STATE OF MICHIGAN

IN THE SUPREME COURT

RAFAELI, LLC, and
ANDRE OHANESSIAN,

Plaintiffs-Appellants,

v.

OAKLAND COUNTY, and
ANDREW MEISNER,

Defendants-Appellees.

S.C. Case No. 156849
C.A. No. 330696
L.C. No. 2015-147429-CZ

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APPELLEES' BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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STATEMENT OF JURISDICTION

Plaintiffs filed a timely application and this Court has jurisdiction. MCR 7.303; MCR 7.305.

COUNTER-STATEMENT OF QUESTION PRESENTED

I.

Plaintiffs' properties were forfeited to Defendants as provided in the General Property Tax Act as a result of Plaintiffs' failure to pay their property taxes. Their properties were foreclosed and later sold at auction. The sale price exceeded the amount Plaintiffs had owed before forfeiture.

DOES THE RETENTION OF THE AMOUNT ABOVE THE TAX OWED CONSTITUTE A TAKING WITHOUT JUST COMPENSATION?

Trial Court said "No."
Court of Appeals said "No."
Plaintiffs-Appellants say "Yes."
Defendants-Appellees say "No."

WHY LEAVE SHOULD BE DENIED

The Court should deny Plaintiff's Application because it does not raise any new, undeveloped or conflicted area of the law that requires this Court's attention. This issue has been previously raised and rejected by the Supreme Court of the United States and a number of state courts.

It is well-established that the government does not take property where a party has forfeited it in accordance with due process. The Supreme Court of the United States, in addressing a Michigan forfeiture statute, held that the "government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority," Bennis v Michigan, 516 US 442, 452 (1996), as long as there has been notice and an opportunity to be heard. Nelson v City of New York, 352 US 103, 110 (1956). Here, the General Property Tax Act (GPTA) establishes a procedure for forfeiture in accordance with due process and Plaintiffs received that process.

Plaintiffs' argument that the forfeiture in this case creates a harsh result is an argument which should be addressed to the Legislature and not this Court. In enacting the GPTA, a comprehensive code, the Legislature considered many competing interests and determined that a system of forfeiture and foreclosure, rather than the prior system of liens and tax deeds, was appropriate. "[T]his Court is obligated to uphold all laws that do not infringe the state or federal Constitutions and invalidate only those laws that do so infringe. We do not render judgments on the wisdom, fairness, or prudence of legislative enactments." AFT Michigan v State of Michigan, 497 Mich 197, 215 (2015).

COUNTER STATEMENT OF FACTS

A. Procedural Background.

The procedural background of the case is somewhat unusual because it has been in three separate courts. Plaintiffs have lost in all three. Plaintiffs originally sued both Wayne and Oakland Counties and their Treasurers in federal court. That case was dismissed because the Tax Injunction Act, 28 USC §1341, bars federal courts from hearing state tax issues where there is an available remedy under state law, which there is in Michigan. Rafaeli, LLC v Wayne County, Case No. 14-13958 (ED Mich June 4, 2015).

Plaintiffs then split the Plaintiffs and filed two cases: this case in Oakland County and the other case in Wayne County. The Complaints were identical in all material respects. Defendants in both cases moved for summary disposition in essentially identical motions. The Wayne Circuit Court (Judge Colombo) ruled first and granted the defendants' motion. Appellees' Response Brief, Court of Appeals Case No. 330696, Exhibit B. Rather than appeal that decision, the Wayne County plaintiffs attempted to re-open the federal case, claiming they did not have an adequate remedy under Michigan law because they lost in state court. The federal court again dismissed the case. Rafaeli, LLC v Wayne County, Case No. 14-13958 (ED Mich June 10, 2016).

The third court is this case, which arises out of Oakland Circuit Court.

