No. 20-90013

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RENASANT BANK INC.,

Defendant-Petitioner,

v.

LANDCASTLE ACQUISITION CORP.,

Plaintiff-Respondent.

On Petition for Permission to Appeal
from the U.S. District Court for the Northern District of Georgia
Honorable Richard W. Story
Case No. 2:17-cv-00275-RWS

MOTION OF THE AMERICAN BANKERS ASSOCIATION AND THE GEORGIA BANKERS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN IN SUPPORT OF RENASANT BANK'S PETITION FOR PERMISSION TO APPEAL

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Counsel for Amici Curiae The American Bankers Association and The Georgia Bankers Association

The American Bankers Association and The Georgia Bankers Association (together, "amici") respectfully request leave to file the attached amicus curiae brief in support of Renasant Bank's Petition for Permission to Appeal. The proposed amicus brief is attached as Exhibit 1. In support of this Motion, amici state as follows:

1. The American Bankers Association ("ABA") is the principal national trade association for the financial-services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $15 trillion banking industry and its over one million employees. The ABA's members are financial institutions of all types and sizes that provide banking services to businesses and individuals in all 50 states, the District of Columbia, and Puerto Rico.

2. The Georgia Bankers Association ("GBA") is a trade and professional organization founded in 1892 to represent the interests of banks and thrift institutions in Georgia. One of the GBA's primary objectives is to be the principal industry voice on banking issues to its members, policymakers, courts, and the public.

3. Amici and their members have an immediate and substantial interest in this Court granting review and resolving the pure legal issue presented in this appeal. To appreciate amici's interest, it is necessary briefly to address how the Federal Deposit Insurance Corporation ("FDIC") and private financial institutions respond to bank failures.

4. The FDIC functions as a receiver for failed banks. Rather than liquidating the failed bank's assets itself, the FDIC typically finds that selling the failed bank's assets and liabilities to a private financial institution through a purchase and assumption ("P&A") transaction is the least costly method of resolving a failed institution.

5. In these transactions, the FDIC arranges another private bank to purchase substantially all of the failed bank's assets and other rights and assume its other obligations. P&A transactions are broadly considered the preferred and least disruptive method of addressing insolvent banks, in part because they enable the failed bank's depositors to become depositors of the assuming bank and have immediate access to their money.

6. The viability of P&A transactions as an effective way of protecting failed banks' assets and stabilizing the banking system necessarily depends on there being a market of private financial institutions willing to assume insolvent banks' assets and liabilities. For banks to do so, they *must* be able to rely on the failed bank's records to make an accurate and quick appraisal of its assets and liabilities. In conducting this analysis—often done in a very short period of time—banks ordinarily do not have the opportunity to explore undocumented liabilities or conditions that do not appear in the bank's records.

7. For these reasons, the *D'Oench* doctrine, which is at issue in this appeal, has long protected the FDIC as receiver (FDIC-R) and private-bank successors from claims seeking to alter the terms of assumed loan obligations based on undisclosed agreements, conditions, defects, or representations that are not contained in the failed bank's records.

8. The *D'Oench* doctrine is premised on—and necessitated by—strong federal policies that stabilize the banking system, including the need to "allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." *Langley v. Fed. Deposit Ins. Corp.*, 484 U.S. 86, 91 (1987). "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Murphy v. Fed. Deposit Ins. Corp.*, 208 F.3d 959, 967 (11th Cir. 2000) (quotations omitted).

9. The *D'Oench* doctrine's protections are equally important for private financial institutions—like amici's members—that take over failed banks. If subjected to undisclosed conditions, banks would be deterred from buying failed banks' assets in receivership. Indeed, "there would be little or no incentive for prospective purchasers to acquire [failed banks] if they were subject to the personal defenses of the obligors based on undisclosed agreements." *Fed. Deposit Ins. Corp. v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989).

10. Despite these compelling federal policies, the district court in this case manufactured a new exception to the *D'Oench* doctrine that directly conflicts with existing district court case law in this Circuit and elsewhere. Specifically, the district court held that the *D'Oench* doctrine does not protect an acquiring bank from undisclosed claims that an agent lacked actual authority to enter into a loan transaction—even if there is no evidence of that purported defect in the acquired bank's records.

11. Amici's members have acquired failed banks' assets and obligations through P&A transactions. Amici's members also represent the market of prospective bidders in the event of future bank failures. Consequently, amici have a substantial interest in the legal issue presented in this case. Given their experience, amici submit the attached brief to provide this Court with a broader perspective on this issue's importance and to urge the Court to grant review.

