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No. 95002-4
Court of Appeals Cause No. 76091-2-1

SUPREME COURT OF THE STATE OF WASHINGTON

REBECCA A. RUFIN,

Plaintiff/Appellant,

v.

CITY OF SEATTLE and JORGE CARRASCO,

Defendants/Respondents.

RESPONDENTS CITY OF SEATTLE AND JORGE CARRASCO'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondents respectfully submit that this Court should deny the Petition. In two of the issues that Petitioner presents (nos. 1 and 4), she argues there is an issue of substantial public interest, but there is none. Petitioner's arguments about the Records Retention Act distort the Court of Appeals' opinion, conflate the Records Retention Act with the Public Records Act, and are unsupported by law. Further, contrary to Petitioner's claims, the City did not violate Washington law and did not act with "gross negligence" or engage in "bad behavior" in discovery.

In the other two issues (nos. 2 and 3), Petitioner claims there is a decisional conflict, but there is not. The Court of Appeals applied appropriate standards correctly. Finally, the Petition should be denied because the Unpublished Opinion has no value as precedent and is not binding on any court. GR 14.1(a).

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

Issue No. 1 Petitioner incorrectly asserts that that Court of Appeals held that the City may destroy emails that it is required to preserve. The Court of Appeals actually rejected Petitioner's argument that copies of an email should have been retained and held that the City's conduct in accordance with Washington law does not provide clear and

convincing evidence of misconduct. Issue No. 1 does not present an issue of substantial public interest.

Issue No. 2 Petitioner incorrectly argues that the Court of Appeals' Unpublished Opinion is in conflict with *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), regarding the "interpretation" of the phrase "public business." *Nissen* is a case under the Public Records Act, RCW 42.56 (the "PRA"), whereas here the Court of Appeals considered the City's conduct under the Records Retention Act, RCW 40.14 (the "Retention Act"). There is no conflict.

Issue No. 3 Petitioner incorrectly asserts that *Peoples Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989), set forth a standard for relief under CR 60(b)(4) that was not followed here. The Court of Appeals applied the correct standard. There is no conflict.

Issue No.4 Petitioner argues the evidence does not support the determination that the City's non-production of an email did not constitute a discovery violation. But the trial court and the Court of Appeals carefully reviewed the all the relevant evidence and correctly applied the law. There is no issue of substantial public interest.

III. STATEMENT OF THE CASE

We incorporate by reference the Court of Appeals' statement of facts, Opinion at 1-5, and the statement of facts in Respondents' Brief on

Appeal at 3-10. Petitioner already has had a great deal of judicial attention to her various claims, including a jury trial, a bench trial, three arguments in the Court of Appeals, and previous petitions to this Court.

Her current arguments center on one email dated April 18, 2012, that she likes to call "the smoking gun." (The April 18, 2012 email is reproduced at CP 45-46 and described in context in the Court of Appeals' Unpublished Opinion ["Op."] at 1-4.) In the April 18 email, City Light hiring manager Mike Haynes internally forwards a communication from Petitioner with a message that reads in full: "I am just getting caught up after being out for a week. I have not replied." CP 45.

In discovery, pursuant to an order from the trial court, the City searched for emails relating to Petitioner in places they would most logically reside—and the City did not find the April 18, 2012 email. Pursuant to a request in a subsequent PRA action (also the subject of a pending petition for discretionary review), the City located the April 18 email and produced it. Petitioner claims the City willfully withheld the April 18, 2012 email from production in discovery to prevent her from using it in support of her retaliation claim, that is, to link City Light's general manager and CEO to the decision not to re-hire her. On Petitioner's CR 60(b)(4) and CR 37 motion, the trial court reviewed its discovery order and the relevant evidence and rejected Petitioner's claim

as not credible. The trial court denied Petitioner's motion, and the Court of Appeals affirmed.

IV. ARGUMENT

Contrary to Petitioner's arguments, there is no decisional conflict, and there is no issue of substantial public interest raised by the Court of Appeals' application of settled Washington law in an unpublished decision. Consequently, the petition should be denied. RAP 13.4(b).

