No. 23-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENE HAZZARD,

Plaintiff/Appellant,

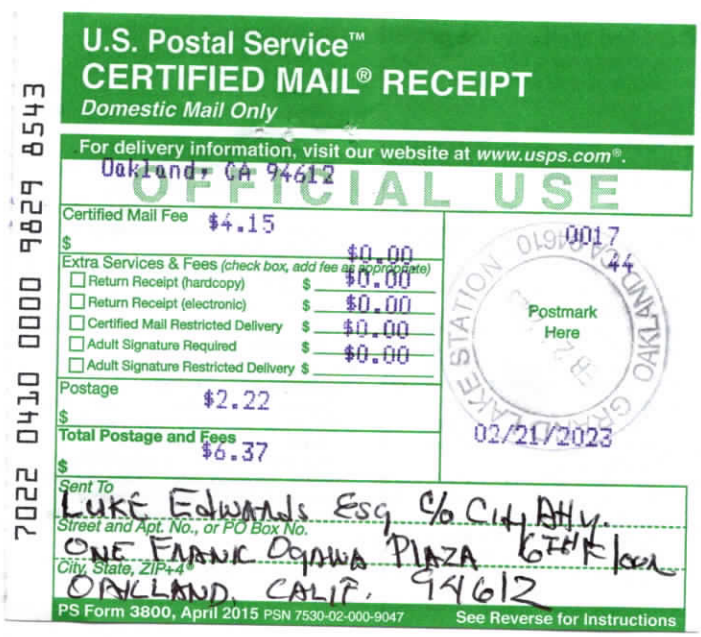
v.

MAYOR LIBBY SCHAAF, et al.

Defendants/Appellees.

On Appeal from the United States District Court
for the Northern District of California
Case No. 22-cv-02921-JSW
Hon. Jeffrey S. White

APPELLANT'S INFORMAL OPENING BRIEF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I. JURISDICTIONAL STATEMENT

Plaintiff/Appellant Gene Hazzard ("Appellant") brings forth this action for review before the Ninth District Court of Appeals pursuant to an Order and Judgment in this matter issued by The Honorable Jeffrey S. White ("Judge White") on January 3, 2023 (ECF 40, 41) and pursuant to a Notice of Appeal filed with the Northern District of California on January 23, 2023 (ECF 42) ("Notice of Appeal"). Judge White's Judgment and Order appealed from are final and appealable because they dispose of all claims between the parties.

The District Court Order Granting Motion to Dismiss First Amended Complaint and Denying Notice of Request to be Heard (ECF 40) ("FAC Order") was entered on January 3, 2023. The Notice of Appeal was timely filed under Federal Rules of Civil Procedure 4(a)(1)(B), as it was filed within 60 days after the entry of the Order appealed from.

Appellant has a right to sue pursuant to 50 U.S.C. 4042; Rule 9(1)(A); *Canon v. Univ.* 441 U.S. 677, 730 (1979).

This matter is within the Court's jurisdiction to be reviewed pursuant to Federal Rule 28 U.S.C. § 1291. Further, 50 U.S.C. § 4042 provides: "Any person aggrieved by a violation of this chapter may in a civil action (1) obtain any appropriate equitable or declaratory relief with respect to the violation." In addition, FRCP 9(a) states:

Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

II. ISSUES PRESENTED

1. Whether or not the FAC Order (as well as earlier rulings by the District Court) effectively eviscerated Appellant's opportunity to be heard. (See (Appellant's) Notice of Request to Be Heard filed on December 27, 2022 (ECF 39)) pursuant to Federal Rule of Evidence 201(e), "Adjudicative Facts," to wit, on December 1, 2022, Appellant filed a Request for Judicial Notice In Opposition to (Defendants'/Appellees') ("Appellees") Reply In Support of Motion to Dismiss (Appellant's) First Amended Complaint (ECF 32) ("RJN 1") and similarly, on December 14, 2022, Appellant filed a Request for Judicial Notice In Opposition to (Appellees') Reply In Support of Motion to Dismiss (Appellant's) First Amended Complaint (ECF 35). (ECF 35 was later replaced by the court with ECF 38, which was the same RJN and exhibits, but included a redacted Exhibit D. ECF 38 is hereinafter referred to as "RJN 2.") These two RJNs brought up pertinent points that Appellant intended to argue in front of a judge. By denying Appellant's right

to be heard, the court denied Appellant's legal right to argue his case. **The denial of his right to be heard is the primary reason that Appellant has filed this Appeal.**

