

NO. 2013-CA-01490

IN THE SUPREME COURT OF MISSISSIPPI

SASS MUNI-V, LLC,

Appellant,

v.

MIC-ROCKY, LLC, et al.,

Appellees.

**ON APPEAL FROM DESOTO COUNTY CHANCERY COURT
NO. 11-CV-1730**

**JOINT BRIEF OF APPELLEES MARSHALL INVESTMENTS CORPORATION A/K/A
MARSHALL INVESTMENTS CORPORATION OF MINNESOTA, E. FRANK
CHILDRESS, JR., R. SPENCER CLIFT, III, AND K. DAVID WADDELL, AS
SUBSTITUTE TRUSTEES, AND MIC-ROCKY, LLC**

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ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

SASS MUNI-V, LLC,

Appellant,

v.

MIC-ROCKY, LLC, et al.,

Appellees.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sass Muni-V, LLC, Delaware Limited Liability Company, Appellant;
2. Joey Treadway, Tax Collector of DeSoto County, Mississippi, Appellee;
3. Parker Pickle, Tax Assessor of DeSoto County, Mississippi, Appellee;
4. W. E. Davis, Chancery Clerk of DeSoto County, Mississippi, Appellee;
5. DeSoto County, Mississippi, Appellee;
6. City of Horn Lake, Mississippi, Appellee;
7. Marshall Investments Corporation a/k/a Marshall Investments Corporation of Minnesota, Appellee;
8. E. Franklin Childress, Jr., R. Spencer Clift, III and K. David Waddell, as Substitute Trustees, Appellees;
9. Mic-Rocky, LLC;
10. Billy C. Campbell, Jr., Esq.
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16. Honorable Mitchell M. Lundy, Jr., Chancellor
Third Chancery Court District
17. State of Mississippi, Nominal Defendant
18. Mississippi State Tax Commission, Nominal Defendant

SO CERTIFIED, this the 1st day of September, 2014.

BAKER, DONELSON, BEARMAN
CALDWELL & BERKOWITZ, PLLC

By: /s/ Jacob A. Dickerson
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STATEMENT REGARDING ORAL ARGUMENT

The Appellees, Marshall Investments Corporation a/k/a Marshall Investments Corporation of Minnesota, E. Frank Childress, Jr., R. Spencer Clift, III, K. David Waddell, as Substitute Trustees, and Mic-Rocky, LLC (hereinafter “Corporate Appellees”), believe the issues presented in this appeal involve well-settled questions of Mississippi law. Therefore, the Corporate Appellees do not believe that oral argument will be beneficial, unless the Court has specific questions that it would like to address with counsel.

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STATEMENT OF ISSUES

1. Whether a voluntary tax sale purchaser has standing under Mississippi law to file suit to set aside a tax sale when the landowner or the lienholder does not contest the sale.
2. Whether lack of standing can be raised on appeal regardless of whether it was raised in the court below.
3. Whether the Trial Court correctly held that the Appellant tax sale purchaser's suit to set aside the sale was barred by the applicable statute of limitations.
4. Whether the Corporate Appellees properly joined in its fellow co-defendants' Motions to Dismiss.

Pursuant to Rule 28(j) of the Mississippi Rules of Appellate Procedure, Corporate Appellees hereby join in and adopt the issues and arguments of the DeSoto Appellees as set forth in the DeSoto Appellees' Joint Appellate Brief, filed on August 27, 2014.

STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Sass Muni-V, LLC, (“Sass Muni”) is a tax sale purchaser who bid over \$500,000.00 on a parcel of property located in Horn Lake, DeSoto County, Mississippi (hereinafter “the Property”)¹ expecting a huge return on its investment in the form of interest and penalties for unpaid 2007 property taxes if the property was redeemed. However, there was always the possibility that the owner of the Property may fail to redeem the Property within the statutory redemption period. In that case, Sass Muni, like any tax sale purchaser, would have the available statutory remedy of securing title to the Property. However, Sass Muni failed to do so. In any event, Sass Muni is not entitled to a refund of the amounts paid at the tax sale.

