IN THE
MISSOURI SUPREME COURT

ROBERT D. CAIN., ET AL.,	)	
	)	
Respondents,	)	**Missouri Supreme Court No.: SC90511**
v.	)	
	)	
	)	
SHERRI PORTER,	)	
	)	
Appellant.	)	

ON APPEAL FROM THE MISSOURI COURT OF APPEALS – WESTERN DISTRICT

REPLY TO SUBSTITUTE BRIEF OF RESPONDENTS ROBERT D. CAIN, ET AL.

Submitted by,

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REPLY TO RESPONDENTS' STATEMENT OF FACTS

A timeline of the facts and events giving rise to this appeal are set forth in Appellant's Brief filed with the Missouri Court of Appeals, which brief appellant did not substitute in this honorable Court.

With regard to the facts set forth in Respondents' Substitute brief, Appellant addresses first the assertion by Respondents regarding the parties' agreement to lift the bankruptcy stay. Respondents assert that, once Appellant's bankruptcy counsel provided the Respondents' counsel with an agreed signed stipulation[1] to lift the bankruptcy stay (provided any recovery by Respondents would not exceed the limits of any applicable insurance coverage), such had the effect of "granting the Cains relief from the automatic stay to pursue their claims." Respondents' Substitute Brief, p. 5. In fact, no order lifting the automatic bankruptcy stay was ever entered by the bankruptcy court, at any time. (LF, 1-17.)

Respondents assert in their facts that the agreed stipulation was not filed with the bankruptcy court due to an oversight of Respondents' counsel. Respondents provide no evidentiary support in the record for such an assertion. In fact, in her Motion for Relief from Void Judgment under Rule 74.06(b), the denial of which is the subject of this appeal, Appellant claimed that Respondent's counsel "acted in willful violation of the automatic stay" in obtaining the Judgment of September 11, 2006. (LF, 136.) At no time before the circuit court did Respondents ever assert that the failure to file the stipulation

[1]Respondents did not include the stipulation in their Supplemental Legal File. Contemporaneously hereto Appellant has filed a Motion for Leave to Supplement Legal File to add the stipulation. The stipulation is also contained in the Appendix hereto.

with the bankruptcy court was a matter of oversight. (Tr., 30-93.) Respondents' counsel raised the matter of the signed stipulation during oral argument before the circuit court and never advised the circuit court of any alleged oversight in failing to file the stipulation with the bankruptcy court. (Tr., 76-80.) In seeking to set aside the circuit court judgment, Appellant Porter testified before the circuit court that the agreement to lift the stay had never been filed in the bankruptcy court by Respondents' counsel. (Tr., 80-81.) Respondents' counsel did not make any counter assertion at the time that the failure to file the stipulation was due to oversight or inadvertence. (Tr., 82.) Appellant argued that such a stipulation to lift the automatic stay to the extent of insurance coverage is not a self-executing document and that an affirmative order from the bankruptcy court lifting the stay was required before Respondents could have proceeded to trial against Appellant in the circuit court. (Tr., 82-85.) Appellant's contentions were denied by virtue of the circuit court's denial of the Motion for Relief from Void Judgment.

Respondents also assert: "Believing that the agreed motion and order granting relief from the automatic stay had been filed and the order entered, the Cains proceeded with their suit." Respondents' Substitute Brief, p. 5. Again, Respondents cite to no evidence in the record for this assertion. In fact, when Appellant argued before the circuit court that the signed stipulation to lift the stay was not a self-executing document, Respondents made no assertion to the circuit that they believed the stipulation had actually been filed with the bankruptcy court or that an order actually had been entered lifting the stay. (Tr., 89-90.) This assertion by Respondents is being made for the first time in the history of this case.

POINTS RELIED ON BY RESPONDENTS

The following is a restatement of the Points Relied on by Respondents, as required by Rule 84.04(e).

I. The Trial Court's Denial of Appellant's Rule 74.06 Motion for Relief Must Be Affirmed Because the Trial Court Judgment did not Violate the Bankruptcy Proceeding's Automatic Stay and was Therefore no Void ab initio.