2. Whether or not the court erred in failing to address the fact that Appellees' organization known as Oakland Promise has not provided the required documentation proving that it is legitimately a 501(c)(3) nonprofit, tax-exempt, public-benefit organization ("501(c)(3)"), or to address other issues that call into question the legitimacy of the Oakland Promise organization.

3. Whether or not the court erred in accepting the legitimacy of Oakland Promise's supposed merger with East Bay College Fund ("EBCF") despite the fact that Appellees have not provided the required Certificate of Merger.

III. STATEMENT OF THE CASE

Appellant filed this matter on May 17, 2022 against all listed and identified Appellees in their official capacity appearing on the face of the original complaint filed on May 17, 2022 (ECF 1) ("Complaint"). The matter was initially assigned to the Honorable Magistrate Donna M. Ryu ("Judge Ryu") (ECF 3) and a Case Management Conference was scheduled for August 17, 2022 (ECF 3).

On July 8, 2022, Appellant filed a Motion for Reconsideration (ECF 12) against the premature Order issued by Judge Ryu to dismiss Appellant's Complaint (ECF 10). Subsequently, on July 15, 2022, the court issued an Order Reassigning

the Case and denying the Motion for Reconsideration as moot (ECF 15). This action also canceled the Case Management Conference which had been scheduled for August 17, 2022.

One of Appellant's central allegations in this matter has been to question the legal status of Appellee Mayor Libby Schaaf's organization known as Oakland Promise. Appellees have been claiming that Oakland Promise is a 501(c)(3) and the organization has been promoted as such, yet they have not provided ***any proof*** of such a status. They were supposed to have filed a 1023 form with the Internal Revenue Service ("IRS") and should have received a Determination Letter from the IRS, yet Appellees have refused to provide any evidence of the existence of either of these documents. **All applicants interested in becoming a 501(c)(3) must submit a 1023 form to the IRS.**

The District Court has chosen to ignore the factual record in spite of the evidence provided by Appellant in the form of a September 17, 2019 letter from former California Attorney General Xavier Becerra (in response to a FOIA request) which stated, "**Oakland Promise has never filed any documentation indicating the organization is a (501(c)(3)).**" (See First Amended Complaint filed on October 31, 2022 (ECF 30) ("FAC"), Exhibit D (ECF 30-4), page 1 (emphasis added).) In addition, Appellant has provided a legal opinion from Appellee City Attorney Barbara Parker in a letter of March 3, 2020, which states,

"Prior to (2019), Oakland Promise was not a non-profit corporation." (See Memorandum of Points and Authorities In Opposition to (Appellees') Motion to Dismiss (Appellant's) First Amended Complaint filed on December 1, 2022 (ECF 33) ("Opp. MPA"), Exhibit B, at p. 9 (p. 22 of the pdf).)

Another important issue that Appellant has raised is to dispute the legality of the supposed merger between Oakland Promise and EBCF. Pursuant to California Corporations Code 6010(a), they were not entitled to merge unless Oakland Promise was a 501(c)(3), and **Appellees have not provided evidence of either a merger or of Oakland Promise legitimately being a 501(c)(3)**. Appellees have failed to provide a copy of the Certificate of Merger (that was supposed to have been received from the California Secretary of State) to support their claim that the merger is legal. **A Certificate of Merger is a required document for all mergers**. (For an example of a Certificate of Merger, see FAC, Exhibit G (ECF 30-7).)

