IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RNS SERVICING, LLC, an Illinois Limited Liability Company,	§	
Plaintiff,	§	
v.	§	Case No. 17-CV-108
SPIRIT CONSTRUCTION SERVICES, INC., a Delaware Corporation, STEVEN VAN DEN HEUVEL, a citizen of the State of Wisconsin, and SHARAD TAK, a citizen of the State of Florida,	§	Honorable Edmond E. Chang
Defendants.	§	

DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR JOINT MOTION FOR SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS, AND DEFENDANTS' OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff's Memorandum in Opposition to Defendants' Joint Summary Judgment Motion Regarding the Statute of Limitations Issue and Motion to Strike Defendants' Affirmative Defenses Based on the Statute of Limitations[1] tries only to complicate a straightforward case. RNS's predecessor in interest, IFC Credit Corporation ("IFC"), entered into a Settlement Agreement with Ron Van Den Heuvel ("VDH") in 2007. RNS alleges that, before entering the Settlement Agreement, IFC relied on representations by Defendants that Ron VDH would be in a position to comply with the Settlement Agreement by making payments from proceeds of subcontracts related to yet-to-be started construction projects.

[1] The Court ruled that the "motion to strike" is really a cross-motion for summary judgment. May 14, 2019 Minute Entry, Dkt. No. 83. Plaintiff's filing is thus referred to as Plaintiff's "Opposition" or "Cross-Motion" as appropriate.

After the execution of the Settlement Agreement and an initial payment, Ron VDH breached the Settlement Agreement by failing to make *any* subsequent payments to IFC. As a result, in 2007 IFC sued and, by 2008, alleged that it had been fraudulently induced to enter the Settlement Agreement by Ron VDH and Spirit Construction Services, Inc. ("Spirit"). IFC made no claim against Sharad Tak personally. RNS now argues that IFC and its successors in interest were never on notice of potential claims against Spirit, Steve VDH and Tak from 2007 to 2016 -- despite IFC's allegation years ago that the original Defendants (not including Tak) induced IFC to enter into the Settlement Agreement that Ron VDH almost immediately breached.

Statutes of limitation are meant to address claims just like the ones brought in this case. Plaintiffs with valid claims must pursue them with reasonable diligence so that unreasonable challenges faced by defendants forced to litigate stale claims (fading memories, lost and destroyed documents, and unavailable witnesses) can be avoided. IFC, and later RNS, failed to pursue the belated claims in this case within the applicable statutes of limitation and, as a result, summary judgment should be granted in favor of the Defendants and the Cross-Motion for summary judgment should be denied.

ARGUMENT

I. RNS'S ALLEGED INJURY IN THIS CASE IS THE SAME INJURY IFC SUFFERED AS A RESULT OF RON VDH'S BREACH OF THE SETTLEMENT AGREEMENT IN 2007.

RNS's opposition argues, for the first time, that RNS's real injury is "the loss of the collateral IFC had negotiated to secure" Ron VDH's debt, "which is a different injury altogether from Ron VDH, TPTC, and PCDI's nonpayment on the debt under March 28, 2007 Settlement Agreement." Opposition, 4. RNS's use of the term "collateral" in this context is misplaced as Tak is not alleged to have ever pledged any security for Ron VDH's repayment to IFC, nor did

any of the Defendants ever agree to forfeit anything in the event Ron VDH defaulted on the Settlement Agreement. Regardless, RNS's First Amended Complaint makes clear that RNS's only injury is the nonpayment of the funds that IFC provided to Ron VDH.

For example, Count I states "[i]n reliance of the Steve [VDH] and Spirits [sic] statements. . . IFC entered into the Settlement Agreement, Master Lease No. 801109, Master Amendment Agreement, and Continuing Pledge Agreement," and that as a result, "RNS Servicing has not been paid the monies owed to it under the Settlement Agreement, Master Lease No. 801109, Master Amendment Agreement, and Continuing Pledge Agreement." Count IV makes identical allegations with respect to Tak. Accordingly, RNS's argument that it has suffered some separate and distinct injury from nonpayment of the funds provided to Ron VDH collides with how it plead its damages.

