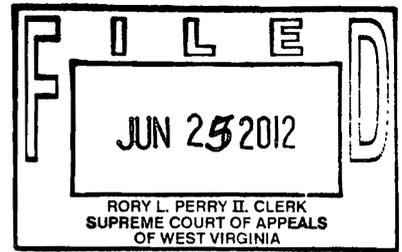


APPEAL NO. 12-0507



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UPON CERTIFIED QUESTIONS FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA, CIVIL ACTION NO. 11-C-231-2

JOSEPH KUBICAN,

Petitioner,

v.

THE TAVERN, LLC d/b/a
BUBBA'S BAR AND GRILL,
and HARRY WISEMAN,

Respondents.

REVISED PETITIONER'S BRIEF

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**TO: THE HONORABLE JUSTICES OF THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA**

I. INTRODUCTION

The instant action involves an altercation that took place on February 7, 2011 at Bubba's Bar and Grill in Bridgeport, West Virginia. The plaintiff below and petitioner herein, Joseph Kubican (hereinafter referred to as "Petitioner"), was violently assaulted by a regular at Bubba's, the defendant Harry Wiseman (hereinafter referred to as "Wiseman"). Kubican's Complaint sets forth numerous claims against both Mr. Wiseman and The Tavern, LLC, the entity that owned Bubba's (hereinafter referred to as "Tavern"). The only claims relevant to this Petition are those brought against Tavern.

Through discovery, the Petitioner ascertained that sufficient evidence exists to hold Tavern's members, Lawson Mangum and James Paugh, liable under a veil piercing theory. Petitioner therefore sought leave, under West Virginia Rule of Civil Procedure 15(a), to amend his complaint and add the members as defendants. Tavern opposed the motion for leave on the grounds that West Virginia's version of the Uniform Limited Liability Company Act, W. Va. Code § 31B-1-101 *et seq.* precluded veil piercing and the amendment was therefore moot. The Circuit Court certified the question to this Court. The issue before this Court therefore is: does West Virginia's version of the uniform limited liability act grant absolute immunity to the members of an LLC? Because the rights and remedies of injured parties should not depend on the preferred tax treatment of a business, this Court should answer the certified question in the negative.

II. THE CERTIFIED QUESTION FROM THE CIRCUIT COURT

On April 12, 2012, the Circuit Court of Harrison County entered an Order certifying the following question to this Court:

Does West Virginia's version of the Uniform Limited Liability Company Act, codified at W. Va. Code § 31B et seq., afford complete protection to members of a limited liability company against a plaintiff seeking to pierce the corporate veil?

On April 24, 2012, this Court accepted the certified question for review and docketed the cause for hearing.

III. STATEMENT OF RELEVANT FACTS

On February 7, 2011, Petitioner and Wiseman were patrons at Bubba's Bar and Grill (hereinafter referred to as "Bubba's") in Bridgeport, West Virginia. Wiseman was a regular at Bubba's. (30(b)(7) Dep. of Tavern at 61, J.A. at 017.) According to Petitioner, upon Wiseman's entry to the bar on October 7, 2011, Petitioner and Wiseman had a brief verbal altercation. (Pl.'s Compl., at 2, J.A. at 049-055) Thereafter both Petitioner and Wiseman were seated. At some point, Wiseman attacked Petitioner, punching him in the face. Id. Wiseman seated himself, took a sip of his beer and returned to further attack Petitioner. Id. At the time of the attack, Bubba's was owned and operated by Tavern. Tavern's charter was administratively revoked effective November 1, 2011 and Bubba's is no longer in operation. (See Letter Revoking Charter, attached as Ex. D to Pl.'s Mot. to Amend Comp., J.A. at 137-138; 30(b)(7) Dep. of Tavern, J.A. at 007).