Also, a similar case was filed by different plaintiffs in federal court in the Western District of Michigan against Van Buren County. The District Court dismissed the case on substantive grounds, holding there was no taking: "Because Plaintiffs do not have a property interest in the pleaded 'surplus equity' at the time of the tax sale, they fail under Rule 12(b)(6) to state a claim

under the Takings Clause of the Constitution upon which relief can be granted." Wayside Church v Van Buren County, Case No. 14-cv-1274 (WD Mich November 9, 2015). Plaintiffs appealed to the Sixth Circuit, which remanded with instructions to dismiss the action for lack of jurisdiction. Wayside Church v Van Buren County, 847 F.3d 812 (6th Cir. 2017). The plaintiff in that case, with the assistance of the Pacific Legal Foundation as in this case, filed a petition for certiorari in the Supreme Court of the United States, making substantially the same arguments as made here. The Supreme Court of the United States denied certiorari. __ S Ct __, 86 USLW 3214 (Oct 30, 2017).

Here, there are two Plaintiffs - Rafaeli, LLC and Ohanessian. The facts, as stated in the Complaint, are slightly different as to each.

B. Rafaeli.

In 2011, Rafaeli purchased 20159 Mada in Southfield. Complaint, ¶44. The deed reflected that Rafaeli's address was 19900 10 Mile Road. A tax deficiency existed and Defendants mailed a notice of delinquency to the property address. Id. ¶¶44-45. Rafaeli apparently received the notice because, on August 30, 2012, it made a payment on the tax bill. Id.¶46.

But a deficiency remained. On September 3, 2012, a second notice of delinquency was mailed to the property. Id.¶46. This notice was also apparently received because, on January 14, 2013, Rafaeli paid more money toward the deficiency. Id.¶46. But Rafaeli did not pay the required amount and a deficiency still remained. On February 1, 2013, a third notice of delinquency was mailed to the property. Id.¶47. This time, no payment was made by

Rafaeli. A notice of forfeiture was filed on March 1, 2013. Defendant's reply brief in the trial court, Exhibit A.

As required by the General Property Tax Act, Defendants filed its annual, bulk Petition of Foreclosure on May 16, 2013 relating to unpaid taxes from 2011 and resulting in forfeiture and loss of the property. The case was assigned to Judge Langford Morris. Rafaeli asserts it never actually received a copy of the Petition. Id.¶48.

Throughout the fall and early winter of 2013-14, Defendants attempted to provide Rafaeli a number of notices, apparently without success. On October 29, 2013, Rafaeli was sent a Notice of Show Cause Hearing and Judicial Foreclosure Hearing in accordance with the GPTA at its address on 10 Mile Road. Id.¶49. On November 4, 2013, Defendants attempted to personally serve Rafaeli at the Mada property address and were able to serve one of Rafaeli's tenants. Id.¶49. On December 30, 2013, Defendants sent a "Final Notice" to the 10 Mile Road address by certified mail and also mailed it to Rafaeli's "resident agent." Id. ¶50 (actually Rafaeli's property manager).

On February 26, 2014, Judge Langford Morris held a foreclosure hearing and a Judgment of Foreclosure was entered on approximately 11,000 properties, which included Rafaeli's. Id. ¶51. At the time, Rafaeli owed $285. On August 19, 2014, the property was sold at auction for $24,500. Id.¶52.

C. Ohanessian.

Plaintiff Ohanessian's claim is similar. He states that in 2003, he purchased a property located at 4591 Arline Dr. in Orchard Lake Village. Id.¶57. Over the next few years, he paid

the taxes just before the property was to go into tax foreclosure. Id.¶¶59-66. He alleges his last payment was on February 12, 2013. Id.¶66. He still owed approximately $6,000. Id.¶67.

Ohanessian claims that sometime in late 2011, he used an electronic form on the Treasurer's website to change his address when he moved to California. Id.¶64. He alleges the Treasurer never sent him any notices of the delinquencies at his California address. Id. ¶68. In June, 2013, December, 2013 and February, 2014, the Treasurer sent notices to Ohanessian's former address in Livonia. Id.¶68. Like Rafaeli, a notice of forfeiture was filed. Defendant's reply brief in the trial court, Exhibit A. Later, the trial court entered a Judgment of Foreclosure against Ohanessian, Id.¶69, and on September 26, 2014, the property was sold at a tax auction for $82,000. Id.¶70.