12. Counsel for amici attempted to obtain consent from all parties before filing this motion. Petitioner Renasant Bank consents to the filing of the brief. Respondent Landcastle Acquisition Corp., however, opposes the filing of the brief.

13. Federal circuit courts routinely grant leave to file amicus briefs in support of or opposition to petitions for permission to appeal. *See, e.g., Wolfchild v. U.S.*, 260 F. App'x 261, 263–64 (Fed. Cir. 2007) (granting motion for leave to file amicus brief in support of petition to appeal); *In re Big Lots, Inc.*, No. 17-0303, 2017

WL 4404634, at *1 (6th Cir. Aug. 23, 2017) (same). Amici ask this Court to do the same here.

14. For these reasons, amici respectfully request that the Court grant leave to file the proposed brief.

Respectfully submitted,

s/ Edmund S. Sauer

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 953 words.

I further certify that the foregoing motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), made applicable to the motion by Federal Rule of Appellate Procedure 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.

Dated: July 16, 2020

s/ Edmund S. Sauer
Edmund S. Sauer

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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EXHIBIT 1

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BRIEF OF AMICI CURIAE THE AMERICAN BANKERS ASSOCIATION AND THE GEORGIA BANKERS ASSOCIATION IN SUPPORT OF RENASANT BANK'S PETITION FOR PERMISSION TO APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the American Bankers Association and the Georgia Bankers Association state that neither of them has a parent corporation, nor does any publicly held corporation own 10% or more of the stock of any of them.

The following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

The American Bankers Association, Proposed Amicus

Ashby, Laura, Former counsel for Defendant–Petitioner Renasant Bank

Bradley Arant Boult Cummings LLP, Counsel for Proposed Amici The American Bankers Association and The Georgia Bankers Association

Burch, Jr., Edward D., Counsel for Plaintiff–Respondent Landcastle Acquisition Corp.

Crescent Bank and Trust Company

Driskell, Robert

Federal Deposit Insurance Corporation, as receiver of Crescent Bank and Trust Company

FNTS Holdings, LLC

FNTG Holdings, LLC

Fidelity National Financial, Inc., a publicly held corporation (NYSE symbol FNF) and the ultimate parent of Landcastle Acquisition Corp.

The Georgia Bankers Association, Proposed Amicus

Hardwick, IV, Nathan E.

Kohler, Michael P., Counsel for Defendant–Petitioner Renasant Bank

Landcastle Acquisition Corp., Plaintiff–Respondent

MHSLAW, P.C.

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Morris, Arthur

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Newman, David C., Counsel for Plaintiff–Respondent Landcastle Acquisition Corp.

Parsley, Robert F., Counsel for Defendant–Petitioner Renasant Bank

Reed, Benjamin E., Counsel for Plaintiff–Respondent Landcastle Acquisition Corp.

Renasant Bank, Defendant–Petitioner

Renasant Corporation, a publicly held corporation (NASDAQ symbol RNST) and

wholly owning parent of Defendant–Petitioner Renasant Bank

Sauer, Edmund, Counsel for Amici The American Bankers Association and The Georgia Bankers Association

Schneider, Randolph

Smith, Gambrell & Russell, LLP, Counsel for Plaintiff–Respondent Landcastle Acquisition Corp.

Story, Richard W., United States District Judge

s/ Edmund S. Sauer
Edmund S. Sauer

Dated: July 16, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Rules

Other Authorities

INTEREST OF AMICI CURIAE[1]

The American Bankers Association ("ABA") is the principal national trade association for the financial-services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $15 trillion banking industry and its over one million employees. The ABA's members are financial institutions of all types and sizes that provide banking services to businesses and individuals in all 50 states, the District of Columbia, and Puerto Rico.

The Georgia Bankers Association ("GBA") is a trade and professional organization founded in 1892 to represent the interests of banks and thrift institutions in Georgia. One of the GBA's primary objectives is to be the principal industry voice on banking issues to its members, policymakers, courts, and the public.

To appreciate amici's interests in this appeal, it is important briefly to examine how the Federal Deposit Insurance Corporation ("FDIC") functions as a receiver for failed banks. Congress established the FDIC in 1933 to stabilize the nation's banking system and economy. When a federally insured bank fails, the FDIC ordinarily is appointed receiver and is responsible for managing the assets and liabilities of the failed bank to avoid a disruption of banking services. *See*

[1] This brief is submitted with a motion for leave to file. Amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Fed. R. App. P. 29.