Petitioner filed his complaint on May 27, 2011. (Compl., J.A. at 049.) That complaint alleges causes of action against Bubba's for negligence; negligent training and supervision of bar staff and security personnel; and gross negligence, willful, wanton and reckless misconduct. Id. at 050-054. The complaint further alleges causes of action against Harry Wiseman for assault

and battery and malicious, willful, wanton and reckless misconduct. *Id.* at 054-055. The only claims pertinent to this Petition are the claims against Bubba's. Bubba's answered the complaint by raising numerous affirmative defenses and denying all fault. (Answer, J.A. at 056-064.)

Thereafter, the parties exchanged written discovery and on February 1, 2012, Petitioner's counsel took the 30(b)(7) deposition of Tavern. Lawson Mangum testified on behalf of Tavern. Mr. Mangum testified that: (1) Lawson Mangum and James Paugh were the only members of Tavern, ((30)(b)(7) Dep. of Tavern, J.A. at 004, 009); (2) Tavern has no insurance coverage, *id.* at 42); (3) Tavern's sole asset is the building it was located in, which has a current net value—according to Mr. Lawson—of approximately \$9,000, *id.* at 004; (4) Tavern never had more than a few hundred dollars in its bank account, *id.* at 019-020; (5) Tavern kept no records regarding profits, losses or disbursements to members, *id.* at 023; (6) the funds of Lawson Mangum may have been commingled with those of Tavern, *id.* at 020; and (7) Lawson Mangum used Tavern's sole asset, the building, to conduct his personal business, *id.* at 021. Additional discovery conducted after the deposition and included in the Petitioner's Supplemental Reply in Support of His Motion Amend, revealed that the Tavern's bank account was used, both during and after Tavern's effective existence, to pay for Mr. Mangum's personal expenses such as vacations, restaurant tabs, sun tanning and car payments. (See Pl.'s Supp. Reply in Supp. of Mot. to Am., J.A. at 244-249.)

Due to Tavern's 30(b)(7) testimony, the Petitioner believed that sufficient evidence existed to hold Mr. Mangum and Mr. Paugh liable under a veil piercing theory as set forth by this Court in cases such as Laya v. Erin Homes, Inc., 177 W. Va. 343, 352 S.E.2d 93 (1986). Petitioner therefore sought leave of the Circuit Court, pursuant to West Virginia Rule of Civil Procedure 15(a), to amend his complaint and add Mr. Mangum and Mr. Paugh as defendants.

(See Pl.’s Mot. For Leave to Amend Compl., J.A. at 065-073.) In its response to the Petitioner’s motion, Tavern’s only argument was that W. Va. Code § 31B-3-303(a), which provides that, “A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager”, creates an absolute bar to the imposition of personal liability on a member of an LLC. (Def. Resp. to Mot. To Amend Compl., J.A. at 185-194.) The Circuit Court concluded that the question was a novel one in West Virginia and certified it to this Court.

IV. ARGUMENT

A. Standard of Review.

When addressing legal issues presented by a certified question from a Circuit Court, the West Virginia Supreme Court of Appeals applies a de novo standard of review. Syl. Pt. 1 Traders Bank v. Dils, 228 W.Va. 692, 704 S.E.2d 692, (2010).

B. West Virginia Has Adopted a Version of the Uniform Limited Liability Act, Which Does Not Preclude Veil Piercing.

Chapter 31B of the West Virginia Code is entitled “Uniform Limited Liability Company Act.” As its name suggests, the West Virginia Act is a version of the National Conference of Commissioners on Uniform State Laws’ 1995/1996 Uniform Limited Liability Company Act (hereinafter referred to as “ULLCA”). The question before this Court is whether West Virginia’s version of that Act precludes application of the equitable doctrine of piercing the corporate veil to a limited liability company or LLC. While this appears to be a novel issue for this Court, many of the other jurisdictions adopting the uniform act have explicitly or implicitly acknowledged application of the doctrine to LLCs and not a single court has concluded that the act prohibits such application. There is no reason for this Court to depart from the sound logic of those courts or its own reasoning as expressed in cases such as Laya v. Erin Homes, Inc., 177

W. Va. 343, 352 S.E.2d 93 (1986) and Dieter Engineering Services, Inc. v. Parkland Dev., Inc., 199 W. Va. 48, 483 S.E.2d 48 (1996).

