IN THE SUPREME COURT OF IOWA

No. 16-0775

OLIVER FENCEROY, Plaintiff-Appellee

v.

GELITA USA, INC., TOM HAIRE, AND JEFF TOLSMA, Defendants-Appellants

and

BOB KERSBERGEN and JEREMY KNEIP, Defendants.

On Appeal from the District Court of Woodbury County, Iowa

Honorable Jeffrey A. Neary

APPELLANTS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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II. ROUTING STATEMENT

Defendants-Appellants Gelita USA, Inc., Tom Haire and Jeff Tolsma (collectively "Defendants") submit that this case should be retained by the Iowa Supreme Court because it presents substantial issues of first impression and of public importance under Iowa R. App. P. 6.1101(2) concerning the

preservation of the attorney-client privilege and work product doctrine when legal counsel is hired to investigate and defend a discrimination charge after an employee-claimant terminates his or her employment.[1]

III. STATEMENT OF THE CASE

This case is before the Court on interlocutory appeal. On April 18, 2016, the District Court overruled Defendants' Motion for a Protective Order arising from Plaintiff's request to take the deposition of defense counsel and obtain testimony and information protected by the attorney-client privilege and work product doctrine. The District Court concluded that Defendant Gelita USA, Inc. waived the attorney-client privilege and the protection of the work product doctrine by asserting the *Faragher-Ellerth* affirmative defense in response to Plaintiff's claims of racial harassment. (App. pgs. 230-36). Defendants seek to overturn the District Court's April 18, 2016 ruling and protect attorney-client communications and work product relating to the defense of Plaintiff's charge of discrimination. Defendants timely filed their Notice of Appeal and Application for Interlocutory Appeal on May 6, 2016. (App. p. 237). On July 1, 2016, the

[1]/ When granting Defendants' Motion to Stay Proceedings Pending Appeal, the District Court noted that this case "involved issues of first impression in this State and are critical to the case for both parties." (App. p. 243).

Iowa Supreme Court granted Defendants' Application for Interlocutory Appeal to review this matter. (App. p. 279-81).

IV. STATEMENT OF FACTS

A. Claims of Discrimination and Harassment.

Plaintiff-Appellee, Oliver Fenceroy ("Fenceroy") was employed by Gelita USA, Inc. ("Gelita" or the "Company") for approximately 37 years. (App. p. 2). He voluntarily retired from his employment at the end of March 2013. (App. p. 22). After leaving his employment, he filed a Charge of Discrimination with the Iowa Civil Rights Commission ("ICRC") in April 2013. (*Id.*). In his charge, Fenceroy alleged that he was subjected to racial jokes, comments and other conduct while working at Gelita. (*Id.*). It is uncontroverted that during his employment, Fenceroy never complained about racial jokes or comments in the workplace to Human Resources or management and did not follow the complaint procedures set forth in the Company's discrimination policy to report these matters. (App. pgs. 22, 42, 138). The alleged racial comments and jokes were not disclosed by Fenceroy until after he retired and filed his charge of discrimination. (App. p. 138).

B. Counsel's Defense of Discrimination Charge.

After Fenceroy filed his charge with the ICRC, Gelita hired defense counsel Ruth Horvatich to defend the Company. (App. p. 22). At all times during the proceedings before the ICRC and throughout the course of this litigation, Horvatich has always served in the capacity of defense counsel and her services have been devoted to providing a defense to Gelita concerning Fenceroy's claims of discrimination and harassment. (App. p. 23). While defending Gelita against Fenceroy's allegations, Horvatich interviewed several employees and had witnesses sign written statements. (*Id.*). Employee witnesses were allowed to keep a copy of their statements and the written statements were produced to Fenceroy during discovery. (*Id.*). Horvatich prepared and filed Gelita's position statement with the ICRC responding to Fenceroy's allegations. (*Id.*).

