

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEXEO SOLUTIONS, LLC,	:	
	:	
Respondent,	:	
	:	Cases 13-CA-46694
and	:	13-CA-62072
	:	20-CA-35519
TRUCK DRIVERS, OIL DRIVERS, FILLING	:	
STATION AND PLATFORM WORKERS'	:	
UNION, LOCAL NO. 705, AN AFFILIATE OF	:	
THE INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS,	:	
	:	
and	:	
	:	
BROTHERHOOD OF TEAMSTERS AND	:	
AUTO TRUCK DRIVERS, LOCAL NO. 70	:	
OF ALAMEDA COUNTY, AFFILIATED WITH	:	
THE INTERNATIONAL BROTHERHOOD OF	:	
TEAMSTERS	:	
	:	
	:	
Charging Parties.	:	

**RESPONDENT NEXEO SOLUTION, LLC'S ANSWERING BRIEF TO
TEAMSTERS LOCAL 705'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

This brief answers the exceptions filed by Local 705¹ on October 18, 2012, to the decision and recommended order issued by the ALJ in these cases on August 30, 2012. Inasmuch as Local 705's exceptions are similar to those filed by the General Counsel, Nexeo's responses to most of them are the same as its responses to the General Counsel's exceptions. Nexeo's responses to the General Counsel's exceptions are contained in its brief answering those exceptions. Rather than repeat the arguments it makes in that brief here, Nexeo incorporates them by reference. Nexeo also incorporates in this brief the statement of facts contained in its brief in support of its exceptions and its brief answering the General Counsel's exceptions. In this brief, Nexeo directly addresses only those arguments made by Local 705 that are materially different from those made by the General Counsel.

II. ARGUMENT

A. **Local 705's Contention That Nexeo's Bargaining Obligation Attached When It Signed The APS On November 5, 2010 Has No Support In The Facts Or The Law**

Local 705 contends that, when Nexeo signed the APS on November 5, 2010, it "stated its unambiguous intention to hire all of Ashland Distribution's bargaining unit employees." The Union says that this "unqualified statement of Nexeo's intention was repeated thereafter to

¹ Counsel for the Acting General Counsel are referred to herein as the "General Counsel"; Respondent Nexeo Solutions, LLC is referred to as "Nexeo" or the "Company"; Nexeo's predecessor, Ashland, Inc., is referred to as "Ashland"; Charging Party Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union, Local No. 705, is referred to as "Local 705" or the "Union"; Charging Party Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70 of Alameda County, is referred to as "Local 70"; Administrative Law Judge William G. Kocol is referred to as the "ALJ"; references to the ALJ's decision and recommended order are abbreviated "ALJD p. __"; the Agreement of Purchase and Sale between Ashland and Nexeo is referred to as the "APS"; Ashland's collective-bargaining agreement with Local 70 is referred to as the "Local 70 CBA"; Ashland's collective bargaining agreement with Local 705 is referred to as the "Local 705 CBA"; references to the transcript of the hearing are abbreviated, "Tr. __"; references to the General Counsel's exhibits are abbreviated, "GCX __"; references to the Company's exhibits are abbreviated, "REX __"; and references to joint exhibits are abbreviated, "JEX __."

employees in a variety of messages expressly approved by Nexeo.” Without citation to any authority, the Union then submits that “Nexeo’s bargaining obligation to Local 705 attached on November 5, 2010.” (Local 705’s Brief p. 45). Both the predicate for this conclusion and the conclusion are wrong.

First, Nexeo did not state in the APS that it intended to “hire” all of Ashland Distribution’s bargaining unit employees. The APS obligated Nexeo to (1) make offers of “at-will employment” to Ashland Distribution employees generally, (2) in a position “comparable to the type of position” the employees held with Ashland, (3) with “no less favorable wages” than Ashland paid them, and (4) benefits under plans “substantially comparable in the aggregate” to those provided by Ashland. (GCX 6, Sec. 7.5(b)-(d)).