There are also other compelling exhibits to the FAC and Opp. MPA that question the legal status and integrity of Oakland Promise. Opp. MPA, Exhibit E (beginning at p. 138 of the pdf) is the unauthorized filing of three 990 forms (for tax years 2017, 2018 and 2019) by the former Chief Executive Officer of Oakland Promise, Mialisa Bonta. (A 990 form is a required annual reporting document to the IRS by a 501(c)(3).) Bonta filed the 990 forms for EBCF; however, she was

the Chief Executive Officer of Oakland Promise (which was under the fiscal sponsorship of the Oakland Public Education Fund at the time of filing) and thus **was not entitled to file forms for EBCF**. (The unauthorized forms by Appellee Mialisa Bonta were filed in addition to authorized forms for EBCF filed by Susan Stutsman for TY 2017 and by Rachel Westmoreland for TY 2019.) Bonta's three 990 forms were also unauthorized because the Employer Identification Number ("EIN") listed on the forms, 54-2103707, was the EIN for EBCF and not for Oakland Promise.

These are legitimate matters which can only be addressed in an oral presentation of the parties pursuant to Federal Rule of Evidence 201(e), "Adjudicative Facts." Yet Appellant has been denied his right to be heard.

At one point, Appellees appear to have disavowed that any merger existed between EBCF and Oakland Promise. (See (Appellees') Reply In Support of Motion to Dismiss (Appellant's) First Amended Complaint ("Reply MTD FAC") (ECF 34) , at 2:27-3:3: "... among other things, the circumstances under which a public benefit corporation may merge with another public benefit corporation. But this claim fails because no private right of action exists and even if one existed, section 6010(a) is wholly inapplicable whereas here, (EBCF) only changed its name, **no merger occurred**." (Emphasis added.)

Appellees have intentionally misrepresented the facts of the supposed merger between EBCF and Oakland Promise, and have contradicted themselves as to whether such a merger occurred, as revealed by the factual record—all intended to avoid the required documentation of a Certificate of Merger from the California Justice Department/Office of the former Attorney General, Xavier Becerra, who stated that no such document exists. (FAC, Exhibit D (ECF 30-4).) (An example of conflicting information as to whether or not a merger has taken place can be found in RJN 2, Exhibit C, at pp. 30-31 of the pdf: "After careful consideration Oakland Promise and (EBCF) have decided to merge into one unified organization named Oakland Promise....We believe this merger will provide a remarkable opportunity to build stronger .... I am thrilled to announce that Oakland Promise and (EBCF) will merge into one unified organization named Oakland Promise ....") *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840, 848 (Or. 1981), delineates clear penalties for attorneys who intentionally mislead the court, and **it is clear that Appellees are doing so here**.

On July 7, 2022, Judge Ryu erred in her decision issuing an Order to Dismiss (Appellant's) Complaint (ECF 10) predicated on presumption of an error made in the filing of Appellant's summons to the complaint which was unexecuted and returned by the Appellees on June 2, 2022 (ECF 5). Appellant subsequently filed a Motion for Reconsideration on July 8, 2022 (ECF 12) and demonstrated to

the court that the error of the summons had been corrected and that the summons had been properly served on Appellees former CEO of Oakland Promise Mialisa Bonta; former 18th Assembly District Rob Bonta, co-founder of EBCF; and former Oakland City Administrator Sabrina Landreth on June 2, 2022 (ECF 6)—none of whom have answered Appellant's Complaint. However, a subsequent Order was issued on July 15, 2022 (ECF 15) Reassigning Case and Denying Motion for Reconsideration as Moot.

This was followed by another Order Reassigning Case to Judge White on July 15, 2022 (ECF 16) and then by another Order on July 15, 2022 (ECF 17) setting a Case Management Conference for September 9, 2022.

IV. ANALYSIS AND LEGAL ARGUMENT AND STANDARD FOR REVIEW

Appellant brings this matter on Appeal pursuant to 28 U.S.C. § 1291. This matter is ripe for review because of Judge White's FAC Order and Judgment of January 3, 2023 (ECF 40, 41).

With the FAC Order **(and throughout this case)**, the court has tangibly prejudiced the substantial rights of Appellant. Appellant has been denied the opportunity to be heard, which is a requirement under Federal Rules of Evidence, Rule 201(e):

> **Opportunity to Be Heard.** On timely request, **a party is entitled to be heard** on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes

judicial notice before notifying a party, **the party**, on request, **is still entitled to be heard**. (Emphasis in original and added.)