A. The Court of Appeals Correctly Determined that Petitioner Did Not Establish Misconduct.

Petitioner's Issue No. 1 rests on a contorted reading of this sentence from the Court of Appeals' Unpublished Opinion:

> The City's failure to retain copies of the e-mails under its retention policy does not provide clear and convincing evidence of misconduct.

Op. at 12. Petitioner asserts that by way of this sentence the Court of Appeals held (1) that the City destroyed documents in violation of Washington law and (2) that such wrongful destruction of documents is not clear and convincing evidence of misconduct. See Petn. at 9-11. That assertion is incorrect on both points. The Court of Appeals actually rejected Petitioner's argument that the email copies should have been retained and held that Petitioner failed to provide clear and convincing evidence of misconduct. Op. at 11-12.

The City's document retention policy follows Washington law. As noted by the Court of Appeals, Op. at 11, the City adheres to retention schedules for different categories of records pursuant to the Local Government Common Records Retention Schedule ("CORE") in accordance with the Retention Act, RCW 40.14.070.[1]

To put Petitioner's Issue No. 1 in full context: The relevant portion of the Court of Appeals decision begins on page 10 (¶ "Rufin also asserts…") and concludes at the end of page 12 ("…the April 18, 2012 e-mail."). The passage begins with the Court of Appeals' summary of one of Rufin's arguments on appeal—that "the City committed misconduct by destroying the copies of the April 18, 2012 e-mail that resided in Haynes's and Johnson's e-mail accounts" and that "the destruction of this evidence constituted misconduct." Op. at 10. The Court of Appeals next briefly reviews Washington spoliation law, noting that there can be no spoliation absent a duty to preserve the evidence in question. Op. at 10-11. The Court of Appeals then notes Rufin's allegation that the City has a statutory duty under the Retention Act, RCW 40.14.070(2)(a), to preserve the April 18, 2012 email in Haynes's and Johnson's possession. To assess that claim, the Court of Appeals analyzes Petitioner's allegation that the April

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[1] *See* https://www.sos.wa.gov/archives/recordsretentionschedules.aspx; *see especially id.* at p.1.

18 email fits within two categories set forth in the Local Government Common Records Retention Schedule. It concludes that the April 18 email fits within neither. Op. at 11. The Court of Appeals concludes with its rejection of Rufin's spoliation claim:

> Rufin cites no case law interpreting RCW 40.14.070(2)(a) or these retention schedules in the context of a spoliation claim. We cannot conclude that the trial court abused its discretion in concluding no sanctionable spoliation occurred here. The City's failure to retain copies of the e-mails under its retention policy does not provide clear and convincing evidence of misconduct.

Op. at 12.

In the entire 3-page passage leading up to this conclusion, there is nothing to suggest that the Court of Appeals determined that the City failed to retain records that it was required to retain. Rather, the Court of Appeals examined Petitioner's allegation—that the email copies should have been preserved on grounds that the email fit two categories requiring retention for 2 and 3 years respectively—and rejected it. The Court of Appeals found that the email copies did not qualify as a non-executive communication or as a recruitment file under CORE. Op. at 11-12. The Court of Appeals held that the Petitioner did not provide clear and convincing evidence of misconduct and that the trial court did not abuse its discretion in finding that no sanctionable spoliation occurred. Op. at 12.

In sum, Petitioner's argument misrepresents the Court of Appeals' decision. It does not present an issue of substantial public interest.

B. There Is No Conflict with the *Nissen* Decision.

Petitioner incorrectly argues that the Court of Appeals' "interpretation of the term 'public business'" is in conflict with *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). There is no conflict.

Nissen is a Public Records Act case—it does not concern or address the issue the Court of Appeals analyzed here under the Retention Act and the local government retention schedules promulgated thereunder ("CORE"). Further, contrary to Petitioner's suggestion, *Nissen* does not "interpret" or define the term "public business."

