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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ALOHA PETROLEUM, LTD., Plaintiff, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. AND AMERICAN HOME ASSURANCE COMPANY, Defendants.	CIVIL NO: 1:22-cv-00372-JAO-WRP (Contract) **DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT [ECF. 56]; CERTIFICATE OF SERVICE** Hearing: Date: August 24, 2023 Time: 9:00 a.m. Judge: The Honorable Jill A. Otake

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

In direct contradiction to settled Hawaii law and its own motion papers, Aloha now argues in its Opposition that the test for determining whether an "occurrence" has been alleged has changed such that only harm subjectively intended by an insured, or "practically certain" to occur, is barred from coverage.[1] Aloha got the test right the first time: "[f]or an event to be an 'accident,' 'the injury cannot be the expected or reasonably foreseeable result of the insured's own intentional acts or omissions.'" (*See* Aloha Mot. at 8.) Ironically, in its effort to persuade the Court that the "practically certain" test applies, Aloha agrees that the property damage alleged in the Underlying Lawsuits is the reasonably foreseeable result of its intentional actions. This alone confirms that the Underlying Lawsuits do not satisfy the foundational element of the Insuring Agreements—that Aloha's potential liability arises from accidental conduct—and that the AIG Insurers do not have a duty to defend. Aloha's futile attempts to satisfy the other elements of the Insuring Agreements and disprove the applicability of the pollution exclusions similarly fall flat.

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[1] References to the "AIG Opposition" or "AIG Opp." are to the AIG Insurers' Opposition to Aloha's Memorandum in Support of Motion (Dkt. 64) and to the "Aloha Opposition" or "Aloha Opp." are to Aloha's Opposition to Defendants' Motion for Partial Summary Judgment (Dkt. 62). Unless otherwise noted, all other capitalized terms shall have the meaning set forth in the AIG Motion or AIG Opposition.

II. ARGUMENT AND AUTHORITIES

A. Aloha Cannot Establish the Possibility of Coverage.

1. Aloha Applies the Wrong Standard for an "Occurrence."

Aloha erroneously contends that an insured must subjectively intend alleged harm for a court to find no "occurrence." (Aloha Opp. at 18.) Not only is this a complete departure from its opening brief (*see* Aloha Mot. at 8), but it also misstates Hawaii law. The Hawaii Supreme Court first considered the "accident" standard more than forty years ago. *See Hawaiian Ins. & Guar. Co. v. Brooks*, 686 P.2d 23 (Haw. 1984). Although the insured in *Brooks* asserted "he did not intend" for a woman to be assaulted by another passenger in a truck, the Supreme Court held he could not reasonably expect to be covered by insurance for the harm that resulted from his intentional failure to act. *Id*. at 28. Six years later, when an insured claimed he only intended to frighten the victim, not injure him, the Supreme Court found there was no accident because "a reasonable man in [the insured's] position . . . would *anticipate*" an injury may result from the intentional act of firing a rifle in the victim's direction. *Hawaiian Ins. & Guar. Co. v. Blanco*, 804 P.2d 876, 881 (Haw. 1990) (emphasis added).

In 1993, the Supreme Court explained that the "teaching" of *Blanco* and *Brooks* is that, "for the insurer to owe a duty to defend . . ., the injury cannot be the expected *or reasonably foreseeable result* of the insured's own intentional acts or omissions." *AIG Haw. Ins. Co. v. Estate of Caraang*, 851 P.2d 321, 329 (Haw. 1993)

(emphasis added). The next year, the Supreme Court reaffirmed that standard in *Hawaiian Holiday Macadamia Nut Co. v. Industrial Indemnity Co.*, 872 P.2d 230, 234 (Haw. 1994). And then in 2000, the Supreme Court overruled its determination in *Brooks* that an insurer can rely on extrinsic evidence when determining the duty to defend, but explicitly stated that "we do not intend to call into question the ongoing viability of *Brooks* and *Blanco in any other respect*." *Dairy Rd. Partners v. Island Ins. Co.*, 992 P.2d 93, 117 n.13 (Haw. 2000) (emphasis added). *See also Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 946 (9th Cir. 2004) (confirming "reasonably foreseeable result" test under Hawaii law).

