

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**AIM ROYAL INSULATION, INC.  
and JACOBSON STAFFING, L.C.,  
Joint Employers**

**and**

**Cases 28-CA-22605  
28-CA-22714**

**INTERNATIONAL ASSOCIATION OF  
HEAT & FROST INSULATORS & ALLIED  
WORKERS, AFL-CIO, LOCAL NO. 73**

**ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT AIM ROYAL'S EXCEPTIONS**

Respondent Aim Royal Insulation's Exceptions to the Decision of Administrative Law Judge William G. Kocol (ALJD) are without merit and not supported by the evidence.<sup>1</sup> The ALJ's findings that Aim Royal violated Section 8(a)(1) and 8(a)(3) of the Act by refusing to hire, or consider for hire, Shawn McMillan are fully supported by the record. Accordingly, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Aim Royal's Exceptions.

**I. PROCEDURAL HISTORY**

The hearing in this matter was conducted before ALJ William G. Kocol on February 8 - 12, and February 17, 2010. (ALJD at 1) ALJ Kocol issued the ALJD on May 21, 2010, finding that Aim Royal violated Section 8(a)(1) of the Act by maintaining overly-broad work rules that prohibited employees from leaving the work area or jobsite

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<sup>1</sup>Aim Royal Insulation, Inc. will be referred to as "Respondent" and/or "Aim Royal." Jacobson Staffing, L.C., will be referred to as "Respondent Jacobson Staffing" or "Jacobson." The International Association of Heat & Frost Insulators & Allied Workers, AFL-CIO, Local No. 73, will be referred to as "Union." References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the General Counsel, Aim Royal, Jacobson, and the Charging Party Union's Exhibits will be referred to as (GC.), (AR.), (J.), and (CP.), respectively, with the appropriate exhibit number. All dates are in 2009, unless otherwise stated.

without permission (ALJD at 3,17), and interrogating Shawn McMillan concerning his support for the Union when McMillan was applying for reemployment with Aim Royal. (ALJD at 11, 17). The ALJ also found that Aim Royal violated Section 8(a)(1) and (3) of the Act by refusing to hire, or consider for hire, both Shawn McMillan and Union organizer Jose Gurrola because of their union support.

The ALJ also found that Respondent Jacobson Staffing violated Section 8(a)(1) by telling Shawn McMillan that he would not be hired because of his union status (ALJD 12, 17), interrogating McMillan when he attempted to apply for work with Aim Royal, through Jacobson (ALJD at 15, 17), and telling applicants Luis Bolaños and Gustavo Gonzalez that they lost employment opportunities because of their support for the Union. (ALJD at 15, 17).<sup>2</sup>

On July 2, 2010, Aim Royal filed three exceptions to the ALJD, all of which relate to the ALJ's finding that Aim Royal violated Section 8(a)(1) and (3) by refusing to hire, or consider for hire, Shawn McMillan:

In Exception 1, Aim Royal excepts to the ALJ's conclusion that antiunion animus contributed to its decision to not hire/consider for hire Shawn McMillan.<sup>3</sup>

In Exception 2, Aim Royal asserts that the ALJ erred in concluding that Aim Royal violated the Act by refusing to hire McMillan, or consider him for hire, because he engaged in union activity.<sup>4</sup>

In Exception 3, Aim Royal claims that "the ALJ erred when he confused testimony regarding the rehire of some former employees who had been fired for cause where the employees had demonstrated their ability to do good work and be trusted."

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<sup>2</sup> No party has filed exceptions to these violations involving Jacobson.

<sup>3</sup> In this exception, Respondent includes the ALJ's findings that Aim Royal specifically relies on a practice of hiring former employees as a means of supplying its hiring needs to avoid hiring unknown applicants, including those who might be supporting a union. *Resp't Exception #1*.

<sup>4</sup> Aim Royal states that this exception includes the company's privilege to not hire a "disrespectful applicant," and the ALJ's failure to credit witnesses and evidence regarding McMillan's language and attitude.