Despite this rule, Appellant has made several "timely requests" to be heard, yet has been denied by the court on each occasion. (See ECF 15, 26, 27, 29, 36, 39, 40.) In fact, on one occasion a hearing and Case Management Conference were each vacated only **three days** before they had been scheduled. (ECF 26.) In fact, the FAC Order permanently concluded this matter without examining the factual record. Under the color of authority and the rule of law, the court has displayed judicial bias which is clearly an abuse of the court's discretion. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995); *Olympic Refining Co., supra*, 332 F.2d. at 265-266; *Wilk, supra*, 635 F.2d; FRCP 26(c); *American Tel. & Tel. Co. v. Grady*, 594 F.2d. 594 (7th Cir. 1978); *First Wisconsin Mtg. Trust v. First Wisconsin Corp.*, 571 F.2d 390 (7th Cir. 1978), adopted en banc on this point, 584 F.2d 201:

> ... four requirements all of which must be satisfied before an interlocutory decision can be considered "final" within the meaning of the collateral order doctrine:
>
> (1) the order must present an important and unsettled question of law;
>
> (2) the order could not be reviewed effectively on appeal from the final judgment of the entire action since the right claimed in the order would have been lost;
>
> (3) the subject of the order must be separate and independent from the subject of the main cause of action; and

(4) on balance, the danger of denying justice by delay outweighs the inconvenience and costs of piecemeal review.

The effect of the court's FAC Order is to shelter Appellees' improper activity, which is clearly elucidated in Appellant's RJN 1 and RJN 2.

Most of the exhibits identified in the aforementioned RJNs also appeared in Appellant's FAC, and **that factual record has been ignored**. The court is disregarding this lack of consideration when it says in its FAC Order (at 3:4): "... the Court may not 'supply essential elements of the claim that were not initially pled.' *Ivey v. Bd. Of Regents of The Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)." (This statement is also eerily similar to Appellees' argument in their Motion to Dismiss (Appellant's) First Amended Complaint (ECF 31), at 9:4, "... complaint may not supply essential elements of claim that were initially pled"—and in fact they even cite the same *Ivey* case.)

It would do the court an injustice if as a result of the FAC Order, there is perceived to be collusion between the court and Appellees. The court is required to consider relevant factors and give appropriate weight and to balance the competing interests and articulate compelling reasons supported by the specific factual findings. (*Hagestad*, *supra*, 49. F.3d at 1434.) **The court does not have the unfettered right of discretion**. The FAC Order is specious, pernicious, repugnant, and frustrates the principles and tenants embedded in the rule of law.

As demonstrated above, there has been a consistent pattern in this case of the court scheduling a hearing, giving the appearance of being just and fair to the Appellant and of giving him a chance to be heard regarding the issues and allegations contained in Appellant's Complaint and FAC, and then pulling out the rug from under him.

To further elucidate the above, Appellant's matter was initially scheduled for a Case Management Conference (ECF 3), then the CMC was mooted (ECF 15) and then a new hearing date was scheduled under Judge White (ECF 18). And then on September 6, 2022, **a mere three days before the scheduled hearing date** (as stated above), the court filed a Clerk's Notice Vacating Motion and Case Management Conference (ECF 26). **None of this was explained by the court.**

On October 31, 2022, Appellant filed his FAC. On November 17, 2022, Appellees filed a Motion to Dismiss the FAC (ECF 31), and a hearing was scheduled for January 6, 2023. However, that hearing was then rescheduled to January 13, 2023 (ECF 36), and then on January 3, 2023, Judge White signed his FAC Order. As with the dismissal of the Complaint, the hearing was canceled a short time before it was scheduled to take place, and **Appellant was once again denied his legal right to be heard**. (As stated above, under Federal Rule of Evidence 201(e), the Appellant is ***entitled*** to be heard.) All of the above bait-and-

switches can only be described as a classic case of "Lucy pulling back the football."