Despite these repeated holdings, Aloha now contends that the standard was changed in *Tri-S Corp. v. Western World Insurance Co.*, 135 P.3d 82 (Haw. 2006). According to Aloha, unless the damages resulting from an insured's intentional acts or omissions were subjectively intentional or "practically certain" to occur, the insured's conduct is still an accident for insurance purposes. (Aloha Opp. at 18.) Aloha misconstrues *Tri-S* and controlling Hawaii law.

In *Tri-S*, the Supreme Court, after discussing the occurrence standard, applied the "practically certain" test to *the applicability of an exclusion* for "bodily injuries 'expected or intended' from the standpoint of the insured[.]" 135 P.3d at 102. The only case cited by Aloha to support its statement that "[t]his Court has followed the holding of *Tri-S*" (Aloha Opp. at 18), also involved an "expected or intended"

exclusion. *See Weight v. USAA Cas. Ins. Co.*, 782 F. Supp. 2d 1114, 1128 (D. Haw. 2011). That the "expected or intended" standard is higher than the occurrence standard makes sense as exclusions are narrowly construed. *See id.*

The handful of other cases citing to the portion of *Tri-S* on which Aloha relies confirm that the "practically certain" standard relates to the expected or intended exclusion and not to the occurrence requirement. *See Island Ins. Co. v. Arakaki*, No. 29116, 2010 WL 2414924, at *6 (Haw. Ct. App. June 16, 2010) (applying "practically certain" standard to "expected or intended" exclusion); *Ill. Nat. Ins. Co. v. Nordic PCL Constr., Inc.*, 870 F. Supp. 2d 1015, 1031 (D. Haw. 2012) (*Tri-S* "focused on language providing that bodily injury 'expected or intended' from the standpoint of the insured was excluded from coverage. . . . Thus, although *Tri-S* did examine whether a claim involved an 'occurrence,' that was not the main focus of that case."); *Allstate Ins. Co. v. Riihimaki*, No. 11-0529 ACK-BMK, 2012 WL 1983321, at *7, n.9 (D. Haw. May 30, 2012) (applying "reasonably foreseeable result" standard to find no duty to defend, and noting insured's "reliance on *Tri-S Corp.* . . . [was] misplaced").[2]

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[2] "Occurrence" in pre-1986 CGL policies was defined as "an accident . . . which results in bodily injury or property damage *neither expected nor intended from the standpoint of the insured*." *See* 16 Eric Mills Holmes, Holmes' Appleman On Insurance 2d § 117.5 (emphasis added). In 1986, "[t]he language 'expected or intended from the standpoint of the insured' was removed from the definition of 'occurrence' and reinserted as an exclusion from coverage." *Id.* Among the AIG Policies are both forms of the definition of "occurrence." *See* AIG SOF at

Critically, since *Tri-S*, numerous decisions from this Court have continued to apply the objective, "reasonably foreseeable result" standard. *See, e.g.*, *State Farm Fire & Cas. Co. v. Certified Mgmt., Inc.*, No. 17-00056 KJM, 2018 WL 1997533, at *7–8 (D. Haw. Apr. 27, 2018); *State Farm Fire & Cas. Co. v. GP West, Inc.*, 190 F. Supp. 3d 1003, 1015-16 (D. Haw. 2016); *State Farm Fire & Cas. Co. v. Miya*, No. 12-00487 LEK-BMK, 2013 WL 3305437, at *7–8 (D. Haw. June 28, 2013); *State Farm Fire & Cas. Co. v. Vogelgesang*, 834 F. Supp. 2d 1026, 1035–36 (D. Haw. 2011). Simply put, it remains Hawaii law that the reasonably foreseeable result of the insured's intentional acts or omissions is not an accident for insurance purposes.[3]

2. Under the Correct Standard, Aloha Agrees that the Alleged Property Damage Does Not Arise from an Accident.

As an initial matter, contrary to Aloha's assertion (*see* Aloha Opp. at 4), Aloha—not the AIG Insurers—has the burden of establishing that the allegations in the Underlying Lawsuits fall within the Insuring Agreements of the AIG Policies.