D. The Complaint.

The Complaint was styled as a putative class action on behalf of Plaintiffs and others similarly situated. Plaintiffs allege that:

(1) Defendants did not properly conduct pre-foreclosure "show cause" hearings, in violation of the Due Process Clause (Count One),

(2) Defendants did not take unspecified "additional reasonable measures" to provide notice to Plaintiffs, in violation of the Due Process Clause (Count Two),

(3) Defendants have taken the equity in Plaintiffs' property without compensating them, in violation of the Takings Clause (Count Three),

(4) The General Property Tax Act violates the Equal Protection Clause because the GPTA does not require the taxing authorities to pay the taxpayer the amounts received in excess of the tax while the mortgage foreclosure statute requires banks and other mortgage holders to do so (Count Four),

(5) Count Five is entitled "Municipal Liability" and appears to simply repeat the prior counts – that additional steps should be taken to provide notice (¶¶117-121) and the show cause hearings are not properly conducted (¶¶122-126).

Plaintiffs also sought injunctive relief (Count Six), declaratory relief (Count Seven) and damages (Wherefore clause).

E. The Circuit Court's Opinion and Order.

Plaintiffs did not respond to Defendants' motion for summary disposition on Counts 4, 5, 6, and 7. As a result, the Court held those counts abandoned and granted Defendants' motion. Plaintiffs did not appeal the issues raised in those counts.

As to the other counts, the Court held the show cause hearing need not comply with due process because there is no deprivation of property at that hearing. A deprivation only occurs at the foreclosure judgment hearing held before a judge in circuit court. Opinion and Order at 2-3. As to the notice process, the Court held the Plaintiffs presented no evidence to support an attack of the statute on its face and as applied. Id. at 3. Finally, the Court held there was no taking because Plaintiffs had forfeit their property for failure to pay the taxes – Plaintiffs lost their property because of their action, not the government's action. Id. at 3.

F. The Court of Appeals Opinion.

The Court of Appeals affirmed the trial court in an unpublished decision. Judges Markey and Meter wrote the Opinion of the Court, and Judge Shapiro concurred. The majority held that, with regard to Plaintiffs' argument that Defendants took Plaintiffs' property, Plaintiffs' argument "is without merit." Opinion at 5. The Court explained that because Defendants lawfully obtained the property by way of a statutory scheme that did not violate due process, the Constitution did not require Defendants to compensate Plaintiffs. The Court relied in part on Bennis, supra, in which the Supreme Court of the United States held that the "government

may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority...." Id. citing Bennis at 452.

Judge Shapiro agreed that Plaintiffs failed to state a claim for violation of the takings clause. Rather than citing Bennis, Judge Shapiro relied on Nelson v City of New York, 352 US 103 (1956), which held that the Constitution does not prevent the government from retaining the entire proceeds of a sale so long as adequate steps were taken to notify the owners of the foreclosure proceedings.

ARGUMENT

I.

FORFEITURE UNDER THE GPTA DOES NOT CONSTITUTE A TAKING

STANDARD OF REVIEW

This Court reviews summary disposition *de novo*. Spiek v Dep't of Transp, 456 Mich 331, 337 (1998).

ARGUMENT

Plaintiffs' claim that the loss of the alleged surplus in their property is an unconstitutional taking is without merit. Plaintiffs' property was not taken by Defendants. Rather, it was forfeited by Plaintiffs.

Forfeiture occurs because of the citizen's action; a taking occurs because of a government's action. Property properly forfeited pursuant to state law and in accordance with due process is not subject to a takings claim. As the Supreme Court of the United States stated in Bennis v Michigan, 516 US 442, 452 (1996) (reviewing a Michigan forfeiture statute):

> Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

(Emphasis added). A forfeiture is not a taking.