In short, all of Respondent's exceptions relate to the ALJ's finding that Aim Royal violated the Act by refusing to hire, or consider for hire, Scott McMillan, the quantum of evidence presented by the Acting General Counsel supporting this violation, and the sufficiency of Aim Royal's defenses.

Significantly, Aim Royal did not file exceptions to any other finding, conclusion of law, or recommendation made by the ALJ, including the finding that Aim Royal violated Section 8(a)(1) by interrogating McMillan when he applied for reemployment with Aim Royal in July 2009, or that Aim Royal violated Section 8(a)(3) of the Act by refusing to hire, or consider for hire, Jose Gurrola, when he too applied for reemployment with the company starting in April 2009. Because no exceptions were filed to these violations, the Board should adopt the ALJ's findings, along with all other findings of fact, conclusions of law, and recommendations as set forth in the ALJD that are not specifically asserted in Aim Royal's exceptions, or otherwise excepted to by the Acting General Counsel.<sup>5</sup> BOARD'S RULES AND REGULATIONS, § 102.46 (b)(2) (any exception to a ruling, finding, or conclusion, not specifically urged is waived); *Id.* at § 102.48 (in the event of no timely or proper exceptions, the ALJ's findings automatically become the decision and order of the Board); *Kings Electronics Co., Inc.*, 109 NLRB 1324, 1324 (1954) (upon respondent's failure to file exceptions, the Board abides by Section 102.48 and adopts the ALJ's findings, conclusions, and recommendations).

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<sup>5</sup> On June 19, 2010, the Acting General Counsel filed exceptions to the ALJD, asking the Board to find, in part, that Aim Royal and Jacobson committed additional 8(a)(1) and 8(a)(3) violations.

## **I. FACTS**

### **A. Aim Royal's Operations.**

Aim Royal operates a commercial insulation company, based in Phoenix, Arizona. Mike Gibbs (Gibbs) is the President and owner, holding this position since the company's inception in 1984. (Tr. 31) Before starting Aim Royal, Gibbs worked as a union insulator for 19 years, and has been in the insulation industry for over 30 years. (Tr. 758, 1032) The day-to-day operations in the field are overseen by Superintendent Lazaro Campos (Campos), who started working at Aim Royal in 2006, and was promoted to Superintendent in February 2007. (Tr. 34, 211-13; AR. 1) Campos reports directly to Gibbs and Jeff Herron (Herron), Vice President and part-owner. (Tr. 214; 954) During the relevant time period, Aim Royal employed about 15 to 20 full-time insulators. (Tr. 1031; ALJD at 2-3)

### **B. Respondent Aim Royal's Hiring Practices.**

Over the years, Aim Royal has relied upon a variety of practices to hire insulators, including newspaper advertisements, cold-call/walk-in applicants, hiring previous employees, and referrals from current and former employees. (Tr. 37, 45-46) When hiring full-time workers, Campos conducts a quick interview with applicants to obtain information about their background. If he decides to hire the employee, Campos discusses the matter with Gibbs and tells him why the applicant should be hired. (Tr. 225-26) Although Gibbs has final authority in deciding whether to hire individual applicants, Campos does not always discuss the matter with Gibbs, and there have been instances when full-time employees were hired without Gibbs knowing the identity of the person being hired. (Tr. 35-36)

During the hearing, much conflicting testimony was presented about Aim Royal's actual hiring practices regarding walk-in applicants, and these specifics have been addressed

in the Acting General Counsel's Exceptions. However, as found by the ALJ, and admitted by Respondent, Aim Royal has previously rehired former employees, including employees who had been fired for cause. (ALJD at 4; Tr. 16-18)