¶¶ 19-20. Regardless of whether the "expected or intended" language is included as part of the "occurrence" definition, the "reasonably foreseeable result" standard applies. *See Hawaiian Holiday*, 872 P.2d at 234 (pre-1986 language); *Blanco*, 804 P.2d at 881 (post-1986 language).

[3] Even if the "practically certain" standard applied (which it does not), it is met here. Honolulu and Maui allege Aloha engaged in a conspiracy to suppress and discredit scientific evidence of the certainty of harm, and participated in marketing efforts designed to *increase*—rather than decrease—the use of petroleum products. (*See, e.g.*, AIG Mot. at 10–11; AIG Opp. at 6–8.)

See State Farm Fire & Cas. Co. v. Gorospe, 106 F. Supp. 2d 1028, 1031 (D. Haw. 2000). Aloha concedes it cannot meet its burden.

Hawaiian Holiday (and its progeny) makes clear that there is a two-part test for determining whether an accident is alleged under Hawaii law. *See supra*. The first step asks whether the underlying conduct was an intentional act. Aloha agrees that it is seeking "coverage for liabilities relating to Aloha's *intentional sale of its products*." (Aloha Opp. at 15–16) (emphasis added). This makes sense given that Aloha's potential liability is not based, for example, on an accidental gasoline spill, the sinking of an oil tanker resulting in the fouling of a waterway, or an explosion at an oil refinery; instead, Aloha's alleged conduct was undertaken voluntarily and with the aim of carrying out the act. (*See, e.g.*, AIG Mot. at 10–13; AIG Opp. at 4–12.)

Nonetheless, Aloha contends the "underlying complaints allege non-intentional conduct" based on its misapplication of the occurrence standard as focusing on the injury. (*See* Aloha Opp. at 5-12.) Determining whether the first part of the test is satisfied has nothing to do with an *intent to cause injury*. Rather, courts look first to whether the insured's injury-producing acts were deliberate. *Hawaiian Holiday*, 872 P.2d at 234 (quoting *Estate of Caraang*, 851 P.2d at 329). Conduct is "intentional" if it is done voluntarily and "with the aim of carrying out the act." Black's Law Dictionary (11th ed. 2019). In Aloha's own words, the Underlying Lawsuits are based on its "intentional sale of its products." (Aloha Opp. at 15–16.)

Although not controlling, a recent case from the Fifth Circuit applying Texas law illustrates this point. In *Discover Property & Casualty Insurance Co. v. Blue Bell Creameries USA, Inc.*, No. 22-50842, 2023 WL 4443246 (5th Cir. Jul. 11, 2023), the Fifth Circuit held no occurrence had been alleged. *Id*. at *1–2. In Texas, like Hawaii, an insured's "act is not an accident 'when [1] he commits an intentional act that [2] results in injuries that ordinarily follow from or could be reasonably anticipated from the intentional act.'" *See id.* at *5 (internal citations omitted). As the Fifth Circuit explained, "an intentional act and the intent to cause injury *are two distinct concepts*." *Id.* (emphasis added). "To illustrate, 'the hunter who deliberately fires a gun at what he believes to be a deer but is actually a person' committed an 'intentional' act, even though the harm was not intentional." *Id*. "As such, the 'intentional acts' requirement is concerned with the voluntariness of an action or omission, not the actor's intended outcome." *Id.*

The same is true here—Aloha is alleged to have deliberately and repeatedly introduced its products into the stream of commerce, encouraged the continued use of its products, and actively concealed the impact of that use on the environment. This simply is not accidental conduct.