In this case, the prior record owners, the Corporate Appellees, chose not to redeem the Property. Rather than seek title to the Property - its only statutory remedy - Sass Muni filed suit in the DeSoto County Chancery Court (hereinafter “Chancery Court”) in August of 2011 seeking to rescind the tax sale and receive a full refund of all monies paid because Corporate Appellees allegedly did not receive proper notice. The Chancellor below correctly dismissed the case for lack of standing and on statute of limitations grounds.

B. Statement of Facts

As set forth in Sass Muni’s Complaint, on August 25, 2008, Sass Muni was the highest bidder for the Property’s delinquent 2007 taxes in the amount of \$530,508.00. (R. 25). The reputed owner of record, MIC-Rocky, LLC, (R. 196) chose not to redeem the taxes before the statutory redemption period set forth in Miss. Code Ann. § 27-45-3 expired. (R. 26-29). Nor did MIC-Rocky, LLC or any other Corporate Appellee file suit to set aside the tax sale due to a purported lack of notice. To be clear, the Corporate Appellees were aware of the redemption

¹ The Property is further identified as tax parcel number 1087-3600.0-00005.00. (R. 26).

deadline and made a conscious choice not to redeem the Property: “the [Corporate Appellees] claim no equitable or legal interest in the Real Property that is the focal point of Plaintiff’s Complaint.” (R. 254).

Upon expiration of the redemption period, rather than pursue its statutorily prescribed remedies of filing suit to Quiet and Confirm Title pursuant to Miss. Code Ann. §11-17-1 or requesting a tax deed from the DeSoto County Chancery Clerk, Sass Muni filed its Complaint seeking a refund of all monies paid at the tax sale on the following grounds:

1. The alleged failure to provide Corporate Appellees with notice of the expiration of the redemption period;
2. The alleged non-existence of MIC-Rocky, LLC prior to October 3, 2008; and
3. The alleged violation of Sass Muni’s Fifth and Fourteenth Amendment rights.

(R. 29 to 52). The Complaint named three groups of defendants: (1) Joey Treadway, Tax Collector of DeSoto County, Mississippi, W. E. “Sluggo” Davis, Chancery Clerk of DeSoto County, Mississippi, Parker Pickle, DeSoto County Tax Assessor, and DeSoto County, Mississippi, (“DeSoto Appellees”); (2) the City of Hornlake, Mississippi (“City Appellee”); and (3) Corporate Appellees.

DeSoto Appellees filed their combined *Answer* on October, 10, 2011. (R. 232 to 242). City Appellee filed its *Answer* on December, 2, 2011. (R. 266 to 290). Corporate Appellees opted to file a *Motion to Dismiss* for failure to state a claim pursuant to Rule 12(b)(6) on October 28, 2011, instead of filing an answer. (R. 253 to 260).

On March 30, 2012, Sass Muni served discovery on Corporate Appellees, DeSoto Appellees, and City Appellee. (R. 328 to 357). On April 18, 2012, Corporate Appellees filed their *Motion and Supporting Memorandum of Law for Protective Order to Stay Discovery* requesting that discovery be stayed pending the outcome of its previously filed Motion to

Dismiss. (R. 358 to 361). The DeSoto Appellees and City Appellee also filed motions to stay discovery on April 20, 2012, and April 23, 2012 respectively, arguing that Sass Muni did not submit its discovery requests within 90 days of service as required by Uniform Chancery Court Rule 1.10(a). (R. 364 to 367, 370 to 373). On June 19, 2012, Sass Muni filed a *Motion for Enlargement of Discovery Deadline* and *Motion to Compel or Opposition to Motions for Protective Orders or Orders Seeking to Stay or Quash Discovery*. (R. 396 to 435). The parties' respective motions were heard by the Chancery Court on July 17, 2012.

On August 13, 2012, the Chancery Court entered its *Order on Defendant's Motions For Protective Order to Stay Discovery and Strike Plaintiff's Discovery Requests, Plaintiff's Motion for Enlargement of Discovery Deadline, and Motion to Compel* wherein the Court granted Sass Muni's Motion to enlarge the discovery deadline and denied the DeSoto Appellees' and City Appellee's Motions for Protective Orders. (R. 476 to 478). However, the Chancery Court also held that discovery was stayed for 90 days so that the DeSoto Appellees and City Appellee could "file any dispositive motions pursuant to Rule 12" if they desired. (R. 477). The Chancellor reserved ruling on the Corporate Appellees' *Motion to Dismiss*, which had already been filed, during this 90-day window. (R. 477).