II. The Trial Court's Denial Must Be Affirmed Even if There was a Violation of the Automatic Stay Because Judgments Obtained in Violation of the Automatic Stay are Voidable, not Void ab initio.

III. The Trial Court Decision Denying Appellant's Rule 74.06 Motion for Relief Must be Affirmed Because the Doctrine of Collateral Estoppel Bars Appellant From Raising the Issue of Subject Matter Jurisdiction.

ARGUMENT

I. "The Trial Court's Denial of Appellant's Rule 74.06 Motion for Relief Must Be Affirmed Because the Trial Court Judgment did not Violate the Bankruptcy Proceeding's Automatic Stay and was Therefore not Void ab initio."

A. Standard of Review.

Appellant agrees with Respondents' suggestion concerning the standard of review. "[T]he applicability of the automatic stay to a pending matter is an issue of law within the competence of the appellate court." *In re: Vierkant,* 240 B.R. 317, 320 (8th Cir. BAP 1999).

B. The Trial Court Judgment Violated the Automatic Stay Because the Parties' Agreement to Lift the Stay Had No Legal Effect.

Respondents argue that the legal file lacks "any finding or determination whatsoever that Respondents violated the automatic stay." Respondents' Substitute Brief, p. 11. That is precisely the point – the circuit court below, faced with the issue of whether the automatic stay had been violated, somehow found that there was no violation because "[Appellant] and [Respondents] agreed to lift the automatic bankruptcy [stay] in this matter before the entry of the September 11, 2006 judgment." (LF, Vol. 2, 216.) The circuit court's ruling is erroneous because the stipulation to lift the automatic stay (on the express condition that any recovery against Appellant "shall not exceed the limits of any applicable insurance coverage") was never filed with or acted upon by the

bankruptcy court. The parties' agreement to lift the stay did not lift the stay to allow for the trial and judgment that occurred on September 11, 2006.

To begin the analysis, "Section 362(a) of the Bankruptcy Code provides that the continuation of a judicial proceeding against the debtor is stayed when the debtor files a bankruptcy petition. 11 U.S.C. § 362(a)(1)." *Lunde v. American Family Mutual Insurance Company*, 297 S.W.3d 88, 91 (Mo.App. 2009). Here, Appellant filed her Chapter 13 bankruptcy petition on March 5, 2004, and filed an Amended Schedule of Creditors Holding Unsecured Nonpriority Claims (identifying Respondents and their claim) on January 10, 2006. At that point Respondents' circuit court action against Appellant was stayed as a matter of law. Section 362 "halts judicial proceedings" such as the underlying circuit court action at issue. *Lunde*, 297 S.W.3d at 91.

Next, the Court must consider whether Respondents' circuit court action against Appellant, which came to a "halt" as a matter of law by at least January 10, 2006, could somehow be "restarted" simply because of the signed stipulation between the parties allowing for the lifting of the stay. Missouri law holds that a debtor has no authority to waive the protection of the automatic bankruptcy stay. *Ousley v. Casada*, 985 S.W.2d 757, 758 (Mo. banc 1999). As further stated in *Noli v. C.I.R.*, 860 F.2d 1521, 1525 (9th Cir. 1988), a case cited with approval by this Court in *Ousley*, "[t]he automatic stay under 11 U.S.C. § 362(a) operates, until further order of the bankruptcy court, as an absolute bar to the commencement or continuation of a proceeding concerning the debtor . . . ." (Emphasis added.) Thus, the circuit court's refusal to set aside the judgment against Appellant as void in violation of the automatic stay, based on the rationale that (i) the

parties informally agreed to lift the stay and (ii) Appellant waived the bankruptcy protection, is erroneous as a matter of law.