Second, in an effort to convince this Court that the resulting injury was not practically certain, Aloha describes its conduct in a way that unwittingly concedes that the alleged injuries arise from the expected or *reasonably foreseeable result* of

its acts or omissions—the second step in the Supreme Court's two-part test. For example, Aloha agrees that: "[t]he 'actual malice' allegations" mean Aloha is alleged to have been "*acting with a conscious disregard for substantial and unjustifiable risk of harm*"; Aloha "had *actual knowledge that their products were defective and dangerous*"; and "[t]he Climate Lawsuits contain a number of other allegations that the damage at issue was at most '*highly probable.*'" (Aloha Opp. at 6 n.4, 7) (emphasis added). According to Aloha, these allegations describe conduct that is "below" the "'practically certain' standard for expected or intended injury." (*Id.*) Whether that is true or not, allegations that Aloha acted with a conscious disregard for a substantial and unjustifiable risk of harm, had actual knowledge that its products were defective and dangerous, and knew the damage at issue was highly probable, are more than sufficient to establish that the property damage alleged in the Underlying Lawsuits was the "*reasonably foreseeable result*" of Aloha's intentional acts or omissions, which is the proper test under Hawaii law.[4]

Nor is there merit to Aloha's complaint that accepting the AIG Insurers' position would negate any products liability coverage. (Aloha Opp. at 15–16.)

[4] Aloha complains that the "Hawaii court decisions" the AIG Insurers cite for the accident standard "are factually inapposite." (*See* Aloha Opp. at 10.) Fact patterns aside, these cases all confirm that (i) even post-*Tri-S*, the reasonably foreseeable result of an insured's intentional acts or omissions are *not* an accident under Hawaii law, and (ii) courts in Hawaii regularly rely on that standard to find no duty to defend. (*See* AIG Mot. at 6-10.)

According to Aloha, because foreseeability is a necessary element in a negligence claim, its coverage "could never be accessed" under the foreseeable result standard. (Aloha Opp. at 16.) It is well-established, however, that negligence is "not synonymous with 'accident,'" precisely "because a claim for negligence may be based on alleged deliberate conduct that presents an unreasonable risk of foreseeable harm." *See AIU Ins. Co. v. McKesson Corp.*, 598 F. Supp. 3d 774, 796 (N.D. Cal. 2022).[5] Under the correct standard, Aloha may still have coverage for a wide variety of injury-producing acts, *i.e.*, accidents. Liability insurance does not exist to insulate commercial actors from the costs of their conscious decisions to flood markets with dangerous products in the pursuit of profits, nor could Aloha have reasonably expected as much. (AIG Mot. at 14; *see also* AIG Mot. at 1.) Aloha had liability coverage related to its petroleum products—but that coverage was *always* subject to the terms and conditions of the AIG Policies, including the requirement that Aloha's potential liability must result from an accident. A ruling in favor of the AIG Insurers would simply enforce the clear terms of the AIG Policies.[6]

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[5] Aloha argues that *McKesson* is inapposite "given that California law . . . require[s] only an intentional, deliberate act that produced the injuries . . . [f]oreseeability of the injury was not an issue." (*See* Aloha Opp. at 11 n.9.) Not so. California also considers whether injury could foreseeably result from the insured's deliberate conduct. *See McKesson*, 598 F. Supp. at 796 (with deliberate conduct there is "no insurable accident . . . unless some additional, unexpected, independent, and unforeseen happening produced the injuries[.]").

[6] *Del Monte Fresh Produce (Haw.), Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734

Nor does it matter, as Aloha protests, that a "reasonable investigation" purportedly would establish, and Aloha will eventually prove, that it did not have full knowledge of the expected consequences of selling its petroleum products. (*See* Aloha Opp. at 8 n.6, 12–14.) While Aloha may eventually disprove the allegations, that is *not relevant* to the accident determination at the duty to defend stage: "Liability of the insured to the plaintiff is not the criterion; it is *the allegation in the complaint* of a cause of action which, *if sustained*, will impose liability covered by the policy." *Allstate Ins. Co. v. Pruett*, 186 P.3d 609, 623 (Haw. 2008) (emphasis added); *see also Com. & Indus. Ins. Co. v. Bank of Hawaii*, 832 P.2d 733, 736 (Haw. 1992) ("The duty to defend is not outcome-determined . . . [it] 'is determined at the time suit is brought and not at the conclusion of litigation.'").