Just over a month later, on September 19, 2012, DeSoto Appellees filed their *Joint Motion to Dismiss* for failure to state a claim upon which relief can be granted pursuant to Mississippi Rule of Civil Procedure 12(b)(6). (R. 479 to 482). The DeSoto Appellees relied on Sass Muni's lack of standing and the running of the applicable statute of limitations as a basis for their Motion. (R. 479 to 482). Corporate Appellees properly joined in the DeSoto Appellee's Motion. (R. 483 to 485). On September 27, 2012, City Appellee likewise filed a Rule 12(b)(6) *Motion to Dismiss* raising substantially the same arguments presented in the DeSoto Appellees'

Motion. (R. 486 to 497). The Corporate Appellees properly joined in the City Appellee's Motion as well. (R. 498 to 500).

Chancellor Mitchell M. Lundy, Jr. heard oral arguments on the pending Motions to Dismiss on July 31, 2013. Chancellor Lundy entered an *Order/Opinion Sustaining Defendants' Motions to Dismiss* granting the Motions. (R. 687 to 688). Specifically the Court held: "County Defendants' and City Defendants' motions to dismiss, ***which the Corporate Defendants have properly joined***, are sustained, and this cause of action be, and the same is hereby dismissed." (R. 688) (emphasis added).

From this Order Sass Muni appeals.

SUMMARY OF THE ARGUMENT

As discussed more fully in the DeSoto Appellees' Joint Appellate Brief, filed on August 27, 2014, which is joined in and adopted by Corporate Appellees pursuant to Miss. R. App. P. 28(j), the Chancery Court's dismissal of Sass Muni's lawsuit for lack of standing should be affirmed because Miss. Code Ann. §§ 27-43-3 and 27-43-11 do not authorize a tax sale purchaser to attempt to set aside a tax sale. A tax sale purchaser only has those remedies specifically provided by statute: file suit to Quiet and Confirm Title of the property pursuant to Miss. Code Section §11-17-1.

As argued in the DeSoto Appellees' Joint Appellate Brief, which argument is joined in and adopted by Corporate Appellees pursuant to Miss. R. App. P. 28(j), dismissal of Sass Muni's lawsuit was also proper because Sass Muni's claims are barred by the applicable three-year statute of limitations.

The Chancery Court's Order of Dismissal applies equally to the Corporate Appellees as it does to the DeSoto Appellees and the City Appellee. First, standing is a jurisdictional threshold question that can be raised by a party or by the Court *sua sponte* at any time, even on appeal.

Second, as the Chancery Court held, Corporate Appellees properly joined in the other Appellees' Motions to Dismiss. Thus, if the Chancery Court's decision to dismiss Sass Muni's case is affirmed, as it should be, the dismissal applies to Corporate Appellees.

ARGUMENT

I. Introduction and Adoption of DeSoto Appellees' Arguments in Favor of Dismissal of Sass Muni's Claims.

As fully discussed in the DeSoto Appellees' Brief filed with this Court on August 27, 2014, the Chancery Court properly dismissed Sass Muni's case because Sass Muni lacked standing and because Sass Muni's case is barred by the applicable three year limitations period. Corporate Appellees adopt and join in the arguments on these issues presented in the DeSoto Appellees' Brief, and fully incorporate them herein pursuant to Mississippi Rule of Appellate Procedure 28(j).

Corporate Appellees write separately to explain why the Chancery Court's *Order/Opinion Sustaining Defendants' Motions to Dismiss* (R. 687 to 688) applies equally to the Corporate Appellees. First, standing is a threshold issue that may be raised by any party or by the Court *sua sponte* for the first time on appeal. Second, Corporate Appellees properly joined in the Motions to Dismiss of the DeSoto Appellees and the City Appellees. Therefore, if the Court affirms the Chancery Court's Order of Dismissal, Sass Muni's claims against Corporate Appellees are likewise dismissed and barred.