The FAC Order denied Appellant's RJN 1 and RJN 2, as well as the Opp. MPA, each of which provided uncontroverted facts and compelling evidence to make the Appellant's case. Exhibit D to RJN 2 (at p. 37 of the pdf)) is evidence that a check signed by Appellee David Silver (the Educational Director in Appellee Mayor Schaaf's office) for $500 was written to the Office of the Oakland City Clerk for the 2018 Parcel Tax Ballot Measure known as the Children's Initiative of 2018, also known as Measure AA (which was on the ballot for the November 6, 2018 election). David Silver is a pivotal Appellee in his role as the Educational Director who has overall responsibility for Oakland Promise as its first Chief Executive Director. It is clear that the overall day-to-day managerial responsibility for Oakland Promise was the jurisdiction of Appellee Silver, Appellee Schaaf's Educational Director (Opp. MPA, Exhibit B, at pp. 18-19 of the pdf.)

Allowing the FAC Order to remain in its entirety would eviscerate any opportunity for an oral hearing to occur, which the Appellant is **clearly entitled to** under the provisions set forth in Federal Rule of Evidence 201(e), "Adjudicative Facts." This would deny Appellant the opportunity to hold the Appellees of Oakland Promise accountable for their unauthorized illegal activity. And the facial

plausibility of the factual content is clear. (*Boim v. Quaranic Literacy Inst. Holy Land for Relief and Dev.*, 291 F.3d. 1000, 1007-09 (7th Cir. 2002).)

The court must conscientiously balance the competing interests and articulate **compelling reasons supported by specific factual findings**. (*Hagestad, supra*, 49 F.3d at 1434 (emphasis added); *Rutherford v. New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988).) However, the effect of the FAC Order is to adversely impact any review of the unauthorized filing of 990 forms (required annual filings) with the IRS by Mialisa Bonta, Chief Executive Officer of Oakland Promise. How is it plausible for Appellee Mialisa Bonta to file 990 forms for EBCF for tax years 2017, 2018 and 2019 (Opp. MPA, Exhibit E (starting at p. 138 of the pdf)) when she was representing Oakland Promise, which had not merged with EBCF and whose legal status as a 501(c)(3) is the subject matter of Appellant's allegation?

Resolution 88208 was approved by the Appellee members of the Oakland City Council on March 5, 2020, accompanied by Resolution 87761. (See Exhibits E and F to FAC (ECF 30-5, 30-6), representing issues of malfeasance in this matter). This is another example in which the court, in its abuse of discretion, has chosen to ignore the factual record. Appellee members retroactively approved $1,650,000.00 (one million, six hundred and fifty thousand dollars) to Oakland Promise which had been originally appropriated in the General Purpose Fund

budget for fiscal years 2015-2016, 2016-2017, 2017-2018, and 2018-2019, and for which Oakland Promise has not provided any legal documentation of its status as a 501(c)(3). This factual record is also being ignored in the FAC Order.

While Resolution 88208 references Appellee Andy Fremder's organization EBCF's "amended and restated Articles of Incorporation" (original Articles of Incorporation, 2003) and name change to Oakland Promise, the contract recipient of the $1,650.000.00 is not Appellee Andy Fremder (who has not responded to Appellant's Complaint) but Appellee Mialisa Bonta, Chief Executive Officer.

In addition, under any legally established merger, the surviving entity and the disappearing entity must be identified, **which has not been done in this case.** (See Exhibit G to FAC (ECF 30-7), at p. 3, Certificate of Merger, for examples of what should have been identified.) This is why Appellees are now claiming, "(Appellant) cannot state a claim against the City (Appellees) for violation of California Corporation Code Section 6010(a) because no private right of action exists under this code provision and no such merger occurred that would trigger this provision" ((Appellees') Motion to Dismiss First Amended Complaint (ECF 31) ("MTD FAC"), at 11:3-4 (Heading 2)); "(t)his is consistent with (Appellant's) inability to locate any merger documents.... No merger documents exist because no merger occurred." (MTD FAC at 11:23-25.) Further, Appellees continue to claim, "(Appellant) is well aware of these facts but continues, in his opposition, to

argue that '(Appellees') Oakland Promise' has failed to provide evidence of a merger. While the Court must generally treat the complaint's factual allegations as true, this presumption does not apply to 'unwarranted' assertions." (Reply MTD at 3:4-8.)