II. IFC WAS ON INQUIRY NOTICE OF THE CLAIMS IN THIS CASE STARTING IN 2007 WHEN IT WAS INJURED BY RON VDH.

The statute of limitations begins to run when a reasonable person possesses sufficient information to put them on inquiry notice to determine whether a cause of action exists. *Knox Coll. v. Celotex Corp.*, 88 Ill. 2d 407, 416-17, 430 N.E.2d 976 (1981). All of RNS's claims allege that Defendants somehow induced IFC to enter into the Settlement Agreement with Ron VDH by making false representations.[2] When Ron VDH very quickly breached that agreement, IFC was aware that it was injured. At that moment, it was on inquiry notice as to how that injury

[2] All of Plaintiff's causes of action allege that the Defendants made false representations before the Settlement Agreement was executed and that, in reliance on these representations, IFC executed the Settlement Agreement. *See* Amended Complaint, ¶¶ 72 (alleging negligent misrepresentation against Steve VDH and Spirit), 82 (alleging fraudulent inducement against Steve VDH and Spirit), 91 (alleging violations of Illinois Consumer Fraud and Deceptive Business Practices Act by Steve VDH and Spirit), 100 (alleging negligent misrepresentation against Tak), 110 (alleging fraudulent inducement against Tak), 119 (alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act by Tak), and 128 (alleging civil conspiracy to induce IFC to enter into the settlement agreement by Steve VDH, Spirit, Tak, and others).

occurred and who was responsible. Given the speed of the breach, moreover, it was readily apparent that the injury was wrongfully caused. Indeed, this Court has previously stated that it is reasonable to infer from the speed with which Ron VDH and his companies breached the Settlement Master Lease that the contracts about which Spirit, Steve VDH and Tak are supposed to have made misrepresentations were not genuine. (Mem. Op. and Order (Aug. 25, 2017), Dkt. No. 29). By June 18, 2008, a decade ago, IFC was aware its injuries had been wrongfully caused because it alleged on that date that it believed that it had been misled as to the funding status or timing of payments under the ephemeral EPC contracts. RNS's Rule 56.1(b)(3)(C) Statement of Additional Undisputed Facts that Require Denial of Defendants' Motion for Summary Judgment ("PSAF"), Dkt. No. 75, ¶ 37.

RNS disputes that IFC *knew*, as a matter of fact, that it had lost its rights to the stream of payments that were to be paid out of the four EPC contracts. Opposition, p. 3. . The entire concept of inquiry notice, however, is that a party does not have to *"know"* the detailed extent of its injury to trigger notice. Once a plaintiff is aware it is injured and that the injury has been wrongfully caused, the statute of limitations begins to run as to *all potential defendants*. *See Janousek v. Katten Muchin Rosenman LLP*, 2015 IL App (1st) 142989, ¶¶ 20-24, 44 N.E.3d 501 (holding that the statute of limitations on a fraud claim began to run as to *all* potential defendants when the plaintiff had knowledge of a wrongfully caused injury "even though he may not yet have known" that two defendants he did not sue in his original lawsuit were partly responsible for his injury); *LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 690-92 (7th Cir. 1998) (applying Illinois law) (affirming dismissal of fraud claims against two individual defendants because the plaintiff believed his injury was caused by a lie, thus triggering the statute of limitations as to *all* potential defendants, despite the plaintiff's argument that he only

learned of the two individual defendants' participation in the fraudulent misrepresentations through discovery in his lawsuit against the original defendant).

IFC knew it was injured when it sued Ron VDH. Hence, RNS's opposition now attempts to distinguish the injury caused by Ron VDH from the injury caused by Defendants. The Seventh Circuit has made clear, however, that even if

> . . . [the plaintiff] did not know of [the individual defendants'] complicity at the time is irrelevant . . . . [O]nce [the plaintiff] was aware of the injury and that it had been wrongfully caused, he was under an obligation to inquire further to determine whether an actionable wrong was committed. A thorough investigation mandates that [the plaintiff] consider the potential liability of ***all parties involved*** in supplying the [misrepresented information], and [the individual defendants] should have been included in this investigation. [The plaintiff] did not have the right to wait until nearly seven years later, when pretrial discovery uncovered information that may have supported a cause of action against [the individual defendants].