Aloha cannot salvage its demand for coverage by distorting Hawaii law, complaining about the demise of products liability coverage, or proclaiming it will defeat the claims in the Underlying Lawsuits. Aloha agrees (as it must) that the

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(Haw. 2007), is not to the contrary. (*See* Aloha Opp. at 15.) *Del Monte* found no coverage because the purportedly "reasonable expectations" of the policyholder turned out to be—like those here—not so reasonable after all. *Id.* at 738. As the Virginia Supreme Court explained when it found no insurance coverage for climate change claims, "[i]n many instances the breach is the manner in which the act was done rather than the doing of the act." *AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532, 537 n.3 (Va. 2012) (rejecting similar products liability and "negat[ing] coverage" argument).

Underlying Lawsuits allege intentional conduct and resulting harm that was reasonably foreseeable. Under the correct occurrence standard, therefore, even Aloha agrees there is no coverage.

3. There Is No Alleged Property Damage During the Policy Periods.

Aloha does not dispute that the Underlying Lawsuits contain no specific allegations of property damage during the policy periods. Instead, Aloha contends that the mere presence of undated allegations of property damage in the Underlying lawsuits is "sufficient to create a *possibility* of coverage." (Aloha Opp. at 18–19.) Aloha's myopic focus on undated allegations mischaracterizes the Underlying Lawsuits. When viewed in the context of the entire pleadings, not just the soundbites Aloha cites, it is clear that any alleged property damage occurred *after* the expiration of the AIG Policies. (*See* AIG Opp. at 12–15.)

Even the sole case Aloha cites does not go so far as accepting the mere presence of undated allegations to satisfy the insured's burden to establish damages during the policy period. In *Group Builders, Inc. v. Admiral Insurance Co.*, No. 29729, 2013 WL 1579600 (Haw. Ct. App. Apr. 15, 2013), the court looked to other allegations in the complaint for context to determine when the alleged damage could have occurred. *Id*. at * 8. Finding none, the court found there was a possibility of damage during the policy period. *Id.* That is not the case here. The Underlying Lawsuits paint a very clear picture of the chain of events that had to take place, over

decades, before any alleged property damage would occur. (*See* AIG Opp. at 12–15.) Those allegations unequivocally place the timing of any such damage *after* the expiration of the last AIG Policy in 2010. (*See id.*)

Aloha's attempt to distinguish *Delta Airlines v. State Farm Fire & Casualty Co.*, Nos. 95–35706, 95–35759, 1996 WL 511575 (9th Cir. Sept. 9, 1996) fails. There, the court considered *extrinsic evidence* that showed the property damage did not occur during the policy period. *Id.* at *1–2. If the Ninth Circuit found it acceptable to look outside the complaint, surely this Court can look *inside* the complaints to allegations that provide crucial context as to the timing of any alleged property damage.

4. Aloha Is Not Facing Liability for "Damages Because of" Property Damage.

The sole basis for Aloha's argument that it may be held liable for "damages because of" property damage is that the Underlying Lawsuits include a request for compensatory damages. (Aloha Opp. at 22.) Embedded in this argument is Aloha's flawed reliance on undated allegations of property damage, which fails for the reasons discussed above. (*See also* AIG Opp. at 15–18.)

Moreover, although Aloha agrees that the AIG Insurers properly articulated how Hawaii courts interpret "damages because of," it complains that the AIG Insurers rely on too many out-of-circuit cases applying that standard. (*See* Aloha Opp. at 21.) Aloha's criticism misses the point: more and more courts applying the

same "damages because of" requirement are finding that government entities seeking funds for their increased economic costs in responding to a public nuisance created by the defendants' intentional conduct do not satisfy that requirement. (*See* AIG Mot. at 19–21; AIG Opp. at 17.) This Court should do the same.