Petitioner asks this Court to conflate the Retention Act and CORE with the PRA. The purpose of the PRA, RCW 42.56, is to provide broad "public access to information about every aspect of state and local government." *Nissen*, 183 Wn.2d at 874. The Retention Act, RCW 40.14, is a government document housekeeping statute, providing guidelines for the management of state records, including as to which government documents must be retained and for how long, and which are not required to be maintained. *See, e.g.,* RCW 40.14.020, -040, -060, -070, -130. Unlike the PRA, the Retention Act does not provide a private right of action. *See* RCW 40.14.

The issue that the Court of Appeals addressed in discussing "public business" is whether the City had a statutory duty—under the Retention Act and CORE, not under the PRA—to preserve the April 18, 2012 email. See Op. 11-12. Rufin argued that the April 18 email fit under two categories provided in CORE: "non-executive communications" or "recruitment files." Op. at 11.[2] Quoting the description in CORE, the Court of Appeals stated that "'non-executive communications' applies to 'internal and external communications to or from employees (includes contractors and volunteers) that are made or received in connection with the transaction of public business.'" Op. at 11-12 [quoting CORE DAN GS2010-001 Rev. 2]; see CP 646. The Court of Appeals then determined that the April 18 email did not fit the definition of non-executive communications, explaining:

> A non-executive communication must be 'made or received in connection with the transaction of public business.' But, the April 18, 2012 e-mail did not purport to transact business with the public. It was a forwarded e-mail from Haynes to Johnson, Maehara, and Kern.

Op. at 12. The Court of Appeals also stated that the email "did not provide or solicit advice regarding Rufin's concerns," referring again to

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[2] The City submits, as it did in its Response Brief below at 24 n.8, that the email the email is more accurately described as a "transitory record" under the CORE schedule, which are retained only "until no longer needed for agency business." See CP 1056 (DAN GS50-02-05, Rev. 1). The so-called smoking gun, which in substance says only "I have not replied," seems a perfect example of a transitory record that can be deleted when no longer needed.

the CORE definition of non-executive communications, which includes "requests for and provision of information/advice." Op. at 12; see CP 646 [CORE DAN GS2010-001 Rev. 2]. The Court of Appeals also found that the email did not fit the other CORE category proposed by Petitioner – "recruitment files." It concluded that the trial court had not abused its discretion in finding that no sanctionable spoliation occurred. Op. at 12.

Petitioner argues that the Court of Appeals' "interpretation" of "transaction of public business" to mean "transact[ing] business with the public" (Op. at 12) is too narrow and that "public business" in the CORE definition of "non-executive communication" must mean "agency business." In support, Petitioner seeks to rely on (1) the definition of "public record" in the Retention Act and (2) the Supreme Court's use of the term "public record" in *Nissen*, a PRA case. But neither the Retention Act nor *Nissen* provides support for Petitioner's argument.

1. The Retention Act supports the Court of Appeals' application of the CORE definition.

Petitioner's reliance on the Retention Act definition of "public records" is misplaced: The definition of "non-executive communication" in CORE is in relevant part and for all practical purposes a verbatim restatement of the Retention Act definition of "public record." Specifically, CORE defines "Communications – Non-executive" in

relevant part as “Internal and external communications to or from employees (includes contractors and volunteers), that are made or received in connection with the transaction of public business[.]” See CP 646 [DAN GS2010-001 Rev. 2]. The Retention Act likewise defines “public record” in relevant part to include “any… correspondence…that [has] been made by or received by any agency of the state of Washington in connection with the transaction of public business[.]” RCW 40.14.010.

Petitioner’s proposed interpretation of the term “public business” as used in CORE and the Retention Act is so expansive that it would effectively delete the phrase “public business” from those definitions. It would make any email generated by a government employee, no matter to whom or whether it concerns “the transaction of public business,” a public record for purposes of the Retention Act and CORE. That result would be contrary to Washington law. A Washington court “must construe statutes such that all of the language is given effect.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

2. *Nissen* does not define “public business” and does not address the Retention Act.