LeBlang Motors, 148 F.3d at 691 (emphasis added) (quotation marks and citations omitted). The injured party does not even need to know all potential causes of their injury for the statute of limitations to accrue as to all potential defendants. *See Cox v. Jed Capital, LLC*, 2016 IL App (1st) 153397-U, 2016 WL 5846681, *6 ("It is not necessary for the plaintiff to know the full extent of his injuries before the statute of limitations begins to run.") (citing *Golla v. Gen. Motors Corp.*, 167 Ill. 2d 353, 364, 657 N.E.2d 894 (1995)).

As in *LeBlang*, at the time Ron VDH breached the Settlement Agreement in 2007, the law mandated that IFC consider the potential liability of ***all parties involved*** in supplying allegedly false information related to Ron VDH's ability to fulfill his obligation under the terms of the Settlement Agreement. Steve VDH, Spirit and Tak should have been included in this investigation, and RNS does not have the right to wait nearly nine years, when IFC's former

Chief-Financial-Officer-turned-RNS-consultant "uncovered" information in March 2016 that may have supported a cause of action against the Defendants had it been looked for years earlier.

III. IFC FAILED TO PROPERLY INVESTIGATE ITS POTENTIAL CLAIMS AGAINST DEFENDANTS ONCE ON INQUIRY NOTICE.

Once it reasonably appeared that IFC's injury had been wrongfully caused – once it became apparent that the alleged representations made by Spirit and Tak that Ron VDH would have cash flow from subcontracts were false – IFC impermissibly slept on its rights. *See Knox Coll.*, 88 Ill.2d at 416. RNS concedes that, as part of its agreement with Ron VDH, it relied on his *own* representations that he would almost immediately have a revenue stream available as a result of alleged subcontracts on the projects that IFC had discussed with both Steve VDH, Spirit and Tak. PSAF, ¶ 37. Accordingly, as soon as Ron VDH's representations proved untrue, the claims in this case accrued: IFC was on inquiry notice and had a duty to immediately investigate claims against all the parties who allegedly convinced IFC to enter the Settlement Agreement with Ron VDH. *See LeBlang Motors*, 148 F.3d at 692.

IFC did pursue claims against Spirit. It did not, however, pursue claims against Tak – nor did any IFC representative even attempt to communicate with Tak in 2008. While IFC's claim against Spirit in its first lawsuit did not succeed, IFC did prevail against Ron VDH and his companies. PSAF, ¶ 40. Unable to collect on its August 13, 2008 judgment against Ron VDH, IFC failed to pursue claims at that time against the other parties RNS alleges induced IFC into the Settlement Agreement. Instead, IFC declared bankruptcy, which "interrupted" the process of investigating its claims against Ron VDH and Spirit. *Id.* at ¶ 41.[3] After IFC declared bankruptcy,

[3] RNS argues that the Defendants took the testimony referenced in Paragraph 41 of the Rule 56.1 statement out of context, and that the quote refers to why Tak was not initially joined as a defendant. *Id.* But the full testimony, quoted in RNS's Response to Rule 56.1(b)(3) Statement, makes clear that the 2007 lawsuit was the "first step" that was interrupted by IFC's bankruptcy.

its claims at issue here passed first to the IFC bankruptcy estate and then to RNS. *Id.* at 45. Tak was never contacted by the IFC Bankruptcy Trustee or anyone else in relation to the IFC bankruptcy estate. PSAF at ¶ 19.

RNS makes several excuses for IFC's failure to satisfy its duty to investigate after receiving inquiry notice of its claims – including the circumstances that led to IFC's bankruptcy. RNS suggests that the IFC Bankruptcy Estate was never on inquiry notice as to its claims, and that, similarly, RNS was not on such notice until at least March 21, 2016. Opposition, pp. 11-16. But both a bankruptcy estate and a subsequent purchaser of a claim take a bankrupt party's claims subject to any applicable statute of limitations; there is no authority for the proposition that a bankruptcy or sale of a claim somehow cuts off inquiry notice or otherwise revives a time-barred claim. *See McDaniel v. Johns-Manville Sales Corp.*, 542 F. Supp. 716, 719 (N.D. Ill. 1982) (once discovery clock begins to run, failure to communicate about claim to successors in interest does not stop it from running).

