

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION**

**CASE NO. 9:15cv81753**

ALLIED MINERAL PRODUCTS, INC.,  
an Ohio Corporation

Plaintiff,

vs.

OSMI, INC.,  
STELLAR MATERIALS, INC.,

and

STELLAR MATERIALS, LLC,

Defendants.

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**COMPLAINT WITH JURY DEMAND**

Plaintiff, Allied Mineral Products, Incorporated (“Allied”), brings this action for declaratory judgment of (a) patent non-infringement, (b) patent invalidity, and (c) patent unenforceability as a result of inequitable conduct before the United States Patent and Trademark Office (“PTO”), and for interference by OSMI, Inc., Stellar Materials, Inc. and Stellar Materials, LLC (collectively referred to as “Stellar”) with the business relationships between Allied and its Mexican distributors.

**NATURE OF THE ACTION**

1. This is a civil action arising under the patent laws of the United States, Title 35, United States Code, seeking declarations of patent non-infringement, patent invalidity and patent unenforceability of U.S. Patent No. 7,503,974 (“the ‘974 Patent”) entitled “Cementitious Material.” A copy of the ‘974 Patent is attached hereto as Exhibit A.

2. The '974 Patent issued on March 17, 2009 from a U.S. application filed March 20, 2007. The March 20, 2007 application was based on a U.S. provisional application filed on March 22, 2006.

3. The '974 Patent purports to claim a two-part cementitious material formulation of fused magnesium oxide and an aqueous acid phosphate solution having utility as a phosphate cement binder for aggregate and refractory cementitious material.

### **THE PARTIES**

4. Plaintiff, Allied, is a corporation organized under the laws of the State of Ohio, having a principal place of business at 2700 Scioto Parkway, Columbus, Ohio 43221.

5. Upon information and belief, Defendant, OSMI, Inc. ("OSMI") is a corporation organized under the laws of the State of Michigan, having offices at 7777 Glades Road, Suite 310, Boca Raton, Florida 33434. OSMI is subject to the jurisdiction of this court pursuant to Fla. Stat. § 48.193, as applied through Rule 4(k)(A) of the Federal Rules of Civil Procedure. OSMI is subject to the jurisdiction of this court pursuant to Fla. Stat. § 48.193 because, among other things, it carries on a business in Florida and has offices in Boca Raton, Florida.

6. Upon information and belief, Defendant Stellar Materials, Inc. is a pseudoname for Stellar Materials, Incorporated. Stellar Materials, Incorporated is the former name of OSMI, Inc.

7. Upon information and belief, Defendant Stellar Materials, LLC is a Delaware limited liability company having a principal place of business at 7777 Glades Road, Suite 310, Boca Raton, Florida 33434. Upon information and belief, Stellar Materials, LLC and OSMI, Inc. are commonly owned and under common control. According to the records of the PTO,

Stellar Materials, LLC is the current owner of the '974 Patent, pursuant to an assignment recorded from Stellar Materials, Inc. on June 5, 2015.

### **JURISDICTION AND VENUE**

8. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1338(a) and 1367, in that it involves substantial claims arising under the United States Patent Act, 35 U.S.C. § 1 *et. seq.*. The court has jurisdiction over the subject of the non-patent claim because such claim is so related to the patent claims that it forms part of the same case or controversy.

9. This court may declare the rights and other legal relations of the parties pursuant to the Federal Declaratory Judgments Act, 28 U.S.C. §§ 2201 and 2202, because there is a case of actual controversy within the court's jurisdiction to provide a declaratory judgment that the '974 Patent is not infringed, is invalid, and is unenforceable.

10. Personal jurisdiction exists over Stellar because it has a regular and established place of business within the State of Florida, and within this judicial district.

11. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b).

### **THE PRESENCE OF AN ACTUAL CONTROVERSY**

12. There is an actual controversy between Allied and Stellar as to the infringement, validity and enforceability of the '974 Patent as a result of threats to, and patent infringement actions initiated against, Allied distributors in Mexico relating to products manufactured by Allied in the United States, which products also are sold throughout the United States.