Petitioner’s reliance on *Nissen* is also misplaced. *Nissen* concerned application of the Washington Public Records Act, RCW 42.56,

and held that the PRA applies to the content of a public employee's private cell phone when used to conduct government business.

Petitioner argues that the Supreme Court "used" the term "public business" four times in *Nissen* and used it interchangeably with other terms such as "agency business," such that "public business" means "agency business." Petn. at 12. Petitioner seeks to import "the broad interpretation of the phrase 'public business' in *Nissen*" (Petn. at 13) into the Retention Act and the CORE definition of non-executive communications.

But *Nissen* does not define or "interpret" the term "public business." Moreover, *Nissen* does not address or concern the Retention Act or CORE. *See* 183 Wn.2d at 872-87 (applying PRA)

Petitioner fails to acknowledge a critical point—that the PRA definition of "public record," RCW 42.56.010(3), is different from the definition of "public record" under the Retention Act.[3] The PRA definition includes no "public business" limitation, whereas the Retention Act definition includes an express reference to "*the transaction of public business*." *Compare* RCW 42.56.010(3) (PRA definition of "public record") *with* RCW 40.14.010 (Retention Act definition of "public

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[3] The PRA defines "public record" as, in relevant part, "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(3).

records") (emphasis added). "[W]hen the legislature uses different words, appellate courts deem the legislature to have intended different meanings." *State v. Castillo-Murcia*, 188 Wn. App. 539, 546, 354 P.3d 932 (2015) (internal quotation omitted).

In light of the different definitions of "public record" under the PRA and the Retention Act, the Courts of Appeals statement that the April 18 email does not fit the CORE definition of "non-executive communication" does not conflict with *Nissen*. Moreover, the Retention Act and CORE definitions' express references to "transaction of public business" make the Court of Appeals' statement that a non-executive communication must be made in connection with the transaction of public business wholly consistent with the Retention Act and CORE itself.

Finally, even if the Court of Appeals' "interpretation" of "public business" were somehow in conflict with *Nissen*—and it is not—it would be of no moment. The Court of Appeals' Unpublished Opinion has no precedential value. GR 14.1(a). And it does not diminish the Supreme Court's well-established, deliberate, broad construction of the PRA as a tool for public access to information about every aspect of government. *See Nissen*, 183 Wn.2d at 874. The Court of Appeals' Unpublished Opinion does not present any issue under the PRA.

C. The Court of Appeals Applied the Correct Standard for Relief under CR 60(b)(4).

Petitioner asserts that *Peoples State Bank*, 55 Wn. App. 367, 777 P.2d 1056 (1989), set a standard "for proving misrepresentation" and that the Court of Appeals failed to follow that standard. Petitioner is incorrect.

In *Peoples State Bank*, the Court of Appeals adopted federal authorities in applying the standard for relief under CR 60(b)(4):

> Courts interpreting the federal rule state that one who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense.

Id. at 372 (citations omitted). Applying that standard for relief under CR 60(b)(4), *Peoples State Bank* affirmed a default judgment.

Here, the Court of Appeals applied the correct standard for relief under CR 60(b)(4), citing *Peoples State Bank*. It stated:

> The party asserting that a judgment has been obtained through fraud, misrepresentation, or other misconduct has the burden of proving the assertion by clear and convincing evidence. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). It is immaterial whether the misrepresentation was willful or innocent, since the effect is the same. *Id.* at 371. The party requesting relief must show that the misconduct prevented a full and fair presentation of its case. *Dalton v. State*, 130 Wn. App. 653, 665, 124 P.3d 305 (2005).

Op. at 6.