**C. The Union's Attempts to Organize Aim Royal.**

For a number of years, the Union has held informal meetings with Aim Royal management officials, discussing with them the benefits of becoming a Union signatory contractor. (Tr. 959-960) In the spring of 2008, the Union launched an organizing drive, with a detailed, written, organizing plan, whose goal was to have Aim Royal sign a contract and its employees become Union members. (ALJD at 5) Jose Gurrola, an organizer for the International Union, led the organizing committee, and on May 16, 2008, Gurrola applied for a job as a covert union applicant, walking into the Aim Royal office and asking for an application. (Tr. 577-78) Gurrola was hired by Aim Royal on May 21, 2008, and started working with his tools the next day. (ALJD at 5; GC. 16-17) After Gurrola was hired, the Union started hand-billing various Aim Royal projects and passing out authorization cards. Gurrola also started wearing union paraphernalia. (Tr. 102, 579, 709-713; GC. 13, 46) On July 2, 2008, the Union faxed a letter to Gibbs, informing him that Gurrola was a Union organizer. (ALJD at 5) On July 18, 2008, Gurrola engaged in a protected strike, to protest the lack of drinking water at his jobsite. (ALJD at 6, 9) Gurrola was fired a week later. (ALJD at 6)

In April 2009, Gurrola called Aim Royal, spoke with Campos, and unconditionally offered to return to work. He was not hired. On May 27, Gurrola went directly to Aim Royal's office, seeking employment. Again, he was not hired. (ALJD at 7) The ALJ found that Aim Royal violated Section 8(a)(1) and (3) of the Act by refusing to hire Gurrola, or

consider him for hire, because he engaged in Union activity. (ALJD at 9) Aim Royal did not file exceptions to this finding.

**D. Shawn McMillan's Attempt to Seek Reemployment at Aim Royal.**

Shawn McMillan had previously worked for Aim Royal as an insulator. He was laid off in April 2007, along with other employees, as part of a reduction in force, due to the completion of a project. (Tr. 90, 445; AR. 1; GC. 10) At the time, Gibbs told McMillan that he was being laid off due to a work shortage, and would call if worked picked up. (Tr. 427) McMillan, who was upset about the layoff, told Gibbs to "lose my number." (Tr. 427, 440; ALJD at 10-11) McMillan then became a Union member, as a third-year apprentice. (Tr. 423, 449-50)

On July 15, McMillan called Campos and told him that he was unemployed and looking for work. (Tr. 233) Campos told McMillan that he would have to speak with Gibbs about job availability, but that Gibbs was out of town. (Tr. 234) The next day, McMillan went to Aim Royal's office and spoke with Gibbs directly. (Tr. 90, 425; ALJD at 10) McMillan told Gibbs that he wanted to come back to work for Aim Royal, and asked if the company was hiring. (Tr. 90, 425-26) Gibbs replied that he had heard McMillan had become a Union member, and asked how it was going. (Tr. 426) McMillan said that it "wasn't going," because he did not have any work, and was just trying to get a job. (Tr. 426) The ALJ properly found that Gibbs's questioning of McMillan constituted a coercive interrogation, in violation of Section 8(a)(1). (ALJD at 11) Aim Royal has not excepted to this finding.

Gibbs then told McMillan that he did not know what his present labor needs were; that Campos had told him they would need additional help; and that he would check with Campos

to see whether they needed more workers. (Tr. 90; ALJD at 10) Although Gibbs testified that he checked with Campos about Aim Royal's labor needs in relation to McMillan, Campos testified that this never occurred. (Tr. 91, 236) Quite the contrary, Campos testified that he and Gibbs never discussed job availability for McMillan at any time. (Tr. 236) Campos also testified that, when McMillan called him on July 15, Campos did not know if he could use McMillan, because he did not have a chance to check his workload. (Tr. 235) The evidence, however, conclusively shows that after McMillan's meeting, Aim Royal hired full time insulators in July, August, September, and October. (AR. 1; GC. 6; ALJD at 10) It is undisputed that Aim Royal never considered McMillan for any of these openings. (Tr. 94, 236; ALJD at 10-11)

## **II. ARGUMENT**

### **A. The ALJ Properly Found that Respondent Aim Royal's Anti-Union Animus Contributed to its Decision to Illegally Refuse to Hire, or Consider for Hire, Shawn McMillan.**