13. On June 24, 2015, legal counsel for Stellar sent letters to Ferro Alloys de México S.A. de C.V. ("Ferro") and Pyrotek Mexico S. de R.L. de C.V. ("Pyrotek") regarding two products, Quick-Fire 88 and PyroFast 235. The Quick-Fire 88 and PyroFast 235 products are

manufactured in the United States by Allied and supplied to Ferro and Pyrotek in Mexico. Ferro and Pyrotek distribute the Quick-Fire 88 and PyroFast 235 products to end users of the products.

14. The June 24, 2015 letters accused Ferro and Pyrotek of infringing Mexican Patent No. 279757.

15. Mexican Patent No. 279757 is Stellar's Mexican equivalent to the '974 Patent, and is based on the specification of the '974 Patent.

16. On July 2, 2015, legal counsel for Allied responded to the June 24, 2015 letter advising Stellar, through Stellar's Mexican counsel, that the Quick-Fire 88 and PyroFast 235 were supplied to Ferro and Pyrotek respectively by Allied, which is based in the United States. Stellar was further advised in the July 2, 2015 letter that neither the Quick-Fire 88 product nor the PyroFast 235 product contained magnesium oxide that had been melted or fused, and that Mexican Patent No. 279757 was non-infringed.

17. On October 27, 2015, Stellar filed patent infringement actions against Ferro and Pyrotek in Mexico. Stellar alleged that Ferro infringed Mexican Patent No. 279757 by its sales of the Quick-Fire 88 product, and that Pyrotek infringed this same Mexican patent by its sales of the PyroFast 235 product.

18. The Mexican lawsuits asserted Ferro and Pyrotek infringed claim 16 and the claims depending from claim 16 in Mexican Patent No. 279757. Claim 16 and the claims depending from claim 16 of Mexican Patent No. 279757 correspond directly to claim 16 and the claims depending from claim 16 in the '974 Patent, and are merely Spanish translations of claim 16 and the claims depending from claim 16 in the '974 Patent.

19. In light of the fact that the Quick-Fire 88 and PyroFast 235 products sold in Mexico are manufactured by Allied in the United States, sold throughout the United States, and shipped to Mexico, and in light of the virtual identity between claim 16 and the claims depending from claim 16 in Mexican Patent No. 279757 and claim 16 and the claims depending from claim 16 in the '974 Patent, a claim that the Quick-Fire 88 and PyroFast 235 products infringe Mexican Patent No. 279757 is tantamount to a claim these same products infringe claim 16 and the claims depending from claim 16 in the '974 Patent.

### **COUNT I**

#### **DECLARATORY JUDGMENT OF NON-INFRINGEMENT OF THE '974 PATENT**

20. Allied realleges, as if fully set forth herein, the allegations of paragraphs 13-19, inclusive.

21. Jurisdiction for this count is founded on Title 28, United States Code, §§ 1331, 1388, 2201 and 2202. Venue for this count is proper under Title 28, § 1391.

22. Allied has not infringed, induced infringement of, or contributed to the infringement of either Mexican Patent No. 279757 or the '974 Patent, nor has it otherwise committed any acts of infringement of any rights of Stellar. Stellar's threats and lawsuits against Allied's distributors in Mexico relating to products manufactured by Allied in the United States have irreparably injured Allied and adversely affected Allied's business in the United States, and will continue to do so unless prevented by this court.

23. Therefore, an actual controversy exists between Allied and Stellar in both Mexico and the United States as to whether products manufactured by Allied infringe the '974 Patent. To resolve the legal and factual questions raised by Stellar's activities and to afford relief from the uncertainty and controversy which Stellar's actions have precipitated, Allied is

entitled to a declaration of its rights under 28 U.S.C. § 2201 and 2202, inclusive of a finding that each asserted claim of the '974 Patent is limited and restricted by its terms, the prior art, and the interpretation placed on it by Stellar during proceedings before the PTO to the extent the '974 Patent cannot be accorded a scope sufficient to encompass any acts or activities of Allied.

24. Claim 16 and the claims depending from claim 16 in the '974 Patent require, inter alia, the presence of fused magnesium oxide.

25. The presence of fused magnesium oxide, as contrasted to magnesium oxide that is not fused, was the sole basis upon which Stellar alleged claim 16, and the claims depending from claim 16, in the '974 Patent was novel and patentable over the prior art.