Second, a naked statement that Nexeo intended to hire all of Ashland Distribution’s bargaining unit employees was never made by Ashland. In its first communication to employees about the sale of the business, a Q & A posted on its intranet on November 8, 2010, Ashland informed employees that they “will be notified as soon as possible about whether they will transfer to the newly independent company and will receive employment offers prior to closing”; and “the newly independent company is required to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing” and “other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011.” (GCX 40, 56). Ashland repeated these messages in other communications and never issued any that conflicted with them.

Third, while Nexeo consultants had knowledge of Ashland’s written communications to employees about the sale of the business, no evidence exists that the communications were issued at the direction or on behalf of Nexeo. The only written communications attributable to Nexeo were those issued on and after January 14, 2011, and they made it clear that the details of

the Company compensation and benefits plans were still being worked on and the plans would be shared with the employees when they were finalized. (GCX 50-52).

Fourth, no evidence exists that Local 705 or any Local 705-represented employees ever saw any of Ashland's or Nexeo's written communications about the sale. The ALJ also excluded on hearsay grounds the testimony the General Counsel sought to elicit from Local 705 representative Neil Messino and stewards Mike Jordan and George Sterba regarding what Ashland managers allegedly told them about Nexeo's hiring plans.

Fifth, the complaint does not allege that Nexeo's duty to recognize and bargain with Local 705 attached prior April 1, 2011. (Region 13 Complaint ¶ VI(e)). While prior to the hearing the General Counsel amended the complaint to add an allegation that Nexeo is a perfectly clear successor, he did not seek then or later to amend his allegation that "[a]t all times since about April 1, 2011 . . . the Union has been the exclusive collective-bargaining representative of Respondent's employees in the Unit." (Id.).

Finally, Local 705's contention that Nexeo's bargaining obligation attached when it executed the APS on November 5, 2010 does not survive analysis under *Spruce Up Corp.*, 209 NLRB 194, (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975). Under the test adopted in *Spruce Up*, the perfectly clear successor caveat from the Supreme Court's decision in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972) is:

restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer ... has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

209 NLRB at 195. By its terms, application of this test turns upon a successor's pre-hire communications with the predecessor's employees or their union. Under it, a successor's

bargaining obligation attaches when it communicates plans to offer its predecessor's employees jobs in a way that misleads the employees or their union that there will be no changes or that fails to put them on notice that changes are forthcoming. (See Nexeo's Brief Answering the General Counsel's Exceptions pp. 18-23).

Here, the Union's claim fails because Nexeo did not communicate at all with Local 705 or the Local 705-represented employees until mid-February 2011. That was when it informed the Union, at its first meeting with it, and the employees, in their offer letters, that it was not adopting any of the terms contained in the Local 705 CBA and that the employees would be covered under its retirement and healthcare plans instead of the Local 705 plans. (Tr. 433-42, 959; GCX 12-13). The Union's claim also fails because, having received a copy of the APS from then Ashland human resources representative Fusco and shared its terms with the employees, the Union and employees were on notice that the APS gave Nexeo the right to make material, substantial and significant changes to the employees terms and conditions of employment, precluding a finding that Nexeo ever became a perfectly clear successor. (See Nexeo's Brief Answering the General Counsel's Exceptions pp. 31-34).

B. Local 705's Interpretation Of The Test Adopted In Spruce Up Is At Odds With What The Board Said In The Case And How It Has Applied The Test

Local 705 offers alternative arguments in support of its contention that the ALJ erred in finding that Nexeo did not become a perfectly clear successor under *Spruce Up* because neither the APS, nor any information communicated to the employees before Nexeo announced the employment terms it had established, misled the employees into believing their terms of employment were not going to change. The Union's first argument is that the ALJ misinterpreted the test adopted in *Spruce Up*. The issue the Union has with the ALJ's interpretation, however, seems to be that he applied the test exactly how the Board laid it out,

examining whether Nexeo “either actively or by tacit inference, misled employees into believing they would all be [retained] without change in their working conditions,” or “failed to clearly announce its [intent] to establish a new set of working conditions prior to making the offer of employment.” (ALJD p. 16).