After completing interviews, it was determined that inappropriate racial comments and jokes did occur in the workplace. (*Id.*). As a result, the Company terminated one employee and disciplined other employees who failed to report incidents of inappropriate behavior. (App. pgs. 23, 43). Defense counsel did not participate in disciplinary decisions that were made by the Company. (App. p. 23).

Jeff Tolsma, Gelita's Vice President, Business Support, was present during all of the interviews Horvatich conducted with employees, and it was Tolsma and other Company representatives that made decisions pertaining to disciplinary action rendered by the Company. (*Id*.). On February 23, 2016, Fenceroy's counsel deposed Tolsma regarding the steps taken by the Company in response to Fenceroy's charge including the disciplinary action imposed by the Company. (App. p. 24).

After administrative proceedings with the ICRC were concluded, Plaintiff filed a Petition in the Iowa District Court for Woodbury County asserting claims for race discrimination under the Iowa Civil Rights Act ("ICRA"). (App. pgs. 1-6). In their Answer to the Petition, Defendants asserted several affirmative defenses including: (1) "Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant Gelita USA, Inc. or to otherwise avoid harm;" and (2) "Defendants exercised reasonable care to prevent and promptly correct any harassing behavior to its knowledge." (App. p. 10). The first defense is based on Fenceroy's failure to report any racial jokes and comments during his employment and his failure to take advantage of preventive and corrective opportunities provided by Gelita. The second defense is based on Gelita's assertion that it exercised reasonable care to prevent and promptly

correct any harassment issues in the workplace that were brought to its attention.[2]

C. Notice to Take Defense Counsel's Deposition and Request for Records.

On March 23, 2016, in connection with this action, Fenceroy's counsel issued an Amended Notice to take the deposition of defense counsel Ruth Horvatich. (App. pgs. 26-27). The Amended Notice included a request to produce "notes from the investigation that resulted in Gelita's Position Statement to the Iowa Civil Rights Commission" and "notes from interviews" with employees of Gelita. (*Id.*).[3]

On March 23 and March 30, 2016, counsel for the parties conferred regarding the deposition of Ruth Horvatich. (App. pgs. 3-4). During those conferences, it was fully explained that Horvatich was hired by Gelita after Fenceroy retired and filed his charge of discrimination. (*Id.*). Furthermore,

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[2]/ In 2011, during Fenceroy's employment, Fenceroy complained about a rope that he thought looked like a noose. (App. pgs. 42-43). The rope was attached to a large scale and was tied in a loop so employees using the scale could easily pull the rope to add weight to the scale during production. (App. p. 42). Gelita maintains that it investigated Fenceroy's complaint in 2011 and the matter was resolved. (App. p. 43). This is the only complaint ever reported by Fenceroy during his employment.

[3]/ Ruth Horvatich did not take any notes during the employee interviews but rather, typed up witness statements which were printed and signed by each employee at the end of their interviews. (App. p. 24). As stated above, these statements have been produced to Fenceroy during discovery. (*Id.*).

Fenceroy's counsel was advised that any communications between defense counsel and Company management would be privileged and any records created by Horvatich concerning her defense of the charge would be protected by the work-product doctrine. (*Id.*). Fenceroy's counsel was asked to identify the information sought from Ruth Horvatich. (*Id.*). In response to this request, Fenceroy's counsel could not identify any non-privileged information that defense counsel could provide that was not available through the testimony of Jeff Tolsma, whose deposition had been taken on February 23, 2016. (*Id.*).

During the course of these proceedings, Fenceroy's counsel asserted that privileged communications and work product are relevant to show that defense counsel was hired by Gelita to manufacture a "sham investigation" that was "carried out" by defense counsel "in reckless disregard of Plaintiff's rights, entitling him to punitive damages." (App. pgs. 188, 191). Defendants maintain that such allegations are completely unfounded and that defense counsel's investigation and defense of the discrimination charge after Fenceroy left his employment is not "at issue" in this action and is protected by the attorney-client privilege and work product doctrine.