26. In arguments made in the USPTO in connection with the '974 Patent on July 23, 2008, Stellar represented to the Patent and Trademark Office:

Independent claim 16 recites magnesium oxide that has been fused (heated to above 2315° Celsius) [0021] of instant specification and crushed to a size of less than 200 microns.

While Applicant readily concedes that Lu et al. teaches magnesium oxide in claim 14, page 10, Applicant submits that Lu et al. is wholly silent as to the fusion and subsequent crushing of the magnesium oxide and instead is submitted to merely be the conventional sintered magnesium oxide reference in the instant specification at paragraph [0021]. Applicant submits that fusion changes the chemical reactivity of MgO and as such constitutes a physical claim recitation as to the properties of MgO. As such, claim 16 is submitted to be novel over the teachings of Lu et al.

A copy of that July 23, 2008 document is attached as Exhibit B.

27. Neither the Quick-Fire 88 product nor the PyroFast 235 product include or otherwise utilize a fused magnesium oxide.

28. Asserted claim 16 and the claims depending from claim 16 in Mexican Patent No. 279757, which are equivalent to claims 16 and the claims depending from claim 16 in the '974 Patent, cannot be infringed in the absence of fused magnesium oxide; neither of the Quick-Fire 88 and PyroFast 235 products infringe claim 16 or any claim depending from claim 16 in the '974 Patent, or any other claims of the '974 Patent.

29. This controversy is amenable to specific relief through a decree of a conclusive character.

30. Allied is entitled to a judicial determination that the manufacture, use, sale, offering for sale, importing, or exporting of the Quick-Fire 88 and PyroFast 235 products do not infringe, directly or indirectly, any valid and enforceable claim of the '974 Patent. To resolve the legal and factual questions raised by Stellar's activities and to afford relief from the uncertainty and controversy which Stellar's actions have precipitated, Allied is entitled to a declaration of its rights under 28 U.S.C. § 2201 and 2202, inclusive of a declaration that the claims of the '974 Patent are not infringed by the Quick-Fire 88 or PyroFast 235 products.

## **COUNT II**

### **DECLARATORY JUDGMENT OF INVALIDITY OF THE '974 PATENT**

31. Allied realleges, as if fully set forth herein, the allegations of paragraphs 13-19 and 24-26, inclusive.

32. Jurisdiction for this count is founded on Title 28, United States Code, §§ 1331, 1388, 2201 and 2202. Venue for this count is proper under Title 28, § 1391.

33. There is a real, immediate substantial and justiciable controversy between Allied and Stellar concerning the validity of the claims of the '974 Patent.

34. This controversy is amenable to specific relief through a decree of a conclusive character.

35. The asserted claims of Mexican Patent No. 279757, which directly correspond to claims 16 and the claims depending from claim 16 in the '974 Patent, differ from the prior art considered by the PTO only in that the magnesium oxide in the prior art considered by the PTO was not fused.

36. The Allied products accused of infringement by Stellar in Mexico contain a two-part formulation of magnesium oxide and aqueous acid phosphate solution. Allied has sold products containing two-part formulations of magnesium oxide crushed to a size less than 200 microns and an aqueous acid phosphate solution in the United States for more than one year prior to the priority filing date of the '974 Patent. Consequently, any claim of the '974 Patent that encompasses the accused Allied products is invalid.

37. The use of fused magnesium oxide in two-part cementitious material formulations that include fused magnesium oxide and aqueous acid phosphate solution was not novel in the art, either at the time of the priority date for the '974 Patent, March 22, 2006, or at the time more than one year before said priority date. In other words, the public disclosure and documentation of fused magnesium oxide and an aqueous acid phosphate solution in two-part cementitious formulations predates the '974 Patent.

38. The claims of Mexican Patent 279757 and the corresponding claims of the '974 Patent thus lack novelty, and are invalid for lack of novelty, as well as being invalid for being obvious over the prior art.