12 U.S.C. § 1821(d).

Rather than liquidating the failed bank's assets itself, the FDIC typically finds that selling the failed bank's assets and liabilities to a private financial institution through a purchase and assumption ("P&A") transaction is the least costly method of resolving a failed institution. In these transactions, the FDIC arranges another private bank to purchase substantially all of the failed bank's assets and other rights and assume its other obligations. P&A transactions are broadly considered the preferred and least disruptive method of addressing insolvent banks, in part because they enable the failed bank's depositors to become depositors of the assuming bank and have immediate access to their money.

The viability of P&A transactions as an effective way of protecting failed banks' assets and stabilizing the banking system necessarily depends on there being a market of private financial institutions willing to assume insolvent banks' assets and liabilities. For banks to do so, they *must* be able to rely on the failed bank's records to make an accurate and quick appraisal of its assets and liabilities. In conducting this analysis—often done in a very short period of time—banks ordinarily do not have the opportunity to explore undocumented liabilities or conditions that do not appear in the bank's records.

For these reasons, the *D'Oench* doctrine has long protected the FDIC as receiver (FDIC-R) and private bank successors from claims seeking to alter the terms

of assumed loan obligations based on undisclosed agreements, conditions, defects, or representations that are not contained in the failed bank's records. *See D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp*., 315 U.S. 447 (1942); 12 U.S.C. § 1823(e).

The *D'Oench* doctrine is premised on—and necessitated by—strong federal policies that stabilize the banking system, including the need to "allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets." *Langley v. Fed. Deposit Ins. Corp.*, 484 U.S. 86, 91 (1987). "Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions." *Murphy v. Fed. Deposit Ins. Corp.*, 208 F.3d 959, 967 (11th Cir. 2000) (quotations omitted).

The *D'Oench* doctrine's protections are equally important for private financial institutions—like amici's members—that take over failed banks. If subjected to undisclosed conditions, banks would be deterred from buying failed banks' assets in receivership. Indeed, "there would be little or no incentive for prospective purchasers to acquire [failed banks] if they were subject to the personal defenses of the obligors based on undisclosed agreements." *Fed. Deposit Ins. Corp. v. Newhart*, 892 F.2d 47, 50 (8th Cir. 1989).

Despite these compelling federal policies, the district court in this case manufactured a new exception to the *D'Oench* doctrine that conflicts with existing

case law. Specifically, the district court held that the *D'Oench* doctrine does not protect an acquiring bank from undisclosed claims that an agent lacked actual authority to enter into a loan transaction—even if there is no evidence of that purported defect in the acquired bank's records.

Amici and their members have an immediate and substantial interest in this Court granting review and resolving the legal issue presented. Amici's members have acquired failed banks' assets and obligations through P&A transactions and represent the market of prospective bidders in the event of future bank failures. Given their experience, amici submit this brief to provide this Court with a broader perspective on this issue's importance and to urge the Court to grant review.

STATEMENT OF ISSUE

When the FDIC as receiver or its successor takes over a failed bank as a receiver, does the *D'Oench* doctrine protect it from claims that an assumed loan obligation is invalid because it was entered into by the borrower without actual authority if that lack of authority was not evident in the assumed bank's records?

SUMMARY OF ARGUMENT

Renasant Bank's petition raises an unsettled issue of national importance that has divided district courts in this Circuit and merits this Court's review. The *D'Oench* doctrine has wide-ranging application and major precedential importance in the financial-services industry. Under that doctrine, the FDIC as receiver (FDIC-

R) and private successors are entitled to rely on a failed bank's files in evaluating the bank's assets and liabilities without fear that an undisclosed condition or defense will impair its rights. Those protections are important to ensure that financial institutions are able and willing to assume a failing bank's assets and liabilities.

The district court's novel exception to that longstanding doctrine is inconsistent with existing case law and casts doubt on countless loan transactions assumed by private bank bidders across the country. The uncertainty created by the district court's opinion threatens to destabilize the longstanding federal banking policy allowing the FDIC-R and acquiring banks to rely on a failed bank's records without fear of being blindsided by unwritten conditions or defenses on a seemingly unencumbered loan.