Overlooking the very language the Board used in *Spruce Up* and the case law applying it, the Union contends that “[no] Board cases, nor *Burns* itself, requires a finding that the ‘new employer has either actively or by tacit inference, misled employees into believing that they would all be retained without change in their working conditions.’” (Local 705’s Brief p. 48, quoting the ALJD without citation). That, of course, is not true, as cases applying *Spruce Up* consider that exact question, as the language comes directly from *Spruce Up*. The Union next contends, again ignoring what *Spruce Up* says, that “the ALJ’s statement that at the least it must be shown that ‘the new employer failed to clearly announce its [intent] to establish a new set of working conditions prior to making the offer of employment . . . turns on its head the consistent Board precedent . . . holding that the new employer must announce his intention to change terms of employment prior to, or contemporaneous with, the statement of his intention to offer employment to the existing work force.” (Id. p. 48, emphasis in original). Far from turning Board precedent on its head, the ALJ’s statement is based upon it and, oddly enough, seems to say the same thing the Union says Board precedent holds.

These contentions, thus, lend no support to Local 705’s argument that the ALJ misinterpreted *Spruce Up*. In attempting to make sense of them, it seems that what the Union may really be arguing is that under *Spruce Up*, when a successor first informs the predecessor’s employees or their union representative that it plans to retain the employees, it must at that time disclose any changes it has decided to make to the employees’ terms of employment to avoid becoming a perfectly clear successor. The evidence that the Union may be making that argument

is its description of the facts in *Spruce Up* – it says that, in *Spruce Up*, “the Board found that the successor was not a ‘perfectly clear’ successor because he announced changes to the terms and conditions of employment at the same time he stated his general willingness to hire all of the employees.” (Local 705 Brief p. 47, emphasis in original). If that is what Local 705 is arguing, the Union misapprehends the *Spruce Up* test and how the Board has long applied it.

To avoid perfectly clear status under the *Spruce Up* test, a successor is not required when it first communicates that it plans to retain the predecessor’s employees to also spell out any changes that it has determined to make to the employees’ terms of employment. Again, under the test, a successor’s bargaining obligation attaches when it communicates plans to offer the predecessor’s employees jobs in a way that misleads the employees or their union that there will be no changes or that fails to put them on notice that changes are forthcoming. It is therefore enough, to avoid perfectly clear successor status, for a successor, prior to commencing operations, to communicate to the employees or their union that there are going to be changes, without describing them, or that it has not yet established initial employment terms and will get back to them when it has. See *Ridgewell’s, Inc.*, 334 NLRB 37 (2001), *enforced*, 38 Fed. Appx. 29 (D.C. Cir. 2002) (successor’s announcement of intent to employ predecessor’s employees as independent contractors found to put the employees on notice that initial employment terms would be different, leading to holding that successor’s unilateral establishment of new terms prior to commencing operations was lawful); *Dupont Dow Elastomers*, 332 NLRB 1071 (2000), *enforced*, 296 F.3d 495 (6th Cir. 2002) (successor that informed predecessor’s employees’ union representatives that it intended to offer employment to all of the employees under terms that it would announce on future date did not become a perfectly clear successor at that time but became one on the date that it announced the terms); *Resco Products, Inc.*, 331 NLRB 1546 (2000) (successor that informed predecessor’s employees that to work for it the employees

would have to waive claims for accrued vacation, and that they would, in return, receive increased pension benefits, held not to be a perfectly clear successor and to have had the right unilaterally to set initial employment terms); *Planned Building Services, Inc.*, 318 NLRB 1049 (1995) (successor that informed predecessor's employees that it would pay them the same wages as the predecessor, but that their benefits would not be the same, was not a perfectly clear successor and had the right to set initial terms of employment); *Banknote Corp. of America*, 315 NLRB 1041 (1994), *enforced*, 84 F.3d 637 (2d Cir. 1996) (successor's letter to predecessor's employees' union representatives informing them of intent to attempt to hire employees from predecessor's workforce, but stating it was not committing to recognize unions or be bound by the predecessor's labor agreements, found to put employees on notice successor would be making changes in employment terms, leading to holding that successor was not a perfectly clear successor and bargaining obligation did not attach until it hired the employees); *Henry M. Hald High School Assn.*, 213 NLRB 415 (1974) (successor that gave assurances to predecessor's employees that it would employ them, but added that the terms under which it would do so had not yet been established, held not to be a perfectly clear successor and to have had right to later establish initial employment terms). Here, the ALJ found that the APS and stream of messages alerted the unions and employees that there were going to be changes that would be announced in due course and that, therefore, neither the unions nor the employees were misled that things were going to remain the same. Board precedent shows that he was right.