Plaintiffs' attempt to distinguish Bennis and its progeny is ill-founded. The issue in Bennis was directly whether a forfeiture was a taking. The Court held it was not:

> We granted certiorari in order to determine whether Michigan's abatement scheme has deprived petitioner of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment, or has taken her interest for public use without compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment. We affirm.

Bennis, 516 US 442 at 446 (Emphasis added).

Plaintiffs argue that Bennis is inapplicable because it involved a criminal act and they are not criminals. Plaintiffs' brief at 5. But, as the Court of Appeals majority stated, the petitioner in Bennis was the spouse of the alleged criminal and, therefore, took no part in any criminal act. Second, Plaintiffs in this case acted contrary to the welfare of the state. In Bennis the act was indecency involving prostitution and here the act was failing to pay taxes.

A number of states employ a forfeiture and foreclosure system related to real estate taxes.[1] Takings challenges to all have been rejected. For example, in Sheehan v County of Suffolk, 499 NYS2d 656, 659 (1986), the New York Court of Appeals stated:

> There is no unfairness, much less a deprivation of due process, in the county's retention of any surplus. The taxpayers in each of the statutory schemes under review are given a three-year period of redemption. During this period, plaintiffs had the opportunity to either pay the taxes and penalties due or sell the property subject to the lien and retain the surplus. This redemption period affords the taxpayer an opportunity to avoid a full forfeiture. Statutes which allow a State to retain the excess collected upon the public

[1] E.g., Oregon – O.R.S. §275.275, Maine – 36 M.R.S.A. §1074, Massachusetts – M.G.L.A. 60 §43-Kelly v City of Boston – 348 Mass. 385 (1965), Minnesota – M.S.A. §282.05; M.S.A. §282.08, Missouri – V.A.M.S. 140.230, New York – McKinney's RPTL §1136; McKinney's RPTL §1166, North Dakota – NDCC, 57-28-20, Oklahoma – 68 Okl. St. Ann. §3137, Rhode Island – Gen.Laws 1956, §44-9-12, South Dakota – SDCL §10-23-8, Utah – U.C.A. 1953 §59-2-1351.1(7). None have been held to be unconstitutional.

> sale of property have been sustained where they provide for a lengthy redemption period.
>
> A three-year redemption period, as set forth in the challenged statutes, gives sufficient opportunity for a taxpayer to reclaim the property. It is not unjust for a legislative body to declare that once a taxpayer has abandoned rights in property after such a period has expired, the taxing authority may take a deed in fee. At that point, the former owner can no longer claim any just compensation upon its resale. Full forfeiture has already occurred upon the taxpayer's failure to redeem the property before it has been resold. There is no constitutional prohibition against such a full forfeiture.

In Ritter v Ross, 558 NW2d 909 (Wis App 1996), the Wisconsin Court of Appeals stated:

> Cases considering constitutional challenges to state tax foreclosure sales generally conclude that a taxpayer has a recognizable interest in the excess proceeds from such a sale only if the state constitution or tax statutes create such an interest. .... Thus, when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements.

Id. at 912 (citations omitted, emphasis added).

In Reinmiller v Marion County Oregon, Case No. 05-1926-PK (D Ore 2006), the court dismissed another challenge, stating:

> Courts construing state tax laws have generally found no constitutional violation in the excess proceeds provisions. This court declines Reinmiller's invitation to overturn settled Oregon tax law. As courts have stated in response to similar challenges to disbursement of excess proceeds based on state law after foreclosure sales, the appropriate forum to raise these concerns is the state legislature.

Id. at 3 (emphasis added).

In Balthazar v Mari, Ltd, 301 F Supp 103 (ND Ill 1969), the court dismissed a due process and taking challenge to the Illinois statute allowing Illinois to retain all excess proceeds in a tax sale:

> In conclusion, the Illinois tax delinquency statutes allow all real estate owners to recover the surplus value of their land. During the two year period of redemption, the owners can simply sell the property to a private purchaser subject to the tax certificate. The Illinois legislation is constitutional since delinquent landowners, including the plaintiffs, are adequately notified of their tax deficiencies and of a tax sale or foreclosure.