D. Motion for Protective Order.

On April 1, 2016, Defendants filed a Motion for Protective Order to preclude the deposition of defense counsel Ruth Horvatich and to protect attorney-client communications and work product. (App. pgs. 19-36). On April 18, 2016, the District Court entered an Order overruling Defendants' Motion for Protective Order and held that Gelita "waived both its attorney-client privilege and protection of the work product doctrine as to Attorney Horvatich's investigation, when Gelita put forth the *Faragher-Ellerth* affirmative defense." (App. pgs. 230-36). In its Order, the District Court did not consider whether other means existed to obtain the information requested or whether the information sought was crucial to the preparation of Fenceroy's case. (*Id.*).

V. ARGUMENT

A. The Issue was Preserved for Appellate Review.

Defendants timely filed their Notice of Appeal and Application for Interlocutory Appeal on May 6, 2016. (App. pgs. 237-38). The Application for Interlocutory Appeal was granted by the Iowa Supreme Court on July 1, 2016. (App. pgs. 279-81).

B. Standard and Scope of Review.

The appellate courts will review the district court's rulings on discovery matters under an abuse of discretion standard. *Mediacomm. Iowa, LLC v. Incorporated City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004). "A ruling based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion." *Id.* (citing *Shook v. City of Davenport*, 497 N.W.2d 883, 885 (Iowa 1993)).

If the District Court's ruling on waiver is not overturned, defense counsel will be required to divulge privileged information and work product relating to the defense of Plaintiff's claims. Requiring defense counsel to appear as a witness and divulge privileged information and work product will likely lead to the disqualification of defense counsel in these proceedings. Rulings relating to the disqualification of counsel are subject to an abuse of discretion standard of review. *Bottoms v. Stapleton*, 706 N.W.2d 411, 415 (Iowa 2005). A court will abuse its discretion when its ruling "is based on clearly untenable grounds, such as reliance upon an improper legal standard or error in the application of the law." *Id.*

C. The District Court Erred in Concluding that the Privilege had been Waived by Asserting the *Faragher-Ellerth* Defense.

In its ruling on Defendants' Motion for Protective Order, the District Court did not challenge Defendants' assertion of the attorney-client privilege and work product doctrine. Rather, the district court found that the privilege had been waived because Defendants asserted the *Faragher-Ellerth* defense in response to Plaintiff's harassment claims.

It is undisputed that defense counsel was hired by Gelita after Fenceroy retired from the Company and filed a charge of discrimination. Any communications between defense counsel and Gelita as well as any documents created by counsel to defend the charge of discrimination were clearly undertaken in anticipation of litigation.

"With respect to EEOC claims in particular, it is fairly well established that where counsel is retained after discrimination charges are filed with the EEOC, in order to investigate those charges, counsel (or counsel's delegate in the investigation) is not performing a business function but rather preparing and advising his client in anticipation of future litigation." *Robinson v. County of San Joaquin*, No. 2:12-cv-2783, 2014 WL 5473049, at *2 (E.D. Cal. Oct. 28, 2014). "Any internal investigation done by counsel or other agents of the corporation in anticipation of litigation will

generally be covered by work-product." *Id.*; *see also Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, No. 1:08-cv-173, 2009 WL 1543651, at *6 (N.D. Ind. Jun. 2, 2009) (outside counsel's investigation clearly in anticipation of litigation where counsel was retained for purposes of responding to EEOC charges of discrimination); *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023, 1034-35 (Cal. Ct. App. 2016) (finding that legal counsel's factual investigation and work developing a response to EEOC claim was privileged); *EEOC v. Koch Meat Co., Inc.*, No. 91C4715, 1992 WL 332310 (N.D. Ill. Nov. 5, 1992) (where counsel is retained after discrimination charges are filed with EEOC, counsel was not performing a business function but was investigating charges and advising client in anticipation of future litigation); *Geller v. North Shore Long Island Jewish Health Sys.*, No. CV-10-170, 2011 WL 5507572, at *4 (E.D.N.Y. Nov. 9, 2011) (finding that investigation documents including notes from employee interviews are privileged work-product in anticipation of litigation); *Moore v. DAN Holdings, Inc.*, No. 1:12cv503, 2013 WL 1833557, *3-4 (M.D. N.C. 2013) (finding that counsel's investigation was not relevant to any defense to discrimination and retaliation claims); *EEOC v. Rose Casual Dining, L.P.*, No. 02-7485, 2004 U.S. Dist. LEXIS 1983, at *7-8 (E.D. Pa. 2003) (holding that portion of counsel's investigation conducted after termination and after