Respondents argue that there was no violation of the automatic stay in light of the Bankruptcy Court's ruling of January 15, 2010. (LF, 99-100.) To put the Bankruptcy Court's ruling in proper perspective:

• Following the cue of the Missouri Court of Appeals in its decision[2], Appellant filed a motion to reopen her bankruptcy case to attempt to set aside the circuit court judgment as void in violation of the automatic stay;

• Although the Bankruptcy Court initially reopened the bankruptcy case it later vacated that order in its Amended Order filed January 15, 2010;

• In refusing to reopen the bankruptcy case the Bankruptcy Court relied upon the representation of Respondents and their counsel that they did not intend to execute on any judgment entered in their favor against any assets of Appellant;

• Once the Bankruptcy Court determined that it was not reopening Appellant's bankruptcy case (because of the representation by Respondents and their counsel that they did not intend to execute on any judgment against Appellant personally) the Bankruptcy Court determined that Appellant's motion to set aside the circuit court judgment as void for violating the automatic bankruptcy stay was moot;

• As a result of the Bankruptcy Court's refusal to reopen Appellant's bankruptcy case, and refusal to consider on the merits Appellant's motion to set aside the circuit

[2] In its decision that Missouri Court of Appeals suggested that the issue of whether the circuit court judgment is void may be one for the federal court system to decide. See *Cain v. Porter*, WD69615, Slip Op. at fn. 4.

court judgment as void, Appellant's contention that the circuit court judgment violated the automatic bankruptcy stay was not considered on the merits.

Indeed, because the Bankruptcy Court found the Appellant's Motion to Declare Judgment Void for Violation of the Automatic Stay was moot, Appellant's attempt to set aside the circuit court judgment was never considered by the Bankruptcy Court on the merits. Contrary to Respondents' argument, therefore, collateral estoppel does not apply to the issues before this Court regarding violation of the automatic bankruptcy stay because the issue was not tried to a judgment on the merits. *Newton v. Ford Motor Co*., 282 S.W.3d 825, 833 (Mo. 2009) (doctrine of issue preclusion only applies when a prior adjudication resulted in a judgment on the merits). Any statements by the Bankruptcy Court relating to the issue before this Court – whether the circuit court judgment of September 11, 2006 is void – were *obiter dicta* because the court's ultimate decision was its refusal to reopen the bankruptcy case based on (i) the fact that Respondents and their counsel stated they would not attempt to recover against Appellant personally, and (ii) the fact that Respondents' claim against Appellant had already been discharged in the bankruptcy. (Respondents' Supp. LF, 99-100.) See *Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo.App. 2003) (*obiter dicta* is a gratuitous opinion, or stated another way, it is a statement by a court that is not essential to the court's decision of the issue before it). The bottom line is that the bankruptcy case was never reopened, and the issue of whether the September 11, 2006 Judgment is void was never adjudicated on the merits by the Bankruptcy Court.

II. "The Trial Court's Denial [of Appellant's Rule 74.06 Motion for Relief] Must Be Affirmed Even if There was a Violation of the Automatic Stay Because Judgment Obtained in Violation of the Automatic Stay are Void, not Void *ab initio*."

A. Contrary to Respondents' Contention, the Trial and Judgment of September 11, 2006 Violated 11 U.S.C. § 362(a) and, Therefore, the Judgment is Void.

1. Actions Taken in Violation of the Automatic Stay are Void, Not Voidable.

In her brief filed with the Missouri Court of Appeals, Appellant set forth precedent showing that actions taken in violation of the automatic stay are void *ab initio*. Appellant understands that this Court desires that such argument not be repeated here. Respondents cite to various cases from the United States District Court in Missouri (some in the Western District) for the proposition that actions taken in violation of the automatic stay are voidable, not void. Yet every one of Respondents' cited cases has been rejected or questioned by some other case within the Western District. See *In re: Carpio*, 213 B.R. 744 (Bkrtcy. W.D. 1997) (rejecting *In re: Sapp*, 91 B.R. 520 (Bkrtcy. E.D. Mo. 1988)); *In re: Harris*, 268 B.R. 199, 203 (Bkrtcy. W.D. Mo. 2001) (rejecting voidable conclusion set forth in *In re: Williams*, 257 B.R. 297 (Bkrtcy. W.D. Mo. 2001)); *In re: Batton*, 308 B.R. 406, 409-410 (Bkrtcy. W.D. Mo. 2004) (pointing out opposing authority to *In re: Adams*, 215 B.R. 194 (Bkrtcy. W.D. Mo. 1997)); *In re: Lett*, 238 B.R. 167, 193 (Bkrtcy.

W.D. Mo. 1999) (acknowledging that a majority of courts in the Eighth Circuit have held that actions in violation of the automatic stay are void *ab initio*).