The Respondent's argument is based on W. Va. Code § 31B-3-303, which is identical to § 303 of 1995/1996 ULLCA and nearly identical to §304 of the 2006 Revised Uniform Limited Liability Company Act (hereinafter referred to as the RULLCA")¹. Section 303 of the ULLCA and W. Va. Code § 31B-3-303 provides that:

- (a) Except as otherwise provided in subsection (c) of this section, the debts, obligations or other liabilities of a limited liability company, whether arising in contract, tort or otherwise are solely the debts, obligations and liabilities of the company. A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager.
- (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.
- (c) [Omitted.]

Section 304 of the RULLCA provides that:

- (a) The debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort, or otherwise:
 - (1) Are solely the debts, obligations or other liabilities of the company; and
 - (2) Do not become the debts obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.
- (b) The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations, or other liabilities of the company.

¹ The full text of the 1996 ULLCA is available online through the University of Pennsylvania at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ullca96.pdf>. The full text of the 2006 RULLCA is available online through the University of Pennsylvania at http://www.law.upenn.edu/bll/archives/ulc/ullca/ULLCA_Final_06_1.htm#_Toc147562711.

Thus, both the ULLCA/ W. Va. Code § 31B-3-303 and RULLCA § 304 contain the language in issue (i.e., A member is not personally liable for a debt of the company and failure to observe formalities is not grounds to impose liability). In both instances, the operative language is not unlike that contained in the West Virginia Business and Non-Profit Corporations Code, applicable to corporations. See W. Va. Code § 31-1-89 (“A holder of or subscriber to shares of a corporation shall be under no obligation to the corporation or its creditors with respect to such shares other than the obligation to pay the corporation the full consideration for which the shares were issued or to be issued.”) The distinction is that in the corporate setting the owners are called shareholders and here, they are members. This distinction, in the veil piercing context, is largely, one without a difference and the treatment of LLCs in this nation’s courts reflects this fact.

In addition to West Virginia, Hawaii, Montana, South Carolina, South Dakota, and Vermont have adopted the ULLCA, and Wyoming, Utah, Idaho, Nebraska, Iowa and the District of Columbia have adopted the RULLCA. Many other states have adopted provisions of the acts. There is little precedent directly addressing whether either uniform act precludes application of the veil piercing doctrine but many cases addressing whether the veil may be pierced under the facts of the case before the court. Implicit in the determination of the propriety of veil piercing under certain circumstances, is the rejection of the notion that the act prohibits veil piercing in all circumstances. See, Connecticut Light & Power v. Westview Carlton Group, LLC, 950 A.2d 522, 527 (Conn. App. Ct. 2008) (“there was ample evidence that Westview [an LLC] had no separate existence, that Sousa [the LLC’s member] treated it as such and that Sousa used it to perpetrate an unjust act in contravention of the Petitioner’s legal rights. The evidence in this case amply supports the court’s determination that the corporate veil should be pierced.”); Cemen

Tech, Inc. v. Three D Industries, LLC, 753 N.W.2d 1, 6 (Iowa 2008) (“CTI argues we can ‘pierce the corporal veil’ to hold Longnecker and Enos [the members of Defendant Three D Industries, LLC] individually liable on the letter of intent because any corporations named were merely their alter egos. The requirements for doing so, however, are substantial”); Wright Therapy Equipment, LLC v. Blue Cross and Blue Shield of Alabama, 991 So.2d 701, 703-704 (Ala. 2008) (piercing of veil by judge in bench trial discussed but not appealed); Thomas & Thomas Court Reporters, LLC v. Switzer, 810 N.W.2d 677, 685 (Neb. 2012) (“the individual members and managers of a limited liability company are generally not liable for a debt, obligation, or liability of the company. And a court will disregard such a company’s identity only where the company has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.”); D’Elia v. Rice Dev., Inc., 147 P. 3d 515, 523 (Utah Ct. App. 2006) (“The record reveals that substantial evidence exists to support the trial court’s decision not to pierce the corporate veil.”)