Id. at 106 (emphasis added). Accord: City of Auburn v Mandarelli, 320 A2d 22 (Me) appeal dismissed, 419 US 810 (1974) (Maine statute did not violate former property owner's due process rights and no taking in application of state tax law that did not return surplus to him). As stated in Nelson v New York, 352 US 103 (1956):

> What the City of New York has done is to foreclose real property for charges four years delinquent and, in the absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.
>
> It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and spoke of the 'extreme hardships' resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed.

Id. at 110-111 (emphasis added).

Here, the GPTA expressly focuses on the taxpayer's behavior and provides that property subject to delinquent taxes is forfeited. "[O]n March 1 in each tax year ... property that is delinquent for taxes, interest, penalties, and fees for the immediately preceding 12 months or

more is forfeited to the county treasurer ...." MCL 211.78g(1) (emphasis added). Here, on March 1, 2013 – a year before the foreclosure hearing in this case – a Certificate of Forfeiture was recorded with the Register of Deeds for the properties at issue. They state the property is being "forfeited to the Oakland County Treasurer for non payment of property taxes."

Even after forfeiture, the property may be redeemed at any time after the entry of the judgment of foreclosure: "Property forfeited to the county treasurer under subsection (1) may be redeemed at any time on or before the March 31 immediately succeeding the entry of a judgment foreclosing the property...." MCL 211.78g(3) (emphasis added). The redemption requires only the payment of the "unpaid delinquent taxes, interest, penalties, and fees ...." MCL 211.78g(3)(a).

It is only on March 31 after the entry of the judgment that title vests in the government. On March 31 after the foreclosure judgment "fee simple title to property foreclosed by the judgment will vest absolutely in the foreclosing governmental unit...." MCL 211.78k(5)(b). At that point, there is no interest in the property that the government "takes." See United States v Dow, 357 US 17, 20 (1958). It has been forfeited:

> [F]ee simple title to property set forth in a petition for foreclosure... on which forfeited delinquent taxes, interest, penalties and fees are not paid on or before the March 31 immediate succeeding the entry of a judgment foreclosing the property...shall vest absolutely in the foreclosing governmental unit, and the foreclosing governmental unit shall have absolute title to the property....

MCL 211.78k(6) (emphasis added). E.g., Meltzer v Newton, 301 Mich 541 (1942) ("Plaintiffs had no interest in the land at the time of the tax sale....").

Plaintiffs attempt to avoid this conclusion by citing clearly distinguishable cases. For example, Plaintiffs cite United States v Lawton, 110 US 146 (1884). But Lawton involved a

federal statute requiring payment of the surplus of the proceeds of the tax sale to the former owner. Id. at 147. The statute stated:

> The surplus proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property....

Act of August 5, 1861 (12 Stat 292). The Constitution was not at issue.

Thomas Tool Services v Town of Croydon, 761 A2d 439 (NH 2009) applied the New Hampshire Constitution to a tax lien statute which did not involve a forfeiture. The Vermont Supreme Court in Bogie v Town of Barnet, 270 A2d 898 (VT 1970) addressed a Vermont statute that obligated the government to sell only the amount of land necessary to pay the outstanding taxes and costs. Plaintiffs also cite Anderton v Bannock County, 2015 WL 428069 (D Idaho 2015), where the District Court in Idaho allowed plaintiff to amend his complaint to plead a theory that the government wrongfully took the surplus equity in his property. But the tax foreclosure statute in Idaho provides that the surplus equity is to be returned to the owner. Idaho Code § 31-808(2)(b).

Plaintiffs also cite to the unpublished federal case of Coleman v District of Columbia, 13-cv-01456 (2014), which involved the Tax Injunction Act. The Act bars federal courts from hearing cases involving state taxes if there is an adequate state remedy. In that case, the court refused to dismiss because the District of Columbia did not provide an adequate remedy. It did not address the issue of forfeiture; it involved an issue of federal jurisdiction. This case was originally filed in federal court and the court dismissed the case on the basis of the Tax Injunction Act because, among other things, Coleman was inapplicable. See Opinion of Judge Berg at 17 dismissing this case for lack of federal jurisdiction.