In its first Exception, Aim Royal asserts that the ALJ erred when he determined that the company exhibited the requisite anti-union animus to support an 8(a)(3) violation. *Resp't Exceptions*, #1; *Resp't Br. Supp.*, at 5. Aim Royal claims that it harbored no such animus because, in the past, it has hired individuals who previously worked for union signatory contractors, or were former union members. *Resp't Br. Supp.*, at 5. However, most of the individuals listed in Aim Royal's brief as union affiliated were hired well before it became aware of the Union's organizing drive in July 2008. *Id.* See also, AR. 1. Moreover, as found by the ALJ, the more recent hires, such as Mario Murrieta (rehired on July 8, 2009) and Mario Chavez (rehired on July 27, 2009), had said "bad things" or otherwise complained about the Union to Aim Royal before the company agreed to rehire them. (ALJD at 10)

In any event, the fact that Aim Royal may have hired some applicants with known union affiliations is of no consequence. The Board and the courts have long held that an employer's failure to discriminate against all union applicants does not bar the finding of a violation concerning any individual applicant. *Zurn/NEPCO*, 345 NLRB 12, 46 (2005); *Fluor Daniel*, 333 NLRB 427, 440, 455 (2001); *KRI Constructors, Inc.*, 290 NLRB 802, 812 (1988) (the fact that an employer did not discriminate against all union applicants does not preclude a violation). *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964) (discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all union adherents); *NLRB v. Nabors* 196 F.2d 272, 276 (5th Cir. 1952) (fact that respondent retained some union employees does not exculpate him from the charge of discrimination as to those discharged).

Here, the evidence fully supports the ALJ's finding that Aim Royal harbored the requisite anti-union animus. First, Aim Royal does not dispute the ALJ's conclusion that Gibbs unlawfully interrogated McMillan about his union support when McMillan was applying for reemployment with the company in July 2009.<sup>6</sup> (ALJD at 11) Such an interrogation, during a job interview, is inherently coercive and is sufficient evidence of anti-union animus. *Enjo Contracting Co., Inc.*, 340 NLRB 1340, 1340 n. 2, 1350 (2003), *enfd.* 131 Fed. Appx. 769 (2d Cir. 2005) (antiunion animus established by employer's interrogating employee applicant during his job interview); *Health Care Corp.*, 334 NLRB 903, 906 (2001) (independent violations of Section 8(a)(1) constitute evidence of animus toward a union). Moreover, Aim Royal's admitted unlawful refusal to rehire Union organizer Jose Gurrola is

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<sup>6</sup> This finding, which was not excepted to by Aim Royal, negates Aim Royal's claim that it did not attempt to discern the union support of any applicants. *Resp't Br. Supp.*, at 7-8.

also evidence of its anti-union animus.<sup>7</sup> *Wisconsin Steel Industries, Inc.*, 318 NLRB 212, 231 (1995) (previous 8(a)(3) violation is sufficient anti-union animus to supporting a finding that employer's layoff was illegal). Finally, the unlawful provisions in Aim Royal's handbook, prohibiting employees from leaving the jobsite without permission and threatening them with discharge, provide further evidence of animus against employees' union activities. ALJD at 3; *Michigan Plumbing & Heating, Inc.*, 333 NLRB 418 n. 2 (2001) (employee handbook provision which independently violated Section 8(a)(1) evidences anti-union animus).

Accordingly, the record confirms the ALJ's finding that Aim Royal harbored the requisite anti-union animus to support his conclusion that Aim Royal violated Section 8(a)(1) and (3) by refusing to hire, or consider for hire, Shawn McMillan. Therefore, Respondent's Exception 1 to the ALJD should be denied.

**B. The ALJ Properly Found that Respondent Aim Royal Violated Section 8(a)(1) and (3) by Not Hiring, or Considering for Hire, Shawn McMillan.**

Aim Royal's second and third Exceptions both relate to the ALJ's finding that Respondent violated Section 8(a)(1) and (3) of the Act by not hiring, or considering for hire, Shawn McMillan. In Exception 2, Aim Royal argues that it was privileged to not hire McMillan because of his previous "objectionable conduct," and because he was formerly a "marginal employee." In Exception 3, Aim Royal claims that the ALJ somehow confused his analysis concerning other former employees hired by Aim Royal, who had been previously fired for cause, but were nonetheless rehired during the time period in which McMillan sought employment. Both of these exceptions deal with the shifting burdens of proof required to establish an 8(a)(3) violation, and both exceptions are without merit.