As an alternative position, Local 705 submits that, if the ALJ is found to have correctly interpreted *Spruce Up*, then the Board should overrule *Spruce Up*. (Local 705's Brief p. 47-48). The Union, however, does not give an explanation why, in that event, *Spruce Up* should be overruled, nor does it suggest an alternative test. It only presents as a conclusion that interpreting *Spruce Up* the way the ALJ did would conflict with *Burns*. Neither the Board nor

the courts, however, have viewed *Spruce Up* that way for 38 years. The case meets every definition of the term “established precedent,” and no reason exists to revisit it here.

Lastly, the Union argues that if the ALJ is found to have correctly interpreted *Spruce Up*, and the Board decides not to overrule *Spruce Up*, the Board should find that the General Counsel proved that Nexeo misled the employees into believing that they would all be retained without changes in their working conditions. (Local 705’s Brief pp. 49-52). The General Counsel makes the same argument in support of his exceptions. Nexeo counters the argument in its brief answering the General Counsel’s exceptions, demonstrating that the argument fails under *Spruce Up* because (1) the terms of the APS and the documents on which the argument is based were not communicated to the unions or employees by Nexeo and (2) the APS and documents, in any event, put the unions and employees on notice that Nexeo had the right to make material, substantial and significant changes to the employees’ terms of employment. Nexeo has only three points to add here.

First, Local 705’s reliance on the information Ashland communicated to employees in the Q & A it posted on its intranet on November 8, 2010, is entirely misplaced because no evidence was presented that any Local 705-represented employees ever saw the Q & A or that they even had access to the Company’s intranet.

Second, the ALJ did not credit the testimony of union stewards Jordan and Sterba on which Local 705 relies to argue that Willow Springs plant manager Tony Kuk told them on February 11, 2011, that Ashland manager Pat Cassidy and he had been hired by Nexeo, that the Company was going to hire everyone, that no one would have to reapply, and that terms and conditions of employment would remain the same. In discrediting Jordan’s and Sterba’s testimony, the ALJ found that “Local 705 had a copy of the APS and knew of its content but thereafter seemed to repeatedly question Ashland Managers in an effort to get them to say

something slightly different.” (ALJD pp. 5-6). The ALJ could have added that Messino instructed Jordan and Sterba to attempt to set-up Kuk by asking him “pointed questions” about the transaction and that notes they took of their conversation on February 11, 2011 conflicted with their testimony. (Tr. 348-351). He might have also added that earlier that same day, Messino was told by Ashland human resources manager Kevin Meyers that, at the meeting it had scheduled with Local 705 on February 15, 2011, Nexeo was going to inform the union that it had determined to change the employees’ terms and conditions of employment, including their benefits, and he was not going to like it. (Tr. 123-126). Lastly, the ALJ could have pointed out that the documentary evidence showed that Kuk, like other Ashland employees, did not receive an offer of employment until February 17, 2011. (REX 8). For these reasons, the Board should not credit Jordan’s and Sterba’s testimony either.

Third, the proffered evidence on which the Union relies, which the ALJ excluded on hearsay grounds, of statements Ashland managers allegedly made to the Union and employees about Nexeo’s hiring plans necessarily cannot, because it is not part of the record, be considered in assessing the Union’s argument.