Aloha also misconstrues *Ass'n of Apartment Owners of the Moorings, Inc. v. Dongbu Insurance Co.*, No. 15-00497 BMK, 2016 WL 4424952 (D. Haw. Aug. 18, 2016), *aff'd,* 731 F. App'x 713 (9th Cir. 2018). *Dongbu* reached the unremarkable conclusion that the attorney fees portion of an arbitration award based on specific, past property damage are also covered damages. *Id.* at * 5. Unlike *Dongbu*, Aloha's potential liability does not flow from past property damage, but a desire to abate the impacts of climate change and prevent potential future damage.

B. There Is No "Legal Uncertainty" Precluding Application of the Pollution Exclusions.

Aloha does not challenge the AIG Insurers' showing that there is no coverage for the Underlying Lawsuits based on the plain, unambiguous terms of the pollution exclusions in ten[7] of the AIG Policies. For this reason alone, the Court should grant summary judgment to the AIG Insurers on those policies. Rather than engage on the

[7] Aloha suggests that the AIG Insurers have conceded that they have a duty to defend the Underlying Lawsuits because they only moved on pollution exclusions in ten of the twelve policies. This is incorrect. The duty to defend is not triggered because an exclusion does not bar coverage; rather, Aloha must demonstrate that the allegations satisfy the Insuring Agreements, which it has not done for *any* of the AIG Policies, as explained above.

substance, Aloha contends that the "legal uncertainty rule" requires the AIG Insurers to defend the Underlying Lawsuits because the Hawaii Supreme Court has not addressed whether "any form of the pollution exclusion" applies only to so-called "traditional" environmental pollution or more broadly. (Aloha Opp. at 24–25.) In other words, according to Aloha, an insurer is required to defend indisputably uncovered claims until the Supreme Court interprets the policy language regardless of the impact on coverage. This is clearly not the law as this Court has held that insurers have no duty to defend based on pollution exclusions. *See Allen v. Scottsdale Ins. Co.*, 307 F. Supp. 2d 1170, 1176–77 (D. Haw. 2004); *Nautilus Ins. Co. v. Hawk Transp. Servs., LLC*, 792 F. Supp. 2d 1123, 1134 (D. Haw. 2011).

The "legal uncertainty rule" only comes into play when there is an open question of law on an issue that matters to resolution of the dispute. *See Hawk Transp. Servs.*, 792 F. Supp. 2d at 1134. There are none here. If the Supreme Court were to interpret the pollution exclusions in the AIG Policies based on their plain, unambiguous terms, coverage for the Underlying Lawsuits would be precluded for the reasons stated in the AIG Motion (*see* AIG Mot. at 22–26), and Aloha does not contend otherwise. If, on the other hand, as Aloha contends, the Supreme Court were to conclude that the pollution exclusions apply only to a subset of claims involving "traditional" environmental pollution, despite the absence of any such limiting language in the exclusions, coverage under the AIG Policies would *still be*

barred because the Underlying Lawsuits allege what would commonly be understood to be "traditional" environmental pollution. (*See* AIG Opp. at 24–25.)[8]

III. CONCLUSION

For the foregoing reasons and those in the AIG Motion and the AIG Opposition, the AIG Insurers respectfully request that the Court grant the AIG Motion and grant the AIG Insurers such further relief as the Court finds just and proper.

DATED: Honolulu, Hawaii, August 16, 2023.

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[8] *Pacific Employers Insurance Co. v. Servco Pacific Inc.*, 273 F. Supp. 2d 1149 (D. Haw. 2003) does not change this result. Unlike here, legal uncertainty triggered the duty to defend in *Servco* because resolution of the issue was determinative of coverage.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ALOHA PETROLEUM, LTD., Plaintiff, vs. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and AMERICAN HOME ASSURANCE COMPANY, Defendants.	CIVIL NO: 1:22-cv-00372-JAO-WRP (Contract) **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date noted below, a true and correct copy of the foregoing document was duly served upon the following parties noticed herein at their last known address via CM/ECF:

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