II. Standing is a threshold question that may be raised by any party or by the Court *sua sponte* at any time, even on appeal.

The Court need not even reach the question of whether Corporate Appellees properly joined in its co-defendants' Motions to Dismiss because standing is a threshold question that may be raised at any time, even on appeal.²

² Amicus Curiae, National Tax Lien Association, admitted as much in its Amicus Brief. *Amicus Brief* at 6.

A threshold issue in every case is standing. *State v. Quitman Cnty.*, 807 So. 2d 401, 404 (Miss. 2001) (“This Court must first address the threshold issue of standing.”); *Kinney v. Catholic Diocese of Biloxi, Inc.*, 2014 WL 3513125, *4 (Miss. July 17, 2014). “Standing is one aspect of subject-matter jurisdiction.” *Kinney*, 2014 WL 3513125 at *4 (citing *Schmidt v. Catholic Diocese of Biloxi*, 18 So. 3d 814, 826 (Miss. 2009)). Thus, when a plaintiff lacks standing, it “‘robs the court of jurisdiction to hear the case.’” *Schmidt*, 18 So. 3d at 826 (quoting *Pruitt v. Hancock Med. Ctr.*, 942 So. 2d 797, 801 (Miss. 2006)). Because “[s]tanding is a jurisdictional issue [it] may be raised by any party or the Court at any time.” *City of Madison v. Bryan*, 763 So. 2d 162, 166 (Miss. 2000) (citing *Williams v. Stevens*, 390 So. 2d 1012, 1014 (Miss. 1980)); *see also* Miss. R. Civ. P. 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action”). Thus, it is well settled that an appellate court may address the issue of standing, even if the issue was not raised in the court below. *Benedict v. City of Hattiesburg*, 693 So. 2d 377, 381 (Miss. 1997) (“This Court may *sua sponte* dismiss a case for lack of standing whether it was raised in the court below or not.”).³

In this case, if the Court affirms the Chancery Court’s holding that Sass Muni lacked standing to bring its suit - in other words, that the Court lacked jurisdiction over the case - Sass Muni’s case must be dismissed as to all defendants. Corporate Appellees’ conduct in the proceedings below, or any alleged lack thereof, does not change the result. *See Penrod Drilling Co. v. Bounds*, 433 So. 2d 916, 925 (Miss. 1983) (“[S]ubject matter jurisdiction may be

³ *See also State v. Hicks*, 806 So. 2d 261, 263 (Miss. 2002) (“Though the issue of whether the State has standing to prosecute this appeal has not been raised by the parties, this Court may *sua sponte* address the question of standing.”) (citing *Benedict*, 693 So. 2d at 381); *In re Adoption of J.D.S.*, 953 So. 2d 1133, 1136 (Miss. Ct. App. 2007) (“Standing is also an issue which this Court may rule on *sua sponte*, whether it was raised in the lower court or not.”) (citing *Benedict*, 693 So. 2d at 381); *DeSoto Times Today v. Memphis Pub. Co.*, 991 So. 2d 609, 611 (Miss. 2008) (“Because standing is jurisdictional and may be considered by this Court *sua sponte*, we will address this issue as well.”) (citing *City of Madison v. Bryan*, 763 So. 2d 162, 166 (Miss. 2000)).

questioned at any time and may not be waived or conferred by consent.”); *E.M.C. v. S.V.M.*, 695 So. 2d 576, 580 (Miss. 1997) (“[S]ubject matter jurisdiction may not be waived and may be asserted at any stage of the proceeding or even collaterally.”); *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 548 (Miss. 2009) (“It is well-established that the defense of lack of subject matter jurisdiction cannot be waived.”).

Therefore, there is no legal basis for granting Sass Muni’s “requests that the Court find that the Corporate Defendants were not properly joined in the County/City motions, and that the dismissal did not reach the Corporate Defendants.” *Appellant’s Brief* at 32. As discussed below, Corporate Appellees properly joined in the other Appellees’ Motions to Dismiss. But even if that was not the case, this Court should affirm the dismissal of Sass Muni’s claims against Corporate Appellees for lack of standing.