RNS states that, "[w]hile the IFC Bankruptcy Trustee investigated possible avenues to enforce the August 13, 2008 Ron VDH judgment, he never became aware of or otherwise had reason to investigate whether IFC had existing claims against Steve VDH, Spirit, or Tak—i.e., whether IFC had the claims asserted against those parties in this lawsuit." Pl.'s Mem. In Opp. to Defs.' Mot. for Summ. J. 12 (citing PSAF at ¶ 22.). That statement is remarkable given the fact that "Ron VDH's lease payments were to come from subcontractor payments Ron VDH's companies were to receive under the four EPC Contracts executed between Spirit and a company run by Tak, ST Paper I." DSF ¶22, 24, 26; and, "[b]ut for that consideration, [IFC] wouldn't have done the transaction" with Ron VDH and his companies. Affidavit of Robert Romashko in Support of Motion for Summary Judgment, Dkt. No. 66, Exhibit 4, 86:22-87:10.

More than two years had passed between the execution of the Settlement Agreement in April 2007 and the IFC bankruptcy on July 27, 2009. Affidavit of Robert Romashko in Support of Motion for Summary Judgment, Dkt. No. 66, Exhibit 1, ¶¶ 51, 67. Yet RNS inexplicably claims that the IFC Bankruptcy Trustee had no reason to investigate why Ron VDH had yet to receive *any* payments on subcontracts under the four EPC Contracts or remit those payments to IFC.

RNS argues that it was only after Marc Langs' March 21, 2016 email exchange with Tak that RNS retained counsel and diligently worked with counsel to get this case on file. That argument is at best too little, too late. Again, under Illinois law, the discovery clock cannot be "reset" for a plaintiff successor-in-interest like RNS. *See UNR Indus., Inc. v. Am. Mut. Liab. Ins. Co.*, 92 B.R. 319, 345-46 (N.D. Ill. 1988) (holding that the plaintiffs' predecessors had full knowledge of material facts and, thus, a plaintiff's "status as a successor-in-interest [does not] give[] it any special protection from the statute of limitations"); *see also McDaniel,* 542 F. Supp. at 719. As IFC was on inquiry notice of potential claims against Steven VDH, Spirit and Tak -- years before Marc Langs sought to make inquiries about the EPC Contracts -- RNS's conduct after March 21, 2016 does nothing to revive its time-barred claims.

In *Guarantee Trust v. Kribbs*, the plaintiff filed a suit for unjust enrichment, conversion, constructive fraud, concert of action, and civil conspiracy. 2016 IL App (1st) 160672, ¶ 5, 68 N.E.3d 1046. Nearly six years after filing its initial complaint, while taking discovery depositions, the plaintiff learned the identity of two of its own employees who it claimed participated in the scheme and sought to name them in the suit. *Id.* at ¶ 1. The court ruled that the plaintiff had provided no reason it could not have learned about its employees' involvement in the alleged scheme within the five-year limitations period and that the plaintiff was "far from

suffering an 'irredeemable lack of information.'" *Id.* at ¶ 48. The court further ruled that the "only thing preventing [the plaintiff] from sooner discovering the purportedly revelatory information it learned in those depositions was its own lack of diligence." *Id.* Accordingly, the court affirmed the circuit court's decision that the five-year statute of limitations applicable to the plaintiff's claims against its employees began to run no later than the day plaintiff filed its original complaint against the original defendant. *Id.* at ¶¶ 1, 16–18, 50.

Here, the only thing preventing RNS and its predecessor-in-interest, IFC, from sooner discovering the purportedly revelatory information it learned in Marc Langs' March 2016 email exchange with Tak was its own lack of diligence. IFC was on inquiry notice of its alleged wrongfully caused injury during IFC Lawsuit II. IFC had suffered an injury and certainly believed it was wrongfully caused at least as of April 8, 2008, when Steven VDH was deposed in IFC Lawsuit II. DSF ¶ 36.