If left unresolved, this uncertainty will deter healthy banks from acquiring failed bank assets, particularly in this Circuit, thereby undermining the viability of an important feature of the federal banking system. Without healthy banks stepping in, the FDIC-R would have to liquidate the failing bank's assets on its own, which would strain federal banking insurance funds and put depositors' uninsured deposits at risk.

Amici urge this Court to grant review and resolve the conflicting authority on this important issue. Doing so, the Court should hold that the *D'Oench* doctrine protects acquiring banks from undisclosed claims that a borrower lacked authority

to enter into a loan transaction.

ARGUMENT

I. REVIEW IS WARRANTED TO RESOLVE AN UNSETTLED LEGAL QUESTION OF NATIONAL IMPORTANCE THAT HAS DIVIDED DISTRICT COURTS IN THIS CIRCUIT.

The district court's order holding that the *D'Oench* doctrine does not protect the FDIC and its successors for undisclosed lack-of-authority claims warrants this Court's review under 28 U.S.C. § 1292(b). This appeal satisfies all of section 1292(b)'s statutory criteria, and other important considerations weigh heavily in favor of granting review.

A. This Appeal Satisfies The Statutory Criteria For Review Under Section 1292(b).

As the district court found, and Renasant Bank cogently explains, this appeal easily satisfies all three statutory criteria for review under 28 U.S.C. § 1292(b). *First*, there is a substantial ground for difference of opinion on the question presented. Indeed, district courts in this Circuit are irreconcilably split, necessitating this Court's review to resolve the conflict. In *Federal Deposit Insurance Corporation v. First One Group, LLC*, No. 1:12-CV-1815-CAP, 2014 WL 12742162 (N.D. Ga. Apr. 25, 2014), the court squarely held that the *D'Oench* doctrine shields receivers from claims that a borrower lacked authority to enter into a loan transaction. *Id.* at *5–6. In contrast, the district court here reached the exact opposite conclusion, expressly acknowledging its disagreement with *First One*

Group and case law in other circuits. Doc. No. 96 at 20 (citing *First One Group* and *First City, Texas-Beaumont, N.A. v. Treece*, 848 F. Supp. 727, 736–39 (E.D. Tex. 1994)).

Courts have repeatedly recognized that the need to resolve such intra-circuit conflicts justifies review under Section 1292(b). *See, e.g.*, *Mei Xing Yu v. Hasaki Rest., Inc*., 874 F.3d 94, 98 (2d Cir. 2017) (granting review under section 1292(b) because "the differing rulings within th[e] Circuit" established a "substantial ground for difference of opinion").

Second, the issue presented is a pure and "controlling question of law," 28 U.S.C. § 1292(b), which this Court "can decide quickly and cleanly . . . without having to delve beyond the surface of the record in order to determine the facts." *Mamani v. Berzain*, 825 F.3d 1304, 1312 (11th Cir. 2016) (internal quotations omitted). There is no factual dispute that would complicate the Court's analysis.

Finally, granting review "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If the *D'Oench* doctrine applies, all the claims asserted in this action would fail as a matter of law, avoiding an unnecessary trial and conserving the associated judicial and litigant resources.

B. The Need For Uniformity And Stability In Federal Banking Laws Weighs Heavily In Favor Of Granting Review.

This Court's review is not only statutorily authorized, it is also needed to ensure uniformity, predictability, and stability in this important area of banking law.

Time and time again, this Court and its sister circuits have recognized the uniquely important need for uniformity in federal banking laws, including the application of the *D'Oench* doctrine. *See, e.g.*, *Fed. Deposit Ins. Corp. v. McCullough*, 911 F.2d 593, 602–04 (11th Cir. 1990) (recognizing need for "uniformity" and "predictability" in federal banking laws in applying the *D'Oench* doctrine to bar claims against receiver); *Fed. Deposit Ins. Corp. v. Gulf Life Ins. Co.,* 737 F.2d 1513, 1517 (11th Cir. 1984) (recognizing need for "uniform federal rule[s]" in banking law); *see also Fed. Deposit Ins. Corp. v. Bank of Boulder*, 911 F.2d 1466, 1475 (10th Cir. 1990) (en banc) (noting need for and adopting a "uniform rule" of banking law to govern P&A transactions because they are "extremely valuable").

No other principle of federal banking law has a greater impact on litigation involving failed financial institutions than the *D'Oench* doctrine. To date, *D'Oench* has been cited in over 1,800 cases nationwide. Yet no federal circuit court has directly answered the issue cleanly presented here. Moreover, as explained above, the district courts that have decided the question are now in conflict.