III. Corporate Appellees properly joined in the other Appellees’ Motions to Dismiss.

While it is not necessary for the Court to reach this issue if it affirms the Chancery Court’s holding that Sass Muni lacked standing to bring its suit, Corporate Appellees would further show that they did, in fact, properly join in all arguments asserted in its co-defendants’ Motions to Dismiss, including Sass Muni’s lack of standing and the fact that the applicable three year statute of limitations expired before Sass Muni filed its Complaint.

Corporate Appellees were the first parties to file a Motion to Dismiss for failure to state a claim pursuant to Mississippi Rule of Civil Procedure 12(b)(6). (R. 253 to 260). At the July 17, 2012 hearing, the Chancellor reserved ruling on the Corporate Appellees’ Motion to Dismiss and afforded the DeSoto Appellees and the City Appellee an opportunity to file Motions to Dismiss as well. (R. 476 to 477). Both the DeSoto Appellees and the City Appellee chose to do so. (R. 479 to 482, 486 to 497). Corporate Appellees joined in these two additional Motions, including the issues of standing and statute of limitations. (R. 483 to 485, 498 to 500).

Corporate Appellees further filed their Reply Brief in support of their Motion to Dismiss and argued that Sass Muni's claims were barred because Sass Muni lacked standing and the applicable statute of limitations had run. (R. 625 to 628). The Chancery Court subsequently entered its *Order/Opinion Sustaining Defendants' Motions to Dismiss*. (R. 687 to 688). The Order expressly dismissed the case as to the Corporate Appellees because “**the Corporate Defendants have properly joined**” in the other Appellees’ Motions to Dismiss. (R. 688) (emphasis added).

Sass Muni challenges the applicability of the Chancellor’s Order to the Corporate Appellees because “[i]t was not the corporate defendants’ 12(b)(6) motion ultimately granted by the chancellor.”⁴ *Sass Muni’s Brief* at 32. The purported “problem” with the Corporate Appellees’ joinder, as alleged by Sass Muni, is that the Corporate Appellees “never asserted any affirmative defenses, and have not answered the Complaint.” *Id.*

Corporate Appellees would first respond that under the Mississippi Rules of Civil Procedure, a defendant may first file a motion to dismiss *in lieu* of filing an answer. Miss. R. Civ. P. 12(a). An answer is not due until 10 days after a ruling on a pending motion to dismiss, unless the court orders otherwise. Miss. R. Civ. P. 12(a)(1). The Court below did not require an answer.

The Corporate Appellees would further show that by timely filing their Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted, they preserved the right to join in the arguments presented in the DeSoto Appellees’ and City Appellee’s Motions to Dismiss. Rule 12(g) provides that if a party fails to raise a defense in its original 12(b) motion, it cannot raise the omitted defense in a subsequent motion except as provided in

⁴ So that the present appeal could be perfected, the Appellant and Corporate Appellees entered into a stipulation that preserved the Appellant’s objection to joinder. (R. 683 to 686).

Rule 12(h)(2). Miss. R. Civ. P. 12(g). The “defense of failure to state a claim upon which relief can be granted” is one those defenses **that can be raised at any time** - even at trial. Miss. R. Civ. P. 12(h)(2).

In addition to being able to bring 12(b)(6) motions for failure to state a claim at any time until trial, there is no prohibition against a party asserting **new arguments** in support of such a motion that is already properly before the Court. Stated differently, Rule 12 contemplates the waiver of **defenses**, not the waiver of **arguments** in support of defenses. *See Howard v. Estate of Harper ex rel. Harper*, 947 So. 2d 854 (Miss. 2006).