charge was filed was not placed in issue because it was in preparation of litigation rather than to show the adequacy of any remedial action).

Thus, when counsel is retained after discrimination charges are filed, counsel's investigation is privileged as it involves preparing and advising the client in anticipation of future litigation. *See Treat*, 2009 WL 1543651, at *7; *Robinson*, 2014 WL 5473049, at *3; *see also Scurto v. Commonwealth Edison Co.*, No. 97 C 7508, 1999 WL 35311, at *4 (N.D. Ill. Jan. 11, 1999) (finding outside counsel acted as a lawyer when he prepared documents only after plaintiff instituted administrative proceedings).

In this case, the District Court erred in finding that the privilege had been waived based on the assertion of the *Faragher-Ellerth* defense. Similar to claims under Title VII, the *Faragher-Ellerth* affirmative defense is available in harassment cases under the ICRA. *Farmland Foods, Inc. v. Dubuque Human Rights Commission*, 672 N.W.2d 733, 744, n.2 (Iowa 2003); *Lopez v. Aramark Uniform and Career Apparel, Inc.*, 426 F. Supp. 2d 914, 949-50 (N.D. Iowa 2006) (collecting cases and stating that Title VII and ICRA claims are analyzed the same and the Iowa Supreme Court has adopted the *Faragher-Ellerth* defense). Under the *Faragher-Ellerth* affirmative defense, an employer may defend a harassment claim by proving: (1) that it exercised reasonable care to prevent and correct any

harassing behavior; and (2) that the employee unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided. *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013). In this case, the *Faragher-Ellerth* defense is based on Fenceroy's unreasonable failure to take advantage of preventative and corrective opportunities available during his employment. Defendants are not relying upon any investigation conducted by defense counsel after Fenceroy filed his discrimination charge. Those complaints were not made by Fenceroy during his employment and therefore, the adequacy of that investigation and remedial action undertaken by the Company are not "at issue" nor are they part of Gelita's *Faragher-Ellerth* affirmative defense. Accordingly, Defendants have not waived the attorney-client privilege.

The waiver issue was squarely addressed by a federal district court in *Treat*, 2009 WL 1543651, at *6-7. In that case, plaintiffs were pursuing claims for harassment and discrimination and were seeking documents relating to counsel's investigation, notes from witness interviews and drafts of position statements and related communications. *Id.* at *1. The court rejected plaintiffs' attempt to obtain this information finding that counsel clearly was acting as a lawyer and the records were prepared in anticipation

of litigation and "only after" administrative proceedings with the EEOC were filed. *Id.* at *6-7.

The court then addressed plaintiffs' argument that the privilege had been waived by the employer who asserted a *Faragher-Ellerth* affirmative defense in its answer. *Id.* at *12. As an affirmative defense, the employer asserted that it "exercised reasonable care to prevent and correct promptly any discriminatory behavior, and plaintiffs unreasonably failed to take advantage of any preventative or corrective opportunities provided by [the employer] or to avoid harm otherwise." *Id*. The court found no waiver and stated that the affirmative defense was based on plaintiffs not taking advantage of the company's policies and procedures for reporting harassment and discrimination. *Id.* at *13. The court stated:

> *In other words, because the Plaintiffs allegedly did not report their complaints during their employment, there is no internal investigation of any complaints to rely upon*; the only investigation (conducted by outside counsel) was for the purpose of preparing for litigation, once the EEOC charges were filed.