In the subsequently filed 2008 declaration of Marc Langs, motion for summary judgment, and motion to strike, IFC articulated its belief that Ron VDH, Steve VDH, and Spirit misrepresented the CPA EPC Contracts to fraudulently induce IFC into settlement. DSF ¶¶ 37–39. These are the same types of misrepresentations RNS now alleges Tak made to IFC related to the same CPA EPC Contracts to also fraudulently induce IFC to enter into a settlement agreement. DSF ¶ 32–33. IFC was on inquiry notice of a possible action against Tak, yet it chose to sit on its rights, failed to depose him or even speak to him, and failed to file an action against him for a full decade. Accordingly, as in *Guarantee Trust*, the statute of limitations on the claims in this case against all parties began to run no later than when IFC declared it had been fraudulently induced in 2008, and almost certainly began to run at the time Ron Van Den Heuvel initially breached.

IV. RNS HAS FAILED TO ESTABLISH THAT DEFENDANTS FRAUDULENTLY CONCEALED FACTS THAT WOULD SAVE ITS CLAIMS FROM THE APPLICABLE STATUTES OF LIMITATION.

RNS argues that Steve VDH and Spirit fraudulently concealed facts necessary to discover the claims brought in this case. RNS does not and cannot make any such argument regarding Tak – someone RNS concedes IFC had no contact with between 2008 and 2016.[4] Furthermore, RNS's fraudulent concealment argument is not developed; RNS cites 735 ILCS § 5/13-215, which provides for a five-year statute of limitations for claims where a person liable to the claim lulled or concealed the existence of the claim. Opposition, p. 1. But a plaintiff seeking to use fraudulent concealment to toll a limitations period "must establish that the defendant made misrepresentations or performed acts which it knew to be false, with the intent to deceive the plaintiff, and that the plaintiff detrimentally relied on those representations or acts." *Richardson v. City of Chicago,* 314 F. Supp. 3d 999, 1011-12 (N.D. Ill. 2018).

This argument, particularly the elements of reliance and knowing falsity, are not developed in RNS's Opposition.[5] In any event, a plaintiff cannot toll the statute of limitations by use of this rule where, as IFC did in this case, they already made inquiry into their cause of action prior to or contemporaneously with the allegedly lulling representations. *Voga v. Nash*, No. 2-13-0750, 2014 WL 1323361, at *11-12 (Ill. App. Ct. Apr. 1, 2014) (unpublished).

[4] While RNS's Opposition cites law for the proposition that a co-conspirator can be charged with its co-conspirator's fraudulent concealment, RNS fails to offer anything to support an allegation that Tak somehow conspired with Steve VDH and Spirit to fraudulently conceal facts necessary to discover the claims against him.

[5] Proposed undisputed facts that may be intended to support this argument are stated in Plaintiff's Statement of Additional Undisputed Facts. However, not only are these facts in dispute and contradicted by the deposition testimony of Marc Langs, they are not cited in Plaintiff's Opposition.

V. RNS HAS NOT ESTABLISHED GROUNDS TO EQUITABLY TOLL THE APPLICABLE STATUTES OF LIMITATION.

Finally, RNS argues that even if its claims accrued in 2007 or 2008, they were equitably tolled between March 31, 2009 and March 21, 2016 because the prior court ruled that "RNS Servicing lacked standing to assert its claim for injunctive relief against Spirit—which was based on Spirit's alleged misrepresentations in this case." Opposition, p. 17. But equitable tolling is applied only when a plaintiff is prevented from asserting its rights in some "extraordinary way." *Goldsmith v. Correct Care Solutions*, No. 12 C 3738, 2014 WL 3377058, *3 (N.D. Ill. July 10, 2014). "While equitable tolling is recognized in Illinois, it is rarely applied." *Am. Family Mut. Ins. Co. v. Plunkett*, 2014 IL App (1st) 131631, ¶ 33, 14 N.E.3d 676.

RNS's own arguments prove too much. RNS alleges that the equitable tolling period ended on March 21, 2016 "when Tak informed Marc Langs via email that EPC contracts were 'frivolous.'" Opposition, p. 19. But RNS could have contacted Tak the same day the prior court ruled that RNS Servicing lacked standing and asked him about the EPC contracts. The court's lack of standing ruling did not in any way prevent investigation of claims, nor did it need to be vacated to institute this suit. Simply put, there was nothing that prevented the assertion of RNS's rights, much less in any "extraordinary way."

VI. RNS IS NOT ENTITLED TO SUMMARY JUDGMENT AS TO DEFENDANTS' STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSES.