C. Whether The Benefits Provided By Nexeo Are Substantially Comparable In The Aggregate To Those That Were Provided By Ashland Is Irrelevant To The Disposition Of This Case

Local 705 devotes several pages of its brief to an argument that the ALJ erred in failing to decide if the retirement and healthcare benefits Nexeo provides to the Local 705-represented employees are substantially comparable in the aggregate to the benefits the employees received as participants in the Local 705 benefit plans while employed by Ashland. (Local 705’s Brief pp. 52-57). It contends that, under the “perfectly clear” doctrine, the ALJ was required to decide if Nexeo kept its promise. It is unclear, however, why the Union takes that position. This is not a breach of contract case.

All that Nexeo can surmise is that what the Union means to argue is that the ALJ needed to resolve whether the benefits are substantially comparable to decide if Nexeo, if it were found to be a perfectly clear successor, had a duty to bargain over implementing its benefit plans, i.e., whether moving the employees from the Local 705 plans to the Nexeo plans was a material, substantial and significant change. That would explain why it devotes so much space to the argument. Nexeo, however, has not argued that, if it were a perfectly clear successor, the changes it made would not be properly classified as mandatory subjects of bargaining. Its position is that it had no duty to bargain over the changes because it is not a perfectly clear successor.

D. The ALJ Properly Excluded As Hearsay Testimony Of Alleged Statements By Ashland Managers Regarding Nexeo's Hiring Plans

The last argument Local 705 makes that calls for a response from Nexeo is that the ALJ erred in excluding as hearsay testimony from Local 705 representative Messino and stewards Jordan and Sterba of alleged statements made by Ashland managers Paul Fusco, Pat Cassidy and Tony Kuk regarding Nexeo's hiring plans. The General Counsel offered the testimony in support of an agency-based theory he advanced in the Region 13 case. Under that theory, he contended that, in the period from November 8, 2010 to mid-February 2011, Ashland managers, acting as agents of Nexeo, made perfectly clear successor-triggering statements to Local 705-represented employees and Local 705. The theory, however, was undone by the General Counsel's failure to present evidence that the Ashland managers had actual or apparent authority to make the alleged statements as agents of Nexeo. In contending that the ALJ erred in excluding the testimony, the Union offers no legal basis for overturning his rulings. Its arguments must be rejected.

The burden of proving agency status is on the party asserting that agency status exists. *D.G. Real Estate, Inc.*, 312 NLRB 999 (1993). The test for determining whether an employee is

the agent of an employer is whether, under all of the circumstances, “the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.” *Omnix International Corp.*, 286 NLRB 425, 426-427 (1987). In *Local 9431, Communications Workers of America, AFL-CIO*, 304 NLRB 446, 448 (1991), the Board stated that agency status may be actual or apparent. An agent acts with actual authority when “the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.” Restatement 3d, Agency § 2.01; *see also Local 9431*, 286 NLRB at 446, n.4 (quoting the Restatement of Agency). Apparent authority, on the other hand, “is created through a manifestation by a principal to a third party that supplies a reasonable basis for the latter to believe the principal has authorized the alleged agent to do the acts in question.” *D.G. Real Estate, Inc.*, 312 NLRB 999 (1993). Two conditions must be satisfied before apparent authority may be found: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.*

Under these authorities, the General Counsel could not prevail on his agency theory without first establishing that Nexeo, as a principal, took some affirmative action to confer agency status on Ashland managers. On the first day of the hearing in the Region 13 case, the ALJ made it clear that the General Counsel would have every opportunity to establish his agency theory, but that in attempting to do so he would be required to follow the rules of evidence. (Tr. 30-31). Accordingly, the ALJ ruled that before he would admit any hearsay statement regarding what Ashland managers said to Ashland employees about Nexeo’s future intentions, the General Counsel would first have to lay a “tolerable” foundation that the managers at issue were in fact agents of Nexeo at the time the statements were made. (Tr. 39, 42, 50). To that end, the ALJ determined that any alleged statements Ashland managers made to employees prior to February

21, 2011 – the date when the managers at issue accepted Nexeo’s February 17, 2011 offer of employment – regarding terms and conditions of employment at Nexeo would not be admitted into evidence absent a foundational showing of agency status. (Id.).