39. This controversy is amenable to specific relief through a decree of a conclusive character.



40. The claims of the '974 Patent are invalid for failure to comply with the statutory prerequisites of Title 35, United States Code, including, inter alia, one or more sections of 101, 102, 103 and 112 thereof. To resolve the legal and factual questions raised by Stellar's activities and to afford relief from the uncertainty and controversy which Stellar's actions have precipitated, Allied is entitled to a declaration of its rights under 28 U.S.C. § 2201 and 2202, inclusive of a declaration that the claims of the '974 Patent are invalid for failure to comply with the statutory requirements of patentability specified in Title 35, United States Code, including, inter alia, one or more sections of 101, 102, 103, and 112 thereof.

### **COUNT III**

#### **UNENFORCEABILITY OF THE '974 PATENT**

41. Allied realleges, as if fully set forth herein, the allegations of paragraphs 13-19 and 24, inclusive.

42. Jurisdiction for this count is founded on Title 28, United States Code, §§ 1331, 1388, 2201 and 2202. Venue for this count is proper under Title 28, § 1391.

43. Each individual associated with the filing and prosecution of a patent application, including its inventors and patent owners, has an absolute duty of candor and good faith in dealing with the United States Patent and Trademark Office. 37 C.F.R. § 1.56. A breach of this duty may constitute inequitable conduct or "fraud on the PTO," rendering the patent unenforceable.

44. Title 37, Code of Federal Regulations, § 1.56 sets forth a duty not only for the inventors, but for all persons substantially involved in the preparation or prosecution of the application who are associated with the inventor, the applicant, and assignee, or anyone to whom there is an obligation to assign the application. 37 C.F.R. § 1.56(c). Both Stellar and its

President, David Mintz, are within the category of persons and organizations to which this duty of disclosure applies in the '974 Patent.

45. Title 37, Code of Federal Regulations, § 1.56 sets forth a duty for all persons named as inventors in a patent application, as well as all others substantially involved with the filing or prosecution of an application to disclose to the PTO all information material to any claim pending in the application.

46. David Mintz, the President of Stellar, was initially listed as the first named inventor of the invention in the '974 Patent.

47. On March 20, 2007, Mr. Mintz signed a DECLARATION FOR PATENT APPLICATION ("Declaration") in the application that lead to the '974 Patent.

48. This Declaration included an acknowledgment by Mr. Mintz of his duty to disclose to the PTO:

*I acknowledge the duty to disclose all information known to me that is material to patentability in accordance with Title 37, Code of Federal Regulations, § 1.56.*

49. This Declaration further included a statement by Mr. Mintz that he had reviewed and understood the contents of the patent application:

*I hereby state that I have reviewed and understood the contents of the above identified specification, including the claims, as amended by an amendment, if any, specifically referred to herein.*

50. This Declaration was signed with the following statement:

*I hereby declare that all statements made herein of my own knowledge are true and that all made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of*

*the United States Code and that such willful false statements may jeopardize the validity of the application or any patent issued therefrom.*

A copy of the March 20, 2007 Declaration as signed by Mr. Mintz is attached as Exhibit C.

51. The most conventional way to comply with 37 C.F.R. § 1.56 is to file with the PTO what is known as an Information Disclosure Statement. The PTO has fill-in PDF forms (PTO/SB/8a and b) available on the PTO website and provides detailed procedures for complying with the duty of disclosure under 37 C.F.R. § 1.56. These Information Disclosure forms include spaces for supplying the patent numbers of relevant prior art patents that are known to the Applicant.

52. On April 14, 2003, Stellar sued Allied for patent infringement in the Eastern District of Michigan. The patent involved in that lawsuit was U.S. Patent No. 6,447,596 (“the ‘596 Patent”). The ‘596 Patent was directed to a bonded aggregate composition and binders for use with the composition.

53. Mr. Mintz was involved with the litigation over the ‘596 Patent. In connection with this lawsuit, Mr. Mintz became aware of U.S. Patent No. 3,930,872 (the ‘872 Patent”).

54. Mr. Mintz has been aware of the ‘872 Patent since at least October 16, 2001 when counsel for Stellar copied Mr. Mintz on correspondence to Allied specifically identifying and discussing the ‘872 Patent.

55. The ‘872 Patent is relevant and material to the validity of the ‘974 Patent, and should have been disclosed to the PTO during the prosecution of the ‘974 Patent.