RNS is not entitled to summary judgment on Defendants' statute of limitations affirmative defenses. RNS's arguments fail to provide any basis for granting summary judgment in RNS's favor. As described more fully, *supra:* (1) RNS discovered its claims no later than during IFC Lawsuit II in 2008, so the discovery rule does not support a summary judgment ruling in RNS's favor; (2) RNS cannot rely on a fraudulent concealment argument where it was

already aware of potential claims prior to Spirit's alleged "lulling" representations; and (3) equitable tolling based on the outcome of IFC Lawsuit II does not apply where RNS has failed to establish how it was prevented from discovering its claims by the outcome of that suit.

Moreover, as stated in Defendants' Response to Plaintiff's Rule 56 Statement of Additional Facts, Plaintiff's Additional Statement of Facts violates Local Rule 56.1. They are, in large part, unreasonably lengthy, include multiple statements of purported facts (almost all of which are immaterial), and, in some cases, include legal conclusions. The Northern District of Illinois has made the requirements of Local Rule 56.1(a) very clear:

> First, a movant's [Local Rule] 56.1(a) statement should contain *only* factual allegations. It is inappropriate to allege legal conclusions in a 56.1(a) statement on the off-chance that one's opponent might not file a correct response. . . . Additionally, the 56.1(a) statement should be limited to *material* facts, that is, facts pertinent to the outcome of the issues identified in the summary judgment motion. . . . Second, the numbered paragraphs should be short; they should contain only one or two individual allegations, thereby allowing easy response. Again, it is inappropriate to confuse the issues by alleging multiple facts in a single paragraph in hopes of one's opponent missing one. . . . Finally, . . . [f]actual allegations not properly supported by citation to the record are nullities. . . . ***[A] movant's failure to submit a proper 56.1(a) statement results in dismissal of the motion***. . . . The purpose of the 56.1 statement is to identify for the Court the evidence supporting a party's factual assertions in an organized manner: it is not intended as a forum for factual or legal argument.

Malec v. Sanford, 191 F.R.D. 581, 583–85 (N.D. Ill. 2000) (quotation marks and citations omitted) (emphasis added and in original).

This Court has also held that a single Rule 56.1 paragraph cannot properly contain multiple facts. *See, e.g.*, *Bordelon v. Bd. of Educ. of the City of Chicago*, No. 11 C 08205, 2014 WL 12661306, at *1 (N.D. Ill. Sept. 13, 2014) (unreported) (Chang, J.) ("And finally, it was Bordelon's responsibility to identify relevant Rule 56.1 facts in his response to the Board's motion for summary judgment—**especially where a single Rule 56.1 paragraph improperly**

contained multiple facts and Bordelon merely referenced the paragraph generally.") (emphasis added); *Kuttner v. Zaruba*, No. 10 C 04290, 2013 WL 5433291, at *1 n.2 (N.D. Ill. Sept. 30, 2013) (unreported) (Chang, J.) ("Kuttner's Statement of Additional Facts . . . failed to comply with Local Rule 56.1 in many instances. Many paragraphs contained multiple facts (instead of just one at a time) with no citation to the record, or a general citation to one or more exhibits.").

Because RNS has failed to set forth arguments sufficient to avoid the granting of Defendants' motion for summary judgment on statute of limitations grounds, it cannot establish its own entitlement to summary judgment. Moreover, Defendants respectfully request that the Court consider denying Plaintiff's cross-motion for summary judgment on the additional ground of failing to submit a proper 56.1(a) statement.[6]

CONCLUSION

For the foregoing reasons and the reasons stated in their initial brief in support of Defendants' Joint Motion for Summary Judgment, Defendants respectfully request that the Court grant summary judgment in Defendants' favor and deny Plaintiff's Cross Motion for Summary Judgment.

[6] At the hearing in this matter on August 3, 2017, the Court stated that it did not want the parties to submit new affidavits in response to Rule 56.1 statements, and that discovery should be completed with an eye toward avoiding doing so. To the extent that RNS has attempted to raise new fact issues via affidavit in support of its own Motion for Summary Judgment, there is no reason it could not have adduced these facts so during the parties' depositions, and those new facts should be disregarded.

Dated: May 31, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 31, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

By: *Brian C. Spahn*

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