semi-annual periods (which shall end on February 28 [February 29 on any leap year] and August 31 of each Contract Year)[.]”²⁵ But FAME would not invoice EmTurn when EmTurn was provided the Royalty Statement. FAME would invoice after, once EmTurn received the cash.²⁶

During that time, FAME was also involved in nearly every aspect of the Stock transfers from Li-Ning to Turner.²⁷ And in June 2016, FAME reminded Turner, through Vujevich (both by phone and email) that they needed “to determine when Evan will sell these shares and pay FAME its 20% fee of their value.”²⁸ Neither Turner nor Vujevich objected to FAME’s email.²⁹ Then, in 2022, FAME invoiced EmTurn for the commission on the Stock after Falk discovered Turner had sold the shares and finally received cash.³⁰ As Falk explained, doing anything else would get an agent fired “because it looks like you are putting your own interest ahead of the player’s.”³¹

²⁵ A745 (emphasis added).

²⁶ See A779 (Invoice dated 11/01/2012 for “Li Ning Royalties paid, 2011 (\$8,111.11) and 2012...”)

²⁷ A683.

²⁸ A802.

²⁹ Op. at 9.

³⁰ *Id.*

³¹ A232 at 79:1-A233 at 83:12.

The Opinion found the FAME Agreement ambiguous as to when the Stock is commissionable yet it ignored evidence in the record supporting FAME's position. FAME's evidence demonstrates that at minimum a genuine issue of fact exists as to the parties' course of performance. The extrinsic evidence is not for the Trial Court or this Court to consider. It is for the jury. Thus, the Trial Court's determination on course of performance and the application of the statute of limitations should be reversed and remanded for trial.

D. This Court Should Remand for Clarification, If Necessary.

If this Court determines that both FAME's and Turner's interpretation of the Trial Court's analysis on the statute of limitations are plausible (*i.e.*, the Trial Court analyzed one question or two), this Court should remand for clarification by the Trial Court of its ruling regarding the statute of limitations issue. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371-73 (Del. 1993) (remanding for further consideration and clarification by trial court based on its prior ruling); *U.S. Timberlands Klamath Falls, L.L.C. v. U.S. Bank Nat'l Assoc.*, 875 A.2d 623 (Del. 2005) (remanding entire case for trial on all issues).

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT CORRECTLY HELD THE FAME AGREEMENT PROVIDES FOR A COMMISSION ON STOCK.

A. Question Presented

If this Court does not affirm the Trial Court’s determination that FAME’s breach of contract claim is barred on statute of limitations grounds, whether the Trial Court erred in holding that the FAME Agreement unambiguously provides FAME a commission on the Stock. A687-A698; Op. at 13-14.

B. Scope of Review

The Supreme Court reviews a grant or denial of a motion for summary judgment *de novo*. *Ferrellgas Partners L.P. v. Zurich American Ins. Co.*, 319 A.3d 849, 865 (Del. 2024). The Court’s “review of the formulation and application of legal principles...is plenary and requires no deference.” *In re Tesla Motors S’holder Litig.*, 298 A.3d 667, 699 (Del. 2023) (quoting *Kahn v. Lynch Commc’n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995)).

C. Merits of Argument

1. *The FAME Agreement Unambiguously Applies to the Li-Ning Stock.*

This Court interprets clear and unambiguous terms according to their ordinary meaning. *GMG Capital*, 36 A.3d at 780. “To aid in the interpretation of the text’s meaning, Delaware adheres to the objective theory of contracts, i.e., a contract’s

construction should be that which would be understood by an objective, reasonable third party.” *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) (internal quotations omitted). “Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.” *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2006).

The FAME Agreement states “FAME shall receive a Marketing Fee of: Fifteen Percent (15%) on *all marketing income*” unless “the total amount of marketing income [EmTurn] receives in any year is equal to or greater than [\$2 million]” in which case “the Marketing Fee shall be [20%] on *all marketing income....*”³² EmTurn owes the Marketing Fee “regardless of when [EmTurn] receives *the compensation for such contracts.*”³³ “Marketing income” and “compensation” are synonymous and used interchangeably in the FAME Agreement.³⁴

Black’s Law Dictionary defines “income” as “the money *or other form of payment* that one receives, usually periodically, from employment, business,

³² A773-A774 (emphasis added).

³³ *Id.* (emphasis added).

³⁴ A648; A230 at 70:17-18, A240 at 112:3-8. Op. at 13 n.72.

investments, royalties, gifts, and the like.” Black’s Law Dictionary, *Income* (12th ed. 2024) (emphasis added). Similarly, Black’s Law Dictionary defines “compensation” as “remuneration and other benefits received in return for services rendered.... Compensation includes wages, stock option plans, profit-sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leave of absence, and expense reimbursement.” Black’s Law Dictionary, *Compensation*. It can also mean “an employee’s earnings that are taxed *when received or distributed rather than when earned*, such as contributions to a qualified pension or profit-sharing plan. *Id.*

Additionally, “[a]s the court assesses whether ambiguity exists, the contract must be read in full and *situated in the commercial context between the parties.*” *Pearl City Elevator, Inc. v. Gieseke*, 2021 WL 1099230, at * (Del. Ch. Mar. 23, 2021) (citation omitted).