However, contrary to Appellees' claims above, **the factual record reveals otherwise**. (Opp. MPA, Exhibit I (at p. 95 of pdf).) "After careful consideration Oakland Promise and East College Fund have decided to merge into one uniformed organization named Oakland Promise..." (RJN 2, Exhibit C (at p. 30 of pdf).)

Where then is the Certificate of Merger required by this union? (See FAC, Exhibit G (ECF 30-7).) An organization requires specific conditions for both the surviving organization and the disappearing organization, and without such proof it is uncertain that these conditions have been met—as noted in the general instructions and application to the Certificate of Merger.

Appellant is able to bring forth these allegations under "implied relief." (50 U.S.C. 4042; FRCP 9 (1)(A); Federal Rule of Evidence 201(e); *Gonzaga v. Doe*, 536 U.S. 273 (2003); *Bob Godfrey Pontiac*, *supra*, 630 P.2d at 848.)

Finally, Appellee Members of the Oakland City Council approved Resolution 87485 C.M.S. on December 14, 2018 (FAC, Exhibit H, ECF 30-8). This action taken by the Council is the result of the measure known as The

Children's Initiative of 2018, also referred to as Measure AA, appearing on the November 6, 2018 General Election Ballot. Measure AA was a Charter Amendment and a $198.00 Parcel Tax that would support both the Children's Initiative and the Oakland Promise Fund.

The Council's action codified the Oakland Promise Fund in section 1607 of the Oakland City Charter, which violates the California Constitution, Article XI, Section 5(a), which reads in pertinent part:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs... (c)ity charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

The intent of the California Legislature is clear that those items that are codified in a City Charter **must constitute a municipal affair**. The issue that is the subject matter of Appellant's allegation is the legal status of Oakland Promise as a 501(c)(3), **which clearly establishes that the Oakland Promise Fund is a private entity and not a municipal affair**.

Appellee Silver, Educational Director and the signatory on the $500.00 check written to the Oakland City Clerk for the November 6, 2018 general election ballot measure known as The Children's Initiative of 2018 (and also known as Measure AA), clearly establishes that Oakland Promise is an independent private

interest whose legal status as a 501(c)(3) is being challenged by Appellant's allegation.

Appellees **must provide** documentation from the legally authorized agencies that support the Appellees' claimed legal status of Oakland Promise as a 501(c)(3), and must provide the legal documentation of a merger between EBCF and Oakland Promise.

V. CONCLUSION

Appellant has a right to sue pursuant to 50 U.S.C. § 4042 and FRCP 9(a).

In addition, Appellant is entitled to be heard (Federal Rule of Evidence 201(e)), and to have his compelling evidence against the legitimacy of Oakland Promise as a 501(c)(3) weighed with serious consideration.

The factual record has been unambiguously presented by Appellant. In conducting judicial reasoning, it requires a determination on the record of a fair procedure in resolving this dispute of "adjudicative facts," which calls for giving each party a chance to meet in the appropriate fashion, facts that come to the tribunal's attention.

All of the exhibits are relevant and have a direct relation to the matters at issue in Appellant's Opposition to the FAC Order.

Given the evidence brought forth in this Brief and compelling reasons, Appellant respectfully requests that this Court reconsider the FAC Order and the Judgment issued by Judge White in the U.S. District Court.

VI. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there are no related cases pending in this or any court.

DATED: February 16, 2023

Respectfully submitted,

Gene Hazzard
Plaintiff/Appellant, *Pro Se*

CERTIFICATE OF SERVICE

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2550 Frances St., Oakland, CA 94601.

On February 16, 2023, I served the following documents on the parties listed below by the methods indicated below:

APPELLANT'S INFORMAL OPENING BRIEF

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: February 16, 2023

Richard Henry

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