56. Despite knowledge of ‘872 Patent by Stellar and Mr. Mintz, neither Mr. Mintz nor any other person associated with the filing of the patent application leading to the ‘974

Patent filed any Information Disclosure Statements at any time during the prosecution of the '974 Patent, and the '872 Patent was not disclosed to the PTO at any time.

57. Neither the '872 Patent nor any other prior art patents were disclosed to the PTO in any other way during the prosecution of the '974 Patent.

58. The '872 Patent was not otherwise identified to the PTO, and the '872 Patent did not become of record in the proceedings in the PTO during the prosecution of the '974 Patent.

59. Mr. Mintz's sworn statement in the Declaration of the '974 Patent that he had reviewed and understood the contents of the '974 Patent, including the claims, demonstrate his ability to understand the technology involved with the '872 and '974 Patents, as well as his ability and competence to understand and appreciate the relevance of the '872 Patent to the claims of the '974 Patent.

60. Given Mr. Mintz's awareness of the '872 Patent, his technical expertise in cementitious formulations and his competence to understand the materiality of the '872 Patent to the '974 Patent, the most plausible inference to draw from Mr. Mintz's and Stellar's failure to disclose the '872 Patent, failure to disclose any other prior art patents, and failure to file an Information Disclosure Statement at any time during the pendency of the '974 Patent, is that Mr. Mintz and Stellar consciously disregarded their respective duties of disclosure, which required Mr. Mintz and Stellar to disclose material prior art to the PTO, as set forth in 37 C.F.R. § 1.56.

61. Upon information and belief, Mr. Mintz and Stellar withheld this material information from the PTO with the specific intent to deceive the PTO and to secure allowance of the '974 Patent. Upon information and belief, the PTO would not have found one or more claims of the '974 Patent to be patentable if it had been aware of the undisclosed prior art that

was known to Mr. Mintz, both at the time of filing and throughout the prosecution of the '974 Patent.

62. The most plausible inference from the facts noted above is that Mr. Mintz was aware that the '872 Patent was closer to the invention claimed in the '974 than the prior art considered by the PTO during the prosecution of the '974 Patent. Particularly, the '872 Patent discloses a two-part or two-package cementitious formulation comprising (a) magnesium oxide of 325 mesh (44 microns) and having a surface area of about 2.3 m<sup>2</sup>/gram, in one package, and (b) an aqueous acid phosphate solution, in another package. The '872 Patent also discloses formulations in which boron is included to improve the strength of formed articles. Despite Mr. Mintz's knowledge of the '872 Patent, this prior art reference was not disclosed to the PTO.

63. On information and belief, the '974 Patent is unenforceable due to inequitable conduct because Mr. Mintz and Stellar failed to disclose to the PTO information known to Mr. Mintz and Stellar that was material to the patentability of the claimed invention, all with an intent to deceive the PTO.

64. For the reasons set forth above, on information and belief, the '974 Patent is unenforceable as a result of inequitable conduct before the PTO based upon Mr. Mintz's failure to comply with his absolute duty of candor and good faith before the PTO by his knowing and deliberate failure to disclose prior art to the PTO during the prosecution of the '974 Patent that was so material that but for such non-disclosure, one or more claims of the '974 Patent would not have issued.

65. This controversy is amenable to specific relief through a decree of a conclusive character.

66. To resolve the legal and factual questions raised by Stellar's activities and to afford relief from the uncertainty and controversy which Stellar's actions have precipitated, Allied is entitled to a declaration of its rights under 28 U.S.C. § 2201 and 2202, inclusive of a finding that the claims of the '974 Patent are unenforceable due to Stellar's failure to disclose material prior art to the PTO during prosecution of the '974 Patent.

**COUNT IV**

**TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS**

67. Allied realleges, as if fully set forth herein, the allegations of paragraphs 13-19 and 24-28, inclusive.

68. Jurisdiction for this count is founded on Title 28, United States Code, §§ 1331, 1388 and 1367. Venue for this count is proper under Title 28, § 1391.

69. Stellar is well aware that each of the asserted claims of Mexican Patent No. 279757 require the presence of fused magnesium oxide, and was so aware at the time it filed the Mexican infringement actions against Allied's distributors.