In *Howard*, the representatives of two estates filed suit against two nursing home employees in their capacity as administrator and licensee of the nursing home. *Id.* at 856. The defendants filed a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Id.* After their motion was denied, the defendants filed petitions for interlocutory appeal, which were granted. *Id.* On appeal, the defendants contended that their motion to dismiss should have been granted because they could not be liable for medical malpractice, fraud, or breach of fiduciary duty, and presented several new **arguments** in support of their position. *Id.* at 860–62. The plaintiffs responded that the defendants should be barred from asserting these arguments on appeal because the defendants did not make them in their motion to dismiss or in their petitions for interlocutory appeal. *Id.* at 860 and n.4. The Mississippi Supreme Court disagreed with the plaintiffs’ position:

In the [defendants’] motion to dismiss, they asserted the Plaintiffs failed to state a claim upon which relief could be granted pursuant to Miss. R. Civ. P. 12(b)(6). **We find this assertion is sufficient to preserve the issue for appeal.**

Id. at 860 (emphasis added). In other words, by properly filing a Rule 12(b)(6) motion to dismiss, the defendants preserved the right to present *arguments* in support of their motion, even if not asserted in the original motion itself.⁵

The holding in *Howard* is in accord with federal cases discussing Federal Rule 12(b)(6). The Seventh Circuit has expressly held that “Rule 12(g)(2) does not prohibit a new Rule 12(b)(6) *argument* from being raised in a successive motion.” *Ennenga v. Starns*, 677 F.3d 766, 773 (7th Cir. 2012) (emphasis added). Subsections (g) and (h) of Federal Rule 12 are almost identical to the same subsections in Mississippi Rule. *Compare* Fed. R. Civ. P. 12(g)-(h), *with* Miss. R. Civ. P. 12(g)-(h). And Mississippi courts will look to federal decisions when interpreting similar rules of procedure. *Lone Star Indus., Inc. v. McGraw*, 90 So. 3d 564, 569 n.5 (Miss. 2012).

Accordingly, the Court should affirm the Chancery Court’s ruling that the Corporate Appellees properly joined in the DeSoto Appellees’ and City Appellee’s Motions to Dismiss. If the Chancery Court’s *Order/Opinion Sustaining Defendants’ Motions to Dismiss* is affirmed on any ground then the effect of the Chancery Court’s dismissal applies in full force to the Corporate Appellees, such that Sass Muni’s claims against Corporate Appellees are dismissed.

CONCLUSION

For the reasons set forth in the DeSoto Appellees’ Brief, which Corporate Appellees have joined and fully adopted herein, the Chancery Court correctly held that Sass Muni lacked standing to maintain its suit against Corporate Appellees, or alternatively, that Sass Muni’s claims against Corporate Appellees were barred by the applicable statute of limitations.

⁵ In contrast, a Rule 12(b)(6) motion will not preserve the *defenses* enumerated in Rule 12(h)(1) when a party fails to raise one of the *defenses* in its responsive pleading. *See* Miss. R. Civ. P. 12(h)(1); *Burleson v. Lathem*, 968 So. 2d 930, 935 (Miss. 2007) (holding that defendants waived Rule 12(b)(4) and 12(b)(5) defenses by failing to include them in their responsive pleading).

As discussed above, Corporate Appellees properly joined in DeSoto Appellees' and City Appellee's Motions to Dismiss. But even if that was not the case, this Court should affirm the dismissal of Sass Muni's claims against Corporate Appellees for lack of standing, because standing is a threshold jurisdictional question that can be raised by any party or by the court at any time, even on appeal. But in any event, the Chancery Court correctly held that Corporate Appellees properly joined in the other Appellees' Motions to Dismiss. Corporate Appellees were the first parties to file a Rule 12(b)(6) Motion to Dismiss and were entitled to join in the arguments presented in the other Appellees' 12(b)(6) Motions that were subsequently filed. Consequently, the Chancery Court's *Order/Opinion Sustaining Defendants' Motions to Dismiss* dismissing Sass Muni's case applies to Corporate Appellees.

For all of the reasons above, Corporate Appellees respectfully submit that this Court should find and affirm that all of the claims of Sass Muni against Corporate Appellees are dismissed with prejudice.

Respectfully Submitted this the 1st day of September, 2014.

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CERTIFICATE OF SERVICE

I, Jacob A. Dickerson, one of the attorneys of record for the Corporate Appellees, hereby certify that I have electronically filed the foregoing document with the Court's electronic filing system which sent notification of such filing to the following:

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