On every occasion that the ALJ ruled testimony the General Counsel sought to elicit of a pre-February 20, 2011 conversation inadmissible, the General Counsel failed to introduce any foundational evidence that the speaker at issue was an authorized agent of Nexeo at the time the statement was allegedly made. The ALJ, thus, properly excluded the testimony. *See Pan-Oston Co.*, 336 NLRB 305, 306 (2001) (no agency status on the part of a supervisor where there was no evidence that the respondent communicated to employees that he was acting on its behalf at the time he engaged in the acts in question); *Omnix International Corp.*, 286 NLRB 425, 426-427 (1987) (agency status not found because no evidence was adduced at the time of the alleged statements that respondent held the individual out as being privy to management decisions or as speaking with management’s voice about the matters at issue); *The Zack Company*, 278 NLRB 958, 959 (1986) (no agency status where the foreman had no responsibility or authority for the employment decisions at issue).

For example, the General Counsel attempted to introduce testimony that Local 705 representative Messino had a discussion with Ashland human resources manager Fusco on November 8, 2010, during which Fusco allegedly stated that Nexeo planned to retain all of the unit employees. (Tr. 73-75). The ALJ properly sustained the Company’s objection to this testimony on the grounds that it was hearsay and that the General Counsel failed to introduce any foundation that Fusco was an agent of Nexeo at the time he allegedly made the statement. (Id.)

The General Counsel attempted to introduce similar testimony regarding a discussion Messino allegedly had with Fusco during an Ashland bargaining session on November 17, 2011. Again, Fusco supposedly said that Nexeo planned to hire all unit employees. However, Fusco

also informed Messino during this conversation that he did not have authority at that time to bargain on behalf of the Company. Thus, ALJ did not abuse his discretion in excluding this testimony on hearsay grounds. (Tr. 83-88).

The General Counsel claimed that Ashland managers Pat Cassidy and Tony Kuk were Nexeo agents based on statements they allegedly made during a November 11, 2010, “town hall” meeting with unit employees and because they “aligned themselves with Respondent.” According to the General Counsel, union steward Jordan would have testified that he heard Cassidy and Kuk say at the meeting that they “assumed” Nexeo would hire them, that Nexeo planned to hire the unit employees, and that there would be no changes. (Tr. 293). Again, however, the General Counsel failed to offer any foundational evidence in support of his claim that Cassidy and Kuk were somehow authorized to communicate this information on behalf of Nexeo. Furthermore, as the Board has made clear, the actions of Kuk and Cassidy in providing alleged “assurances” to unit employees, standing alone, cannot establish their agency status. *See Sea Mar Community Health Centers*, 345 N.L.R.B. 947, 950 (2005) (holding that the alleged agent’s “conduct alone cannot establish apparent authority”). To the contrary, as the Board squarely held in *Bekins Moving & Storage Co.*, 330 NLRB 761 (2000), if a representative of the predecessor is not authorized to act on behalf of the successor, the representatives actions are not binding and cannot form the basis for a perfectly clear successor finding.

Under Section 102.35 of the Board’s Rules and Regulations, the administrative law judge has a duty to “rule upon offers of proof and receive relevant evidence.” 29 C.F.R. § 102.35. Under well settled Board principles, an administrative law judge’s evidentiary rulings will not be disturbed absent a showing that the rulings constituted an abuse of discretion. *See, e.g., Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005). The Union has made no showing that the ALJ abused his discretion.

III. CONCLUSION

For all of the foregoing reasons, and the reasons stated in its brief answering the General Counsel's exceptions, Nexeo respectfully requests that the Board adopt the ALJ's findings that the General Counsel failed to prove, and the ALJ's recommended order dismissing the paragraphs of the complaint alleging, that Nexeo is a perfectly clear successor and violated the Act by unilaterally implementing its retirement and healthcare plans in place of the plans in which the Local 70- and Local 705-represented employees participated as Ashland employees.

Respectfully submitted,



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I hereby certify that on this 30th day of November 2012, I served the foregoing Brief upon the following via email:

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