Id. (emphasis added). Thus, the court noted that the company was not relying upon the adequacy of any investigation conducted after the charge was filed but rather, the defense related to whether plaintiffs were aware of the company's policies and failed to comply with those policies by failing to complain of the alleged harassment during their employment. *Id.*

This same rational was applied in a recent decision from the California Court of Appeals in *City of Petaluma* where the plaintiff alleged that she was subjected to a hostile work environment based on gender and was seeking documents and testimony relating to an investigation conducted by the employer's legal counsel. *City of Petaluma,* 248 Cal. App. 4th at 1030. The investigation was conducted after the plaintiff had left her employment and filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 1029. The court concluded that the investigation conducted by counsel was protected by the attorney-client privilege and work product doctrine and that the employer did not waive the privilege by asserting the avoidable consequences doctrine as an affirmative defense.[4] *Id.* at 1036-37. The court held that:

> The avoidable consequences defense focuses upon what the employer and employee did or did not do while the employee was employed. *The assertion of the avoidable consequences defense may put the adequacy of an investigation into issue if the person was still employed and able to take advantage of any corrective measures the employer undertook as a result of the investigation. The investigation may also be relied upon to*

[4]/ The avoidable consequences defense under California law incorporates the same elements as *Faragher-Ellerth*: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventative and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered. *See State Dept. of Health Servs. v. Superior Court*, 31 Cal. App. 4th 1026, 1044 (Cal. Ct. App. 2003).

> *show that the employer took reasonable steps to prevent and correct workplace sexual harassment while the employee was employed. But the assertion of an avoidable consequences defense does not put a post-employment investigation directly at issue in the litigation. The employee necessarily could not have taken advantage of any corrective measures adopted in response to a post-employment investigation.* Further, a post-employment investigation would not itself demonstrate the employer took reasonable steps to prevent and correct workplace harassment while the employee was still employed.

Id. at *12 (emphasis added).

Here, it is uncontroverted that Fenceroy did not report any racial jokes or comments from coworkers during his employment. (Ex. 13, Fenceroy Dep. 187:6-21; 189:4-10). Evidence that an employee failed to report his complaints and avail himself of the employer's complaint procedure during employment "normally suffice[s] to satisfy the employer's burden under the second element of the [*Faragher-Ellerth*] defense." *Faragher-Ellerth v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). Complaining after resigning does not defeat the second prong of the defense because filing a complaint "upon or after, resigning does not mitigate any of the damage, because it does not allow the employer to remediate the situation." *Lauderdale v. Texas Dept. of Criminal Justice Institutional Div.*, 512 F.3d 157, 165 (5th Cir. 2007); *see also McCurdy v. Arkansas State Police*, 375 F.3d 762, 772 (8th Cir. 2004) (stating that the *Faragher-Ellerth* affirmative defense "protects employers in harassment cases in which an employee fails

to stop the harassment by using the employer's effective anti-harassment policy") (emphasis added).

In this case, Horvatich was clearly hired to defend the Company after Fenceroy retired and after Fenceroy filed a charge with the ICRC. Fenceroy did not report any racial jokes or comments during his employment and as such, the adequacy of any investigation conducted after his employment is not at issue because Gelita had no opportunity to remediate the situation. In other words, Fenceroy was never in a position to take advantage of any corrective measures undertaken by the Company because he was no longer employed. Communications between Horvatich and Gelita representatives, as well as any notes or documents pertaining to the investigation are privileged and protected work-product in anticipation of litigation, and that privilege has not been waived. Defendants' Motion for Protective Order should have been granted on that basis.