Plaintiffs' "fairness and justice" argument, brief at 21, is addressed to the wrong body. In enacting the GPTA, the Legislature held hearings, considered the shortcomings of the prior, tax lien system and developed a system which gave taxpayers ample notice and time to pay their taxes, but also gave the State clear title when the taxpayer did not comply:

> Michigan's current two-track, six-year tax reversion process is too long and too cumbersome. Under the current system, delinquent tax properties that are not redeemed are either acquired by private purchasers, or deeded to the state. The process for properties deeded to the state can take more than five or six years. More important, title companies are often reluctant to insure title to tax delinquent properties acquired from the state, largely because of concerns about attacks on the state's title based on the adequacy of notice - - both because of concerns that the state may not have complied with statutory requirements and because of concerns that a title defense may require defending a constitutional challenge to the statute. As a consequence, many delinquent tax properties deeded to the state are effectively unmarketable.
>
> The current tax reversion process allows properties to deteriorate and serves as a barrier to their productive use. The process promotes urban blight as it thwarts urban reinvestment. These bills would reform the tax reversion system to 1) shorten the process; 2) simplify the steps for taxpayers; and 3) provide clear and marketable title to tax reverted property. Clear title will facilitate property improvements and it will encourage new construction and renovation. What's more, these bills strike the necessary balance between property owners' rights and the need for neighborhood revitalization in the heart of our urban centers. The legislation achieves that balance by providing for sufficient notice to all who have an interest in tax delinquent property. Following ample notice, the bills allow a court to reliably quiet title to the property, and then to transfer absolute title to a new owner who can invest in the property with confidence and security. This legislation, together with the legislation that creates the Urban Homesteading Program, can help improve the quality of life in cities throughout Michigan.

Michigan House Legislative Analysis, Property Tax Delinquency and Revision System at 18 (Exhibit F to Defendant's motion for summary disposition) (emphasis added).

Returning unproductive property to the tax rolls is essential. The Legislature expressly made that determination in enacting the GPTA:

> The legislature finds that there exists in this state a continuing need to strengthen and revitalize the economy of this state and its municipalities by encouraging the efficient and expeditious return to productive use of property returned for delinquent taxes. Therefore, the powers granted in this act relating to the return of property for delinquent taxes constitute the performance by this state or a political subdivision of this state of essential public purposes and functions.

MCL 211.78(1) (emphasis added).

Vesting absolute title in the State simplifies the process by not requiring the State to attempt to locate property owners after a sale (many of whom could not be located in the first place). It also provides for a clear consequence, thus ensuring property taxes are timely paid. Returning surplus to the former owner would privatize gains and subsidize losses (if the property sells at a loss, the State bears the financial burden). The judgment as to how to best address these facts and considerations is clearly within the purview of the Legislature.

Plaintiffs' final argument – that they should have been allowed to amend their Complaint to add an Eighth Amendment and substantive due process claim – is likewise without merit. First, they have made no showing, as they must, that the trial court abused its discretion in denying the motion. E.g., Weymers v Khera, 454 Mich 639 (1997). In addition, the Court of Appeals held that Plaintiffs did not properly address either issue on appeal. Opinion at 5, n 6. Their Application does not cure those deficiencies. Second, both arguments were futile. See Order Denying Motion for Reconsideration and For Leave to File Amended Complaint and Defendants' Response to Plaintiffs' Motion for Reconsideration.

RELIEF REQUESTED

Defendants request that this Court deny leave or affirm the Court of Appeals.

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PROOF OF SERVICE

William H. Horton states that on December 21, 2017, he served, or caused to be served copies of the following documents:

1. Appellees' Brief in Opposition to Application for Leave to Appeal; and

2. Proof of Service

upon:

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via First Class mail, the same being said individuals' last known addresses.

I declare that the above statements are true to the best of my knowledge, information and belief.

GIARMARCO, MULLINS & HORTON, P.C.

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