Although the Eighth Circuit Court of Appeals has not weighed in on the issue, a majority of the federal courts of appeal have held that actions taken in violation of the automatic stay are void, not voidable. See *In re: Walker*, 405 B.R. 300, 307 (Bkrtcy. E.D. Wisc. 2009).

The two Missouri state appellate court cases of which Appellant is aware that have considered the issue both have held that actions taken in violation of the automatic stay are void. *Kliefoth v. Fields*, 828 S.W.2d 714, 715 (Mo.App. 1992); *Crowley v. Crowley*, 715 S.W.2d 934, 938 (Mo.App. 1986). *Kliefoth* is particularly instructive in this case. In *Kliefoth*, after a bankruptcy debtor had filed Chapter 11 reorganization, giving rise to the automatic stay, the state circuit court entered an order and judgment against the bankruptcy debtor in a separate civil case. The Missouri Court of Appeals held that the circuit court's order and judgment against the bankruptcy debtor violated the automatic stay and declared the judgment void. 828 S.W.2d at 715-716. "The automatic stay is designed to protect the debtor from judgments and the consequences thereof . . . ." *Id*. at 716.

As a result of the Respondents violating the automatic stay in this case, an improper judgment awarding damages to Respondents in the amounts of $146,018.99 and $54,081.25 was entered without Appellant even having an opportunity to make a defense. In a trial where Respondents offered no medical testimony to support their claims of past and future medical care (Tr., 2-23) these awards are clearly improper on their face.

Indeed, Respondents themselves introduced evidence at the trial showing that their attorney was authorized to settle their claims for $15,000 and $6,000, respectively, yet they proceeded to trial and a judgment against Appellant and recovered amounts vastly in excess of what could be considered reasonable. Willfully violating the automatic bankruptcy stay to obtain such a judgment against Appellant violates the rule of law.

The September 11, 2006 judgment is void. This Court should declare it so and remand this case to the circuit court for further proceedings.

2. Even If This Court Employs A Voidable Standard to the Automatic Stay Violation, Equity Requires that The September 11, 2006 Judgment Be Declared Void.

Indeed, this Court need not attempt to predict or resolve what the Eighth Circuit would do to settle the "void versus voidable" debate. Even under the federal court cases holding that actions in violation of the automatic stay are voidable, the September 11, 2006 judgment entered by the circuit court against Appellant can be voided by this Court for equitable reasons. See, e.g., *In re: Lett*, 238 B.R. at 193. The Respondents obtained a judgment against Appellant when they had full notice of Appellant's bankruptcy action and were specifically identified as creditors. Respondents made no attempt at all to even advise the circuit court at the time of the trial that the case was subject to the automatic stay. (Tr., 2-29.) Respondents have no evidence in the record to support the proposition that proceeding to trial without the stay having been lifted was somehow inadvertent. Indeed, Appellant's contention that Respondent's counsel willfully violated the stay (LF, 136) was never refuted by Respondents in their written opposition to Appellant's Motion

for Relief from Void Judgment. (LF, 187-190.) Finally, the judgment awarded, as shown above, was grossly excessive.

Heightening the inequity, Respondents have taken a situation in which, at most, they would have been limited to the $50,000 policy limit of Appellant's insurance policy, and have bootstrapped their unlawful trial and judgment into an attempted windfall. The Court is now aware that a stipulation to lift the stay was signed by Appellant's bankruptcy counsel but was never filed with the Bankruptcy Court by Respondents. See Appendix hereto. That stipulation limited any recovery against Appellant to the limit of her applicable insurance coverage, $50,000. Yet because Respondents proceeded to obtain their improper judgment in an amount over $200,000, Appellant was required to post a supersedeas bond for this appeal in the amount of $250,000. Whereas the parties had expressly agreed to limit any recovery to Appellant's insurance coverage, Respondents now are attempting to collect the full amount of the supersedeas bond in the event the judgment is affirmed in this appeal. See Respondents' Supplemental Legal File, 92-93. Respondents are now seeking to profit, handsomely, by willfully violating the automatic stay and the rule of law.