The Court of Appeals carefully reviewed Petitioner's arguments that the April 18 email contradicted four facts elicited at the discrimination trial. Op. at 14. Among these was the fact that in a declaration in response to Rufin's motion to compel, Johnson stated that all of her responsive emails had already been provided to Rufin. *Id.* Addressing this particular issue, the Court of Appeals noted that Johnson was presented with the April 18 email in a deposition in October 2015 and testified that she did not remember receiving it or discussing it with Haynes. Op. at 15. The Court of Appeals then stated that "while Johnson's statement that she had already provided all responsive emails was factually untrue, she believed it to be true." Op. at 14. The Court of Appeals then concluded that "[t]he April 18, 2012 email does not provide clear and convincing evidence of misrepresentation by the City. We hold that the trial court did not err in finding that the City did not commit misconduct or misrepresentation as is necessary to vacate a judgment under CR 60(b)(4)." Op. at 15.

Contrary to Petitioner's assertion, the Court of Appeals manifestly applied the correct standard—the very standard set forth in *Peoples State Bank*. See Op. at 6, 15; *Peoples State Bank*, 55 Wn. App. at 372. The

Court of Appeals found that Petitioner had not established by clear and convincing evidence that the judgment was unfairly obtained. Rufin now asks, in her Petition, that this Court consider Johnson's statement that she had already provided all responsive emails in isolation, but the Court of Appeals appropriately considered it in the context of all of Petitioner's arguments regarding the April 18 email and concluded that Rufin had not met the standard for relief under CR 60(b)(4). See Op. at 13-15. There is no conflict between the Court of Appeals Unpublished Opinion and *Peoples State Bank* regarding the standard for relief under CR 60(b)(4).

D. The Finding that No Discovery Violation Occurred Does Not Present an Issue of Substantial Public Interest.

Petitioner argues, as she did in the trial court and on appeal, that a discovery violation occurred. She argues that it was unreasonable for the City not to include the emails of Gary Maehara in its search for emails relating to Rufin during discovery in the retaliation lawsuit. Petitioner argues that the issue presents a matter of substantial public interest because "[p]ermitting such grossly negligent conduct in discovery to go unremedied will only encourage more bad behavior from litigants." Petn. at 17. But there was no grossly negligent conduct – far from it – and no "bad behavior."

As Petitioner acknowledges, the trial court found that the City "conducted a reasonable search for all responsive emails and had no reason to search Maehara's archived emails until Rufin filed a public records act lawsuit in 2015." Petn. at 14; CP 1370. The trial court first noted the terms of its own discovery order that governed the City's conduct. It required the City…

> …to look for emails relating to Rufin 'in places they are most logically likely to reside and places easily accessible and searchable, including personnel files, any paper files, and any electronic files' maintained by specified individuals—DaVonna Johnson, Jorge Carrasco, Mike Haynes, and Darnell Cola. The Court also ordered the City to search the City's email server or 'wherever it is most logical that [these specified employees' email will reside.' The Court did not order the City to conduct a city-wide computer search for all emails relating to Rufin.

CP 1370. The trial court then reviewed all the evidence and concluded that the City conducted the required search and that the search was reasonable. CP 1370-71. It found that at the time the City conducted the search, it had no cause to believe "that any responsive emails would be found in Maehara's email archives." CP 1371.

Further, the trial court found that Maehara's failure to realize he had received an email relating to Rufin more than a year earlier "does not prove fraud or intentional withholding of evidence by the City." *Id.* The trial court determined that if the City had found the email it would have

produced it, given the City's responses to multiple discovery and PRA requests at the time, and that Rufin's contention that the City withheld it to prevent her from connecting Carrasco to the decision not to re-interview her in 2012 was not credible. *Id.*

The trial court concluded that the City had not willfully violated the discovery rules or the trial court's discovery order and declined to impose sanctions under CR 37. The trial court again noted that its order did not require the City to search Maehara's files. CP 1372. The trial court specifically found: "Rufin's contention that the City hid this email from her in discovery as a way to protect Carrasco from possible liability is not credible." *Id.* Accordingly, it found discovery sanctions unwarranted under CR 37, *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 835, 696 P.2d 28 (1985), and *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.2d 191 (2009). CP 1373.