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<sup>7</sup> The fact that Aim Royal did not file exceptions to the ALJ's finding that it failed to hire, or consider to hire, Gurrola because of his Union activities, demonstrates the fallacy of Respondent's claim that it was not hostile towards the Union. *Resp't Br. Supp.*, at 8-10.

1. Legal Framework.

To establish a discriminatory refusal to hire violation in the salting context, the General Counsel must show the following: (1) the applicant's actual interest in employment, if challenged by the employer; (2) that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (3) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements or that the requirements were themselves pretextual or applied as a pretext for discrimination; and (4) that antiunion animus contributed to the decision to not hire the applicants.<sup>8</sup> *Air Management Services, Inc.*, 352 NLRB 1280, 1287 (2008), citing *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000), supplemented 333 NLRB 66 (2001); and *Toering Electric*, 351 NLRB 225, 234 (2007). To establish that an employer discriminatorily refused to consider an applicant for hire, the General Counsel bears the burden to show that the employer excluded applicants from the hiring process, and that antiunion animus contributed to the decision. *Air Management Services, Inc.*, 352 NLRB at 1289. Once the General Counsel has shown a discriminatory refusal to hire, or consider for hire, the burden shifts to Respondent to show that it would not have hired the applicants even in the absence of their union activity. *Id.* citing *FES (A Division of Thermo Power)*, 331 NLRB at 12, 15.

Here, there is no question that Aim Royal was hiring in July 2009, when McMillan first sought re-employment with the company on July 15. As found by the ALJ, the company hired workers on July 15, July 17, July 24, and August 10. (ALJD at 4) It is undisputed that

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<sup>8</sup> Acting General Counsel asserts that, because McMillan applied for work on his own accord, he was not a Union salt. Notwithstanding, McMillan was a Union member, and applied for work at Aim Royal during the pendency of the Union's organizing drive. Therefore, the Acting General Counsel will analyze this allegation under the more stringent *FES* framework, which is consistent with the allocations of the burdens of proof set forth in *Wright Line*, 251 NLRB 1083 (1980). See *Air Management Services, Inc.*, 352 NLRB at 1287 n. 9.

McMillan was genuinely interested in employment, where he sought out employment with Aim Royal on his own accord, had previously worked for the company, and credibly testified that he would have accepted a job if offered. (Tr. 425-26, 430; ALJD at 10) It is also undisputed that McMillan had the requisite experience and training for the position. He was a third-year Union apprentice, had previously worked for Aim Royal as an insulator for almost a year, and was laid off because of a reduction in force, and not because of any issues with his job performance. (Tr. 90; ALJD at 10) Finally, as discussed above, the ALJ found ample evidence of animus. Thus, the record establishes all of the elements of required by *FES* and its progeny.

2. Respondent's Claim that McMillan Engaged in Objectionable Conduct is Pretext.

In an attempt to show that it would have not hired McMillan, even absent his union activity, Aim Royal argues that McMillan was not hired because he engaged in “objectionable conduct” and his “rude and disrespectful behavior.” *Resp't Exceptions*, at p. 2; *Resp't Br. Supp.* at 13. The only such behavior Aim Royal points to as being “objectionable” or “rude and disrespectful” is McMillan’s statement to Gibbs to “lose my number” three years earlier, when McMillan was being laid off. *Resp't Br. Supp.*, at 13-15. Although Aim Royal’s witnesses tried to characterize McMillan’s demeanor as “belligerent,” “disdainful,” and “rude,” the ALJ found this testimony to be an “obvious exaggeration.” (ALJD at 11) Instead, the ALJ found, based on McMillan’s testimony, that he was understandably disappointed by his layoff, and “simply stated” that Gibbs should “lose his number.” Aim Royal has not presented any relevant evidence to demonstrate that the ALJ’s credibility resolutions were flawed. *Standard Dry Wall Products*, 91 NLRB 544 (1950) *enf'd*. 188 F.2d 362 (3rd Cir. 1951). (Board’s established policy is not to overrule an administrative law judge’s credibility

resolutions unless the clear preponderance of all the relevant evidence shows that the determinations are incorrect).