Respondents' attempt to rely for support on *In re: Hoskins*, 266 B.R. 872 (Bkrtcy. W.D. Mo. 2001), is unavailing. In *Hoskins*, the bankruptcy court found that Ford Motor Credit had willfully violated the automatic bankruptcy stay even though counsel for Ford Motor Credit did not intend to violate the stay. Likewise, despite Respondents' protestations that their failure to move to lift the stay was inadvertent, *Hoskins* establishes

that Respondents' act of going to trial and obtaining a judgment against Appellant amounts to a willful violation of the stay under bankruptcy law.

More importantly, however, in *Hoskins* the court granted a motion by Ford Motor Credit for retroactive relief from the automatic stay. Here, Respondents have never moved for retroactive relief of the automatic stay. Such a mode of relief is unavailable to Respondents in this appeal.

In addition, Respondents' argument that Appellant knowingly waived the automatic stay is not supported by the record. There are no facts in the record to show that Appellant's counsel in the circuit court was even aware of Appellant's bankruptcy action until after the unlawful trial. Respondents themselves acknowledge that the stipulation to lift the stay was arranged between counsel for Respondents and bankruptcy counsel for Appellant, not counsel for Appellant who was handling the circuit case below. Moreover, a waiver of the automatic stay does not fit the facts of this case. Moe importantly, this is not a situation where Appellant appeared and defended against the Respondents' claims at trial and then, after losing the trial, decided to raise the bankruptcy issue. Rather, it is clear that Appellant was not even present at trial, either personally or by counsel (and for good reasons as cited in Appellant's statement of facts in her brief to the Court of Appeals). The trial court's reasoning, now shared by Respondents, is inherently flawed because there is no evidence at all that Appellant chose to stay away from the trial in some attempt to gain advantage.

In short, even if this Court applies a voidable standard in reviewing the facts of this case, this Court should declare the September 11, 2006 judgment void because of the violation of the stay and the inequity of allowing the judgment to stand.

III. "The Trial Court Decision Denying Appellant's Rule 74.06 Motion for Relief Must be Affirmed Because the Doctrine of Collateral Estoppel Bars Appellant From Raising the Issue of Subject Matter Jurisdiction."

A. Appellant Was Not Barred by Collateral Estoppel from Asserting Her Rule 74.06(b) Motion for Relief from Void Judgment.

Citing *Spino v. Bhakta*, 174 S.W.3d 702 (Mo.App. 2005), the Court of Appeals determined that Appellant was barred by the doctrine of issue preclusion from asserting her Rule 74.06(b) Motion to Set Aside Void Judgment. Respondents argue in support of this same reasoning in their third point relied on.

The facts surrounding the post-trial events are, Appellant acknowledges, confusing. The timeline of events is as follows:

09/11/06 Judgment is entered against Appellant, *in absentia*, after a short trial to the bench in favor of Respondents awarding damages of $146,018.99 and $54,081.25, respectively (LF, 71-72);

09/26/06 Motion to Set Aside the Judgment filed by Appellant (LF, 78);

10/04/06 Amended Motion to Set Aside the Judgment filed by Appellant (LF, 84);

11/01/06 Hearing held on Appellant's Motion to Set Aside the Judgment (Tr., 30);

11/17/06 Circuit Court denies the motion to set aside (LF, 93);

11/30/06 Motion to Reconsider Motion to Set Aside Default Judgment filed by Appellant, pointing out that the court's judgment was void as violative of the automatic bankruptcy stay (LF, 96);

02/28/06 Appellant's Motion to Reconsider Motion to Set Aside Default Judgment deemed denied by operation of Rule 78.06[3].

03/13/07 The circuit court denies the Motion to Reconsider without a hearing stating it did not "state a sufficient basis upon which this court may grant the relief sought . . . ." (LF, 111)[4];

03/23/07 Undersigned counsel enters an appearance for Appellant, and files a Notice of Appeal of the circuit court Judgment (LF, 114, 127)[5];

04/13/07 Appellant files a Motion for Relief from Void Judgment in the circuit court on the basis that the circuit court judgment violated the automatic bankruptcy stay (LF, 132);

04/16/07 Pursuant to Appellant's Motion for Dismissal, the Court of Appeals dismisses the direct appeal of the Judgment (LF, 180)[6];

07/26/07 Hearing held pursuant to Rule 74.06(c) on Appellant's Motion for Relief from Void Judgment (Tr., 56);

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[3] "If not ruled upon with 90 days of filing the motion, the motion is deemed denied and the judgment becomes final." *Spino*, 174 S.W.3d at 706.