In addition to the cases discussed above, several uniform act jurisdictions have directly addressed the liability of members in slightly different contexts. None have reached the conclusion that the act absolutely bars liability. In Allen v. Pinnacle Healthcare Systems, LLC, 715 S.E.2d 362 (S.C. Ct. App 2001), the defendants relied upon the LLC act to argue that the members/managers of the LLC could never be held personally liable for the debts of the LLC. The South Carolina Appellate Court disagreed, finding that the South Carolina Wage Payment and Collection Act, as interpreted in Dumas v. Infosave Corp., 463 S.E.2d 641 (S.C. Ct. App. 1995), created a mechanism to impose personal liability on the members/managers under certain circumstances. Allen, 715 S.E.2d at 366. In the instant case, the mechanism to find member liability is equitable

and not statutory but in both scenarios the immunity from liability provided by the act is no absolute.

Two decisions out of Wyoming directly confront the issue, but were decided before the adoption of the RULLCA by that state. In Kaycee Land and Livestock v. Flahive, 46 P.3d 323 (Wyo. 2002), the Wyoming Supreme Court discussed whether Wyo. Stat. Ann. § 17-15-113, which provided that, “Neither the members of a limited liability company nor the managers of a limited liability company managed . . . are liable under a judgment, decree or order of a court, or in any other manner, for a debt obligation or liability of the limited liability company.” Id. at 326. The Wyoming court concluded that, “No reason exists in law or equity for treating an LLC differently than a corporation is treated. . . . We conclude the equitable remedy of piercing the veil is an available remedy under the Wyoming Limited Liability Company Act.” Id. at 329. The Court reaffirmed that holding in Gastop Two, LLC v. Seatwo, LLC, 225 P.3d 1072 (Wyo. 2010), which was handed down the same year that Wyoming adopted the RULLCA.

In promulgating the RULLCA, recently adopted by Wyoming and several other jurisdictions, the National Conference of Commissioners on Uniform State Laws included Official Comments. Pertinent to this discussion is the Comment concerning RULLCA § 304(b), which is identical to ULLCA § 303(b) and W. VA. Code § 31B-3-303(b). The distinction is that the former states that the failure to observe “the usual company formalities” is not grounds for the imposition of member liability, whereas the latter indicates that the failure to observe “any particular formalities” does not justify member liability. Implicit in both, of course, is the recognition that some failure is sufficient to impose liability on the members. The Official Comment to § 304(b) of the RULLCA makes this point clear:

This subsection pertains to the equitable doctrine of “piercing the veil” – i.e., conflating an entity and its owners to hold one liable for the obligations of the

other. The doctrine of “piercing the corporate veil” is well-established, and courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies. In the corporate realm, “disregard of corporate formalities” is a key factor in the piercing analysis. In the realm of LLCs, that factor is inappropriate, because informality of organization and operation is both common and desired.

This subsection does not preclude consideration of another key piercing factor – disregard by an entity’s owners of the entity’s economic separateness from the owners.

....

EXAMPLE: The sole owner of a limited liability company uses a car titled in the company’s name for personal purposes and writes checks on the company’s account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not subsection (b) formalities.

Thus, the inclusion of the ULLCA § 303(b) and RULLCA § 304(b) was not a move toward creating an iron-clad rule that LLCs cannot be pierced, it was an admission that other veil-piercing factors could and should be considered in conducting a veil piercing analysis for LLCs.

In sum, the drafters of W. Va. Code § 31B-3-303 does no more than extend the same sort of limited liability available to corporate shareholders to LLC members. The statute itself acknowledged that veil piercing is anticipated and none of the courts applying the statute has concluded to the contrary. It cannot, therefore, be argued that the language cited by the Respondent bars application of the veil piercing doctrine and this Court should not use the cited language to deny Petitioner, and others similarly situated, a means redress for wrongs perpetrated by the improper use of the limited liability company form.