The lack of uniformity ushered in by the district court's decision is untenable to the marketplace. Financial institutions—particularly in this Circuit—are left to guess as to whether the *D'Oench* doctrine protects the FDIC-R and its successors from claims seeking to alter facially valid loan obligations based on undisclosed authority issues. This decision not only casts doubt on the enforceability of loan

agreements already purchased through the receivership process, it also deters banks from buying failed-bank assets in the future. Without this Court's review, financial institutions will be forced to incur the very same costs, litigation delays, and inconsistent outcomes that the *D'Oench* doctrine is designed to prevent.

The need for this Court's review is critical given the significant and disproportionate number of bank failures that have occurred in this Circuit. Nearly *one third* of all bank failures nationwide since the Great Recession have occurred in this Circuit. In fact, Georgia and Florida have suffered the most and second most bank failures in the nation. *See* Federal Deposit Ins. Corp., Failed Bank List, *available at* https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/banklist.html (accessed July 15, 2020). The Court should take this opportunity to resolve the issue now to avoid the uncertainty and needless expenses in this and future litigation.

II. THE DISTRICT COURT INCORRECTLY HELD THAT THE *D'OENCH* DOCTRINE DOES NOT PROTECT ACQUIRING BANKS FROM LACK-OF-AUTHORITY CLAIMS.

Review is further warranted because the district court's judgment cannot be squared with the *D'Oench* doctrine or the important federal policies underlying it. The need to protect receivers from undisclosed defenses on assumed loans is no less compelling where, as here, the defense is based on a borrower's alleged lack of authority to enter into the loan transaction.

As explained above, depriving the FDIC-R and acquiring banks of the *D'Oench* doctrine's protections in this context would cast doubt on countless facially valid loan obligations. This uncertainty would deter financially healthy banks from taking over insolvent banks in the future. Such a rule would also make P&A transactions significantly more expensive and reduce the price banks would be willing to pay for failed-bank assets. Moreover, banks would feel compelled to try to conduct additional and time-consuming due diligence on loans (to the extent time pressures would even allow for such diligence), and then be forced to incur the costs of defending against unexpected claims based on agreements or representations outside the assumed bank's records.

Without banks willing to assume assets, the FDIC-R must liquidate the failing bank's assets on its own, draining the Deposit Insurance Fund and exposing uninsured depositors to increased risk. Under a proper reading of the *D'Oench* doctrine, a lack-of-authority claim against a receiver is barred unless the receiver had notice of the claim in the defaulted bank records. *See First One Group*, 2014 WL 12742162, at *5–6; *First City*, 848 F Supp. at 736–39.

To be sure, as the district court noted, certain claims or defenses may not be subject to the *D'Oench* doctrine if they are based on "fraud in the factum," which renders an agreement void. *Langley*, 484 U.S. at 93. But that "fraud-in-the-factum" exception, as defined in *Langley* and the same authorities that opinion cites, only

applies to the narrow "sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents." *Id.*; *see* U.C.C. § 3-305; Restatement (Second) of Contracts § 163 (1981).

The fraud-in-the-factum exception does not apply where, as here, a borrower knows what he is signing, but allegedly lacks the authority to do so. Like other types of fraud, this type of misrepresentation renders the agreement *voidable*, not void. *See* Ga. Code Ann. § 13-5-5 ("Fraud renders contracts voidable at the election of the injured party."). And voidable interests are fully transferrable. *Langley*, 484 U.S. at 94. Because a borrower's lack of authority to sign a loan agreement renders the agreement merely voidable, that defect does not preclude the FDIC-R and its successors from obtaining an interest in the loan. Otherwise, the FDIC-R and its successors would be subject to a wide range of undisclosed defenses that make loans voidable. The *D'Oench* doctrine, and the compelling federal policies underlying it, do not tolerate such risks and uncertainty.

CONCLUSION

For these reasons, amici urge this Court to grant Renasant Bank's petition for permission to appeal.

Dated: July 16, 2020

Respectfully submitted,

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I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman.

I further certify that this brief complies with the type-volume limitations ordinarily applicable to amicus briefs because it contains 2,534 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief is less than one-half the length of the parties' briefs allowed under Fed. R. App. P. 5(c)(1).

Dated: July 16, 2020

s/ Edmund S. Sauer
Edmund S. Sauer

CERTIFICATE OF SERVICE

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