Notably, even if Aim Royal's evidence were credited, it still does not suggest that McMillan engaged in the type of conduct that would disqualify him from future employment. Aim Royal's witnesses did not claim that McMillan yelled at them, was violent, made any threats, or caused damage to Aim Royal's property. Aim Royal's claim that McMillan engaged in objectionable conduct is, quite frankly, frivolous where the company had no problem rehiring employees it had previously fired for cause, including employees who caused customer complaints and "deep loss of revenue."

2. Respondent's Claim that McMillan Was a Poor Performer is Pretext.

Aim Royal also argues that it would not have hired McMillan because he performed poorly when he had previously worked for the company. Even Aim Royal admits, however, that this was "not as significant a reason" for its decision. The ALJ's rejection of this defense is well supported by the record. First, it is undisputed that McMillan was laid-off, along with other employees, as part of a reduction in force, because the project he was working on was completed, and not because of any perceived deficiencies with his work. (Tr. 90, 445) Second, the record establishes that the first time Aim Royal ever suggested that McMillan's work was somehow deficient was at the hearing, years after his initial layoff. The record is devoid of any written counseling, warning, performance review, or other document that indicates that Aim Royal ever had problems with McMillan's work. Third, and most tellingly, the record establishes that, during the time McMillan applied for work with Aim Royal, the company regularly rehired employees it had previously fired for poor work performance. These employees included Anthony Sandoval, who was fired in February 2008,

for not showing up at work (Tr. 328; AR. 1; ALJD at 4); Manuel Murrieta, who was fired in May 2008, for not showing up at work, for arriving late, leaving early, and for other “deficient work performance” (Tr. 241; GC. 8); Mario Chavez, who was fired in October 2008, because he was lazy, was the subject of customer complaints, had “hurt the company by his actions” and caused Aim Royal a deep “loss of revenue” (Tr. 238, 1037; GC. 9); and William Loy, who was in fired in July 2008, because of a drug problem. (Tr. 326-27; ALJD at 4) Although Aim Royal tries to explain away the decision to rehire these employees by saying that the employees apologized to Campos for their previous deficiencies, the record establishes that this same opportunity was never offered to McMillan.

In sum, the record evidence supports the ALJ’s conclusion that all of the excuses advanced by Aim Royal for not hiring McMillan are pretext, and that Aim Royal violated Section 8(a)(1) and (3) by refusing to hire, or consider for hire, McMillan or Gurrola.

### **III. CONCLUSION**

Based on the foregoing, and the record evidence considered as a whole, the ALJ properly found that Aim Royal refused to hire, or consider for hire, Shawn McMillan in violation of Section 8(a)(1) and (3) of the Act, as set forth in the ALJD. Aim Royal’s exceptions are without merit and should be rejected by the Board. The Board should affirm and adopt the ALJ’s findings of fact, conclusions of law, and recommended Order insofar as such are consistent with the Acting General Counsel’s exceptions to the ALJD, filed on

June 18, 2010. It is further requested that the Board order whatever other relief it deems just and necessary to remedy Respondent's numerous violations of the Act.

Dated at Phoenix, Arizona, this 16<sup>th</sup> day of July 2010.

Respectfully submitted,

/s/ John T. Giannopoulos  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT AIM ROYAL'S EXCEPTIONS in AIM ROYAL INSULATION, INC. and JACOBSON STAFFING, L.C., Joint Employers, Cases 28-CA-22605 et al., was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 16<sup>th</sup> day of July 2010, on the following:

***Via E-Gov, E-Filing:***

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