C. The Non-Uniform Act States Uniformly Allow LLC Veil Piercing.

Eleven states have adopted a version of the uniform act and all, or nearly all, of the remaining states have some form of limited liability company statute. Though these may differ from West Virginia's statute, the concept is the same. As with the uniform act jurisdictions, there is a dearth of precedent directly confronting the issue of whether the veil may be pierced against an LLC and the cases directly on point unanimously reject the Respondents' contention. There is no reason for this Court to interpret West Virginia's act any differently than the LLC acts in those states.

Delaware was an early adopter of the LLC form and its act contains a provision that is very similar to the West Virginia Act. Delaware Code Annotated Title 6 § 18-303 states that:

Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company . . . shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligations or liability of the limited liability company solely by reason of being a member

This provision was tested in Westmeyer v. Flynn, 889 N.E.2d 671 (Ill. App. 2008), when an LLC member argued that he could not be held individually liable due to the statute. The court concluded, "Just as with a corporation, the members of an LLC are not generally liable for the obligations of the LLC. However, under Delaware law, just as with a corporation, the corporate veil of an LLC may be pierced, where appropriate." Id. at 678; See also Netjets Aviation, Inc. v. LHC Commun., LLC, 537 F.3d 168, 176 (2d Cir. 2008) ("emerging case law illustrates that situations that result in a piercing of the limited liability veil are similar to those that warrant piercing the corporate veil." (internal citations omitted)).

In a Colorado case, as in the present proceeding, the defendant argued that because the LLC statute did not expressly extend veil piercing liability to the manager of an LLC, the court

was prohibited from applying the doctrine. Sheffield Serv. Co. v. Trowbridge, 211 P.3d 714 (Colo. App. 2009). The Colorado court disagreed:

Because allowing an LLC manager to hide behind the LLC's cloak of limited liability would promote injustice, protect fraud, or defeat legitimate creditors' claims, we conclude that the equitable common law doctrine of piercing the corporate veil may be applied to hold an LLC manager personally liable for the LLC's improper actions.

Id. at 722.

In an Arkansas case, an intermediate court certified a question remarkably similar to the one in this case to the Arkansas Supreme Court, "suggesting that [the Arkansas Supreme Court] should 'decide the extent of the protection that Ark. Code Ann. 4-32-304 affords investors who chose [to operate as a LLC].'" Anderson v. Stewart, 234 S.W. 3d 295, 296 at n.1 (Ark. 2006). The statute cited by the Arkansas court is very similar to W. Va. Code § 31B-3-303 and provides that, "a member . . . of a limited liability company is not liable for a debt, obligation or liability of the limited liability company, whether arising in contract, tort, or otherwise." Ark. Code Ann. 4-32-304. Because the issue of whether the statute absolutely bars application of the doctrine was not raised in the brief, the Court did not address it but the court applied a veil piercing analysis to the facts and held that: "the trial court did not err in piercing the corporate veil and holding the individual defendants personally liable." Anderson, 234 S.E.3d at 296 n.1, 301.

In addition to the cases discussed above, Courts in the following jurisdictions, among others, have either explicitly or implicitly acknowledged application of the doctrine: Georgia- Gardner v. Marcum, 665 S.E.2d 336, 340 (Ga. App. 2008) (defendants are not liable for [the LLC's] obligations solely by reason of being members, and 'whether to pierce the corporate veil is normally a jury issue.');

Indiana- Four Seasons Manufacturing, Inc. v. 1001 Coliseum, LLC, 870 N.E.2d 494, (Ind. App. 2007) ("we cannot find that the trial court's decision to pierce [the