On appeal, the Court of Appeals stated correctly that "whether the City conducted a reasonable search for records was a factual question best resolved by the trial court." Op. at 9. But the Court of Appeals extensively reviewed the evidence presented by the City relating to the issue, including the content of several declarations and testimony. Op. at 9-10. It also reviewed the evidence offered by Rufin, noting that she "presented no evidence that Maehara saw the April 18, 2012 e-mail" and

that "[s]he did not show that he remembered receiving this email." Op. at 10. The Court of Appeals concluded: "On this evidence the trial court could find that the City conducted a reasonable search for responsive e-mails and that it would have produced the e-mail in response to Rufin's discovery requests, if it had found it." *Id.*

The Court of Appeals also held that "the trial court properly applied the law in determining that the harsh sanctions of default judgment or a new trial were not warranted" and that the trial court did not abuse its discretion in denying Rufin's CR 37 motion. Op. at 20. The Court of Appeals carefully reviewed *Magaña* and *Taylor* and held that the trial court did not misapply the law: "[The trial court] found that the City did not willfully or deliberately violate the discovery rules or the court's order." Op. at 19. Moreover, the Court of Appeals noted that—unlike in *Magaña* and *Taylor*, in which defendants knew of responsive documents and withheld them without a reasonable excuse—the record here shows that the City looked for responsive documents in the most likely places, and nothing in the record suggests the City knowingly withheld the April 18 email. *Id.*

Petitioner argues that it was unreasonable not to search Maehara's email archives. But, as detailed above, the trial court and the Court of Appeals rejected that argument after thorough review of the discovery

order and all the evidence concerning the City's conduct. CP 1370-72; Op. at 9-10, 15-20.

Petitioner argues that the trial court ignored the willful violation standard—that a discovery violation is willful if done without a reasonable excuse. Petn. at 14; *see Taylor*, 39 Wn. App. at 836. But the trial court found that the City's search was indeed reasonable and that the City would have produced the email if the City had found it. CP 1370, 1371. Accordingly it found no willful violation of discovery rules. CP 1372. Similarly, Court of Appeals expressly acknowledged the *Taylor* elaboration of the standard and concluded that the trial court properly applied the standard. Op. at 16, 19, 20.

Petitioner argues that the Court of Appeals has "allowed" the City "to aver" that it had no reason to search Maehara's email. Petn. at 16. But the City's witnesses submitted fact declarations that were carefully considered by the trial court and subsequently by the Court of Appeals. CP 1371; Op. at 9-10.

Petitioner also argues that there was a finding that Maehara "should have known" to search his own email account for email relating to Rufin. Petn. at 16. But Petitioner misrepresents the trials court's statement and the full context of the trial court's determination on the issue. The trial court stated that "[w]hile Maehara could have and,

perhaps should have, realized" in 2013 that he had received email correspondence relating to Rufin in April 2012, "his failure to remember does not prove fraud or intentional withholding of evidence by the City" because the City was responding to multiple email requests at the time, the City would have produced the April 18 email had it been found. CP 1371 (emphasis added). The trial court found Rufin's contention that the City withheld the April 18 email to prevent Rufin from drawing a connection between Carrasco and the decision not to re-hire was not credible. *Id.*

In short, the Court of Appeals applied the correct standard, and the evidence supports the conclusions of the trial court and the Court of Appeals that no willful violation of the discovery order or discovery rules occurred. There was no wrongful conduct by the City and no decision to leave wrongful conduct without a remedy. There is no issue of substantial public interest.

V. CONCLUSION

The Unpublished Opinion has no precedential value and no binding authority on any court. GR 14.1(a). The petition identifies no decisional conflict and no issue of substantial public interest. *See* RAP 13.4(b). As a result, the petition must be denied. *Id.*; *In re Combs*, 182 Wn.2d 1015, 353 P.2d 631 (2015).

RESPECTFULLY SUBMITTED: October 20, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 20, 2017, a true and correct copy of the foregoing **ANSWER TO PETITION FOR REVIEW** was served via email/PDF on the following:

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