At the time FAME and EmTurn entered into the FAME Agreement, FAME had already negotiated the Li-Ning Contract for EmTurn, which included stock. The Li-Ning Contract is a Marketing Contract. Thus, any payment to EmTurn and Turner pursuant to that Marketing Contract is Marketing Income. In turn, the Stock under the Li-Ning Contract, as with the Guaranteed Payments, Bonuses, and Royalties, was marketing income and compensation. Indeed, even the Li-Ning

Contract calls the Stock “COMPENSATION”.³⁵ There is no reasonable basis to argue that the Stock is not marketing income under the FAME Agreement.

2. *Appellees implicitly argue that Marketing Income in the FAME Agreement is ambiguous. But if it is ambiguous, questions of fact exist requiring the issue be decided by the jury.*

If this Court holds that the FAME Agreement is ambiguous as to whether it applies to the Li-Ning Stock, the issue must be decided by the jury at trial. “In a dispute over the proper interpretation of a contract, summary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer *uncontested* evidence as to the proper interpretation.” *GMG Capital*, 36 A.3d at 784 (emphasis added).

EmTurn argues that the FAME Agreement does not apply to Stock because the parties did not discuss a commission on stock. However, it is EmTurn’s burden to prove that the broad language in the FAME Agreement has a limitation. *AR Cap. LLC v. XI Specialty Ins. Co.*, 2018 WL 6601184, at *6 (Del. Super. Dec. 12, 2018) (“The absence of a phrase does not automatically suggest an exclusion.”). Additionally, EmTurn’s interpretation, although unreasonable, is for the jury to decide. It cannot be decided as a matter of law as the parties have both presented

³⁵ A744.

interpretations of the language through extrinsic evidence. *See supra* Argument On Appeal I.

II. THE TRIAL COURT DID NOT NEED TO APPLY THE DOCTRINE OF *CONTRA PROFERENTEM* GIVEN THE UNAMBIGUOUS LANGUAGE AND, IN ANY EVENT, THE DOCTRINE DOES NOT APPLY.

A. Question Presented

If this Court does not affirm the Trial Court’s determination that FAME’s breach of contract claim is barred on statute of limitations grounds, whether the Trial Court erred in holding that the doctrine of *contra proferentem* does not apply. A695-A698; Op. at 13-14.

B. Scope of Review

The Supreme Court reviews a grant or denial of a motion for summary judgment *de novo*. *Ferrellgas*, 319 A.3d at 865. The Court’s “review of the formulation and application of legal principles...is plenary and requires no deference.” *In re Tesla*, 298 A.3d at 699 (quoting *Kahn*, 669 A.2d at 84).

C. Merits of Argument

The Trial Court properly did not apply *contra proferentem* because the FAME Agreement unambiguously established that Stock is commissionable. But even if the Trial Court found, or this Court finds, the FAME Agreement ambiguous, the doctrine does not apply and cannot apply as a matter of law on summary judgment.

The doctrine of *contra proferentem* is a rule of last resort applying only “if the extrinsic evidence does not reveal the parties’ intent.” *ConAgra Foods, Inc. v.*

Lexington Ins. Co., 21 A.3d 62, 72 (Del. 2011). In other words, it “applies only where other secondary rules of interpretation have failed to elucidate the contract’s meaning.” *Wilmington Firefighters Ass’n, Local 1590 v. City of Wilmington*, 2002 WL 418032, at *10 (Del. Ch. Mar. 12, 2002) Further, the trier of fact must consider the extrinsic evidence, meaning the *contra proferentem* doctrine cannot be applied as a matter of law at summary judgment. See *Sunline*, 206 A.3d at 851-52; *GMG*, 36 A.3d at 783-84; *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 2012 WL 2913226 (Del. Super. Apr. 9, 2012) (instructing jury to apply rule (“[i]f you cannot decide the parties’ intent” from the extrinsic evidence.); *Wilmington Firefighters*, 2002 WL 418032, at *10 (Del. Ch. Mar. 12, 2002) (doctrine applied by factfinder Public Employee Relations Board); see also DEL. P.J.I. CIV. § 19.15 (2000) (pattern jury instruction regarding rule).

But even if this Court were to analyze the doctrine at summary judgment, the rule does not apply here. The rule “is not a mechanistic device to be deployed whenever ambiguity arises.” *Wilmington Firefighters*, 2002 WL 418032, at *10. “Rather, the doctrine’s utility hinges upon the extent to which it is helpful in divining the intent of the contracting parties.” *Id.* “When the parties have equal bargaining power and have engaged in significant negotiation, the rule of strict construction against the drafter has little utility in ascertaining their intent.” *Id.* Typically, the

doctrine applies to contracts “involving an adhesion or otherwise standardized contract where the non-drafting party had little or no chance to provide input as to the language contained therein.” *Id.* at *10 n.51.

Turner had significant bargaining power and even had Falk change the terms of the draft agreement before signing. When Turner entered the NBA draft, he had meetings with multiple potential agents, and he had advisors guiding him through the process.³⁶ Turner used his power as a valuable NBA draft pick to intensely haggle with Falk for four and a half months over FAME’s fee structure.³⁷ Ultimately getting Falk to waive the 4% fee on Turner’s rookie contract and reducing the marketing fee to 15% on “all marketing income” under \$2,000,000 annually on the FAME Agreement.³⁸ Such significant bargaining power and negotiation bars any application of *contra proferentem*.

³⁶ OB at 5.

³⁷ *Id.*

³⁸ *Id.*

CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court's decision and remand for trial on the statute of limitations analysis on appeal, and this Court should affirm the Trial Court's decision that the FAME Agreement provides for a commission on Stock.

Dated: October 7, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2025, I caused true and correct copies of the foregoing **Redacted – Public Version of Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal** to be served upon the following counsel of record via File & Serve*Xpress*:

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