LLC's] corporate veil and hold [its member] liable was erroneous.”); Kentucky- Sudamax Industria e Comercio de Sigarras, LTDA v. Buttes & Ashes, Inc., 516 F. Supp.2d 841 (W.D. Ky. 2007) (“Because there are not sufficient allegations of fraud, there is no basis for LLC’s corporate veil to be pierced.”); Massachusetts- Middlesex Retirement Sys., LLC v. Bd. Assessors of Billerica, 903 N.E.2d 210, 217, 453 Mass. 495, 504 (2009) (“Although the doctrine usually applies to corporations, we see no reason why it should not also apply to limited liability companies.”); Michigan-RDM Holdings, Ltd. v. Continental Plastics Co. 762, N.W. 529, 551 (Mich. App. 2008) (“there was sufficient documentary evidence to create an issue of fact regarding whether Con-Lighting [an LLC] was a mere instrumentality of Con-Plastics”); Minnesota-Equity Trust Co. v. Cole, 766 N.W.2d 334, 339 (Min. App. 2009) (If the “limited liability company is found to be an ‘alter ego’ or mere ‘instrumentality,’ a court may pierce the corporate veil if there is an “element of injustice or fundamental unfairness.”); Missouri-Howard v. Turnbull, 316 S.W. 3d 431, 440 at N. 10 (Mo. App. 2010) (“unjust enrichment cannot be used to make the owners of a limited liability company liable for the company’s obligations, absent circumstances that would justify piercing the company’s corporate veil.”).

In this case, as in many others, including, the Westmeyer, 889 N.E.2d 671, Sheffield Serv., 211 P.3d 714 and Anderson, 234 S.W. 3d 295 cases cited above, the legislation creating the relevant limited liability company places limitations on the liability of the individual members. This is the very purpose of a limited liability company. It is likewise, the very purpose of a corporation, limited partnership, limited liability partnership or any other limited liability business entity from the Dutch East India Company to Facebook, Inc. Each form includes a limitation on the liability imposed upon the owners by sheer virtue of ownership. This limitation does not render the owners of that entity, whatever it may be, immune from the veil

piercing doctrine created by the courts to prevent the use of that form for an improper purpose. This fact has been recognized by every Court that has addressed it and refuted by none. Accordingly, the fact that the Respondent's chosen form is an LLC is no basis for the imposition of an insurmountable hurdle to the Petitioner's already justifiably difficult burden of proving the essential elements of veil piercing.

D. Adopting the Respondent's Reading of the Statute Would Invite Fraud and Reward Corporate Irresponsibility

To the Petitioner's knowledge, every state in the country has some form of limited liability company statute. The statutes follow a typical pattern and were largely enacted in response to the Internal Revenue Service's decision to treat LLCs as partnerships for tax purposes. The key benefits of an LLC are the combination of the limited liability of a corporation with the simplified taxation of a partnership. See e.g., Hamby v. Profile Products, LLC, 652 S.E.2d 231, 236 (N.C. 2007). The liability of a member in an LLC is therefore, the same as that of a corporate shareholder. Id. This comports with the applicable provisions of West Virginia law. Compare W. Va. Code § 31-1-89 (no liability for shareholders or subscribers to corporation), and W. Va. Code § 31B-3-303 (no liability for member or manager of LLC).

Adopting the rule requested by the Respondent would be an elevation of form over substance and a departure from the intent of the legislature, i.e., to impart corporate style limited liability to a smaller, less formal entity. More alarming, such a decision would render West Virginia a safe haven for corporate irresponsibility and fraud. Any corporation or individual, regardless of its size or wealth, could simply incorporate all of its West Virginia operations as a subsidiary in the form of a West Virginia Limited Liability Company, invest no capital above that necessary to maintain operations, purchase no insurance and treat the LLC in all respects as a division of the parent corporation. There would be no incentive to deal fairly with the public,

insure against calamity, or set aside funds for the future, as there would be no consequences for such neglect. This is not the result that was desired or anticipated by the National Conference of Commissioners on Uniform State Laws in drafting the uniform act or the West Virginia Legislature in enacting it. Accordingly the certified question from the court below must be answered in the negative.

V. **CONCLUSION**

For the foregoing reason, Joseph Kubican respectfully requests that this Court, in answering the question certified to it by the Circuit Court of Harrison County, enter an Order finding that W. Va. Code § 31B-3-301 et seq. is not an absolute bar to application of the equitable doctrine of veil piercing to members of a limited liability company.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2012, I served the foregoing

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