[4] This ruling was of no effect because the Motion to Reconsider Motion to Set Aside Default Judgment had already been denied by operation of law.

[5] This Notice of Appeal was of no effect because it was not filed within ten days of February 28, 2007, the date the Motion to Reconsider Motion to Set Aside Default Judgment was deemed denied.

[6] Again, the Notice of Appeal was without effect because it was not filed within ten days of the judgment becoming final.

01/08/08 The circuit court enters a Judgment denying appellant's Motion for Relief from Void Judgment (LF, 195);

02/13/08 Appellant timely files a Notice of Appeal of the circuit court's 01/08/08 Judgment (LF, 203).

Appellant's Motion for Relief from Void Judgment filed April 13, 2007, that is the subject of the instant appeal, constituted an independent action in equity seeking to vacate an improper judgment that violated the automatic stay. See *Spino*, 174 S.W.3d at 706 (Rule 74.06 motion that invokes the equitable power of the court considered an independent action in equity).

The question becomes whether the relief requested in Appellant's Motion for Relief from Void Judgment, an independent action in equity, is barred under principles of *res judicata* because Appellant also raised the issue of the bankruptcy stay violation in her underlying motion to set aside the judgment. This Court should find that Appellant is not barred from raising this issue.

Under Missouri law. "to the extent that [Appellant] has properly pleaded an independent action in equity to set aside a judgment for fraud on the court, *res judicata* and collateral estoppel have no bearing on the case." *Sanders v. Insurance Company of North America*, 904 S.W.2d 397, 401 (Mo.App. 1995). In her Motion for Relief from Void Judgment filed April 13, 2007, Appellant essentially asserted that Respondents had committed a fraud on the court by knowingly going to trial against Appellant, in her absence, in the face of the automatic stay: "By continuing to prosecute this case after receiving notice of the bankruptcy action, counsel for the plaintiff has acted in willful

violation of the automatic stay." (LF, 136.) Here, this Court should find that Appellant properly pleaded, in her Motion for Relief from Void Judgment filed April 13, 2007, grounds to support setting aside the September 11, 2006 judgment for fraud upon the court. As such, Appellant was not barred from again asserting the judgment was void because it resulted from a willful violation of the bankruptcy stay, and the circuit court erred in denying Appellant's requested relief.

The final question for this Court is whether the circuit court erred in denying Appellant's Motion for Relief from Void Judgment. The standard of review for an independent action in equity is that "the decree of judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). If the circuit court's Judgment of January 8, 2008 fails in any of these regards it must be reversed.

A review of the circuit court's Judgment of January 8, 2008 (see Appendix hereto) demonstrates that every one of the findings made by the circuit court either lacks substantial evidence, is against the weight of the evidence, or erroneously applies the law. Above all, the circuit court failed to recognize that, as a matter of law and equity, Respondents' willful violation of the automatic stay rendered the September 11, 2006 judgment void, as shown above.

Appellant respectfully requests that this Court reverse the circuit court's denial of her Motion for Relief from Void Judgment filed April 13, 2007, and to remand this action to the circuit court for further proceedings.

CONCLUSION

The trial court did not have authority to enter Judgment against Porter on September 11, 2006. The trial court's actions that day resulted from a willful violation of the automatic bankruptcy stay. No relief from that stay was ever sought or obtained before the trial court's Judgment of September 11, 2006. As a result, the underlying circuit court Judgment of September 11, 2006, as well as all proceedings in that case, are void. This Court must set aside the Judgment of September 11, 2006 as a matter of law, and remand this case to the circuit court for further proceedings.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached reply brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,897 words, as determined by Microsoft Office Word 2007 software;

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed via U.S. mail, postage prepaid this 4th day of March, 2010 to:

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APPENDIX

[1] The Motion itself is contained at Respondents' Supplemental Legal File, P. 27.