In finding that the privilege had been waived, the District Court rejected the above authority and relied upon the case *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D. N.J. 1996). However, the *Harding* case is easily distinguishable because there, the employer specifically admitted that it intended to rely upon counsel's investigation to defend liability and to show the adequacy of its remedial response to the employee's

complaints of harassment. *Id.* at 1087-88, 1092-93, 1096. In this case, Gelita has not placed Horvatich's investigation at issue in these proceedings. Rather, Gelita submits that Fenceroy did not report any alleged racial discrimination or comments during his employment. Because Fenceroy did not report the racial jokes and comments during his employment, Gelita was not in a position to investigate and resolve any issues for Fenceroy. Defense counsel's investigation was conducted for purposes of preparing for litigation and not for the purpose of remedial action because Fenceroy was no longer employed. *See Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 125-29 (Cal. Ct. App. 1997) (distinguishing the *Harding* case where adequacy of counsel's investigation was placed at issue versus a situation where the investigation was conducted in preparation of litigation).

D. The District Court Failed to Consider Whether Other Means Existed to Obtain the Information and Whether it was Crucial to the Preparation of the Case.

As stated above, the District Court erred when it concluded that Defendants had placed "at issue" the investigation of defense counsel by asserting the *Faragher-Ellerth* defense. In the alternative, Defendants submit that the District Court erred by ordering defense counsel to appear for a deposition without considering whether other means existed to obtain

the information or whether the testimony of counsel was crucial to the preparation of Fenceroy's case.[5]

According to the Eighth Circuit, the practice of forcing trial counsel to testify as a witness has long been discouraged. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (citing *Hickman v. Taylor*, 329 U.S. 495, 513 (1947)). Taking the deposition of opposing counsel "not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation." *Id.* It further "detracts from the quality of client representation" and places burdens upon trial counsel who should "be free to devote his or her time and efforts to prepare the client's case without fear of being interrogated by his or her opponent." *Id.*

In *Shelton*, the Eighth Circuit held that opposing counsel's deposition should only be taken where: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *Id.*

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[5]/ In the *Harding* case, the New Jersey federal district court adopted the view that there is no general prohibition against obtaining the deposition of adverse counsel if the information sought is relevant and non-privileged. *Harding*, 914 F. Supp. at 1102. The Eighth Circuit has held to the contrary. *See Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (requiring three factors be met before opposing counsel may be deposed).

Information relating to decisions and actions by the Company after Fenceroy filed his charge of discrimination has always been available through the testimony of Jeff Tolsma who participated in all employee interviews and made all decisions relating to the disciplinary action rendered after the charge was filed. Mr. Tolsma appeared for a deposition and fully responded to all questions from Fenceroy's counsel on this topic. *See Scurto*, 1999 WL 35311, at *4 (stating that company's investigation after plaintiff's discrimination complaint, including the actions taken as a result of the complaint were "readily available through the ordinary mechanisms of discovery of fact witnesses"). Furthermore, there has never been any showing in this case that information possessed by defense counsel is crucial to the preparation of Fenceroy's case.

Here, the District Court committed error by failing to consider whether other means existed to obtain the information rather than deposing defense counsel and whether the information was crucial to the preparation of Fenceroy's case. None of the factors set forth in the *Shelton* case have been established to warrant the deposition of defense counsel.

The issues presented on this appeal raise significant concerns regarding the preservation of attorney-client communications and work product when an attorney is hired to defend a harassment charge and

performs an investigation in anticipation of litigation. According to the District Court, any time the employer asserts the *Faragher-Ellerth* defense in a harassment case, the employer is placing "at issue" defense counsel's investigation and work product even in cases where the employee did not report the matter during his or her employment, thereby giving the employer no opportunity to investigate and remediate the situation. Defendants submit that the District Court's findings are untenable and apply a misguided legal analysis that is contrary to the majority of jurisdictions that have addressed this issue.

VI. CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request the Court to reverse the District Court's ruling on Appellant's Motion for Protective Order on the basis that the privilege has not been waived and defense counsel's testimony and documents are privileged and/or protected by the work product doctrine.

VII. REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument in this matter.

DATED this 6th day of December, 2016.

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COST CERTIFICATE

I hereby certify that the true and actual cost of printing the foregoing Appellant's Final Brief and Request for Oral Argument was the sum of $0.00.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 6th day of December, 2016, the foregoing Appellant's Final Brief and Request for Oral Argument was filed electronically with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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