70. On July 2, 2015, legal counsel for Allied, responding to June 24, 2015 letters from Stellar's Mexican counsel accusing Ferro and Pyrotek of infringement of Mexican Patent No. 279757, advised Stellar, through Stellar's Mexican counsel, that neither the Quick-Fire 88 nor the PyroFast 235 products included any fused magnesium oxide. Consequently, Stellar has known since at least July 2, 2015 that the Quick-Fire 88 and PyroFast 235 do not include fused magnesium oxide.

71. Stellar acted in objective and subjective bad faith by threatening patent infringement actions against Allied's distributors without any objective evidence that the accused products contained fused magnesium oxide because without fused magnesium oxide,

the asserted claims Mexican Patent No. 279757 were obviously not infringed, and Stellar knew or should have known that to be the case.

72. Despite its knowledge that the asserted claims of Mexican Patent No. 279757 required the presence of fused magnesium oxide, and that the Quick-Fire 88 and PyroFast 235 products did not include fused magnesium oxide, Stellar filed patent infringement lawsuits against Ferro and Pyrotek on October 27, 2015.

73. In recognition of the absence of fused magnesium oxide in both the Quick-Fire 88 and PyroFast 235 products, the allegations in the lawsuits against Ferro and Pyrotek only alleged the presence of magnesium oxide, i.e, Stellar did not even allege that the Quick-Fire 88 and PyroFast 235 products contain fused magnesium oxide.

74. Stellar is well aware that the only material difference between claim 16 and the claims depending from claim 16 and the prior art of which it is aware is that the magnesium oxide is fused.

75. Stellar further acted in objective and subjective bad faith by asserting patent infringement claims against Allied's distributors in Mexico without objective evidence that the accused products included fused magnesium oxide, and further having been advised that was not the case.

76. Ferro is a distributor of Allied's products, and Stellar is and was well aware of the business relationship between Allied and Ferro at the time it accused Ferro of patent infringement on June 24, 2015, and at the time it filed the infringement actions in Mexico on October 27, 2015.

77. Pyrotek is a distributor of Allied's product, and Stellar is and was well aware of the business relationship between Allied and Pyrotek at the time it accused Pyrotek of patent

infringement on June 24, 2015, and at the time it filed the infringement actions in Mexico on October 27, 2015.

78. Stellar also was well aware that the Quick-Fire 88 and PyroFast 235 products were manufactured by Allied in the United States.

79. Stellar's threats of patent infringement against Allied's distributors on June 24, 2015 were unjustified, were known by Stellar to be unjustified, and were made to intentionally interfere with the sales and distribution of Allied's products in Mexico.

80. The lawsuits Stellar filed against Ferro and Pyrotek in Mexico were unjustified, were known by Stellar to be unjustified, and were filed to intentionally interfere with the sales and distribution of Allied's products in Mexico.

81. The threats of patent infringement made by Stellar and the lawsuits Stellar filed against Ferro and Pyrotek have interfered with Allied's business relationship with its distributors Ferro and Pyrotek and resulted in damage to Allied as a result of the interference such lawsuits have had with respect to.

#### **PRAYER FOR RELIEF**

WHEREFORE, Allied respectfully requests that the Court enter judgment as follows:

- A. Declaring that Allied has not infringed, and does not infringe, directly or indirectly, any valid and enforceable claim of U.S. Patent No. 7,503,974;
- B. Declaring that all claims of U.S. Patent No. 7,503,974 asserted against Allied or its distributors are invalid;
- C. Declaring that U.S. Patent No. 7,503,974 is unenforceable due to inequitable conduct before the United States Patent and Trademark Office by failing to disclose prior art of which Mr. Mintz and Stellar was aware;



- D. Awarding Allied damages for injuries it incurred from Stellar's unlawful interference with Allied distributors;
- E. Declaring that this is an exceptional case in favor of Allied and awarding attorneys' fees pursuant to 35 U.S.C. § 285;
- F. Awarding costs and expenses to Allied;
- G. Awarding any and all such other relief as the Court determines to be just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a jury trial of all issues so triable.

Dated: 12/23/15

Respectfully submitted,

PORTER, WRIGHT, MORRIS & ARTHUR, LLP

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