IN THE SUPREME COURT OF OHIO

THE FARMERS STATE BANK,	*	**CASE NO. 2017-1377**
	*	
Plaintiff-Appellant,	*	**On Appeal from the Darke County**
	*	**Court of Appeals, Second Appellate**
v.	*	**District**
	*	
STEVEN SPONAUGLE, et al.,	*	**Court of Appeals**
	*	**Case No. 2016-CA-4**
Defendants-Appellees.	*	
	*	

BRIEF OF THE INDEPENDENT COMMUNITY BANKERS OF AMERICA AND COMMUNITY BANKERS ASSOCIATION OF OHIO, GREENVILLE NATIONAL BANK, FARMERS AND MERCHANTS BANK, OSGOOD STATE BANK, AND TWIN VALLEY BANK *AMICI CURIAE* IN SUPPORT OF APPELLANT THE FARMERS STATE BANK

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae The Independent Community Bankers of America® ("ICBA"), the nation's voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans and hold $4.9 trillion in assets, $3.9 trillion in deposits, and $3.3 trillion in loans to consumers, small businesses, and the agricultural community.

Amicus curiae Community Bankers Association of Ohio ("CBAO"), an affiliate of ICBA, was organized more than four decades ago to establish and maintain an informed network of independent community banks in Ohio. CBAO's mission is to promote the interests of its members through: (1) representation of the principles of independent community banking in Ohio to state and national governmental officials, the press and the public; (2) promotion, presentation and advancement of education to officers, directors and other personnel of independent community banks in pursuit of high ethical standards and superior business practices; and (3) research and development of opportunities whereby its membership can benefit from pooling of financial and human resources to gain economic and competitive advantages.

Amicus curiae Farmers & Merchants Bank, Greenville National Bank, Osgood State Bank, and Twin Valley Bank are all community banks located within the Second District Court of Appeals. Each individual bank is located within the Ohio appellate district from which this appeal arises and is directly affected by the legal holdings in the decision under review.

Amici curiae and their respective constituents represent a significant volume of Ohio mortgage lending and foreclosure litigation, both residential and commercial. As this Court is

aware, each year, creditors file tens of thousands of foreclosure actions in Ohio courts, and foreclosures are the most common type of civil litigation in the State. In 2016 alone, 44,913 foreclosures were filed in Ohio.[1] Foreclosure sales clear title and enable the lienholders to recover the value of their security in the order of their priority. As such, and as discussed below, the timing and finality of a completed foreclosure action, including a sheriff's sale, is of compelling interest to *amici curiae*.

This Court's discretionary jurisdiction serves an important role for Ohio foreclosure law, and this case is no exception. In the past seven years, for example, the Court has refined and clarified Ohio foreclosure law concerning:

1. Standing Issues – *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214 (clarifying a conflict on the requirements for standing); *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040 (establishing that standing cannot be collaterally attacked); *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637 (establishing when standing evidence must be submitted);
2. Enforcement Issues – *FirstMerit Bank, N.A. v. Inks*, 138 Ohio St.3d 384, 2014-Ohio-789, 7 N.E.3d 1150 (establishing that the statute of frauds bars challenging the efficacy of a foreclosure decree); *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243 (defining enforcement issues when indebtedness has been discharged in bankruptcy); and
3. Post-judgment Procedure Issues – *Countrywide Home Loans Servicing, L.P. v. Nichpor*, 136 Ohio St.3d 55, 2013-Ohio-2083, 990 N.E.2d 565 (addressing the

[1] 2016 Ohio Courts Statistical Summary, p. 55 – available at https://www.supremecourt.ohio.gov/Publications/annrep/16OCSR/summary/2016OCS.pdf

availability of a Civ.R. 41(A)(1)(a) dismissal after foreclosure decree is entered); *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140 (establishing requirements of a foreclosure decree to qualify as a final appealable order);

This discretionary appeal represents yet another opportunity for the Court to clarify and stabilize critical facets of Ohio foreclosure law. Because foreclosure and execution procedures are of great interest to Ohio mortgagees and judgment creditors, *amici curiae* have chosen to participate in this important case to address the conflicts created by the Second Appellate District in the underlying decision, *The Farmers State Bank v. Sponaugle*, 2017-Ohio-4322, 92 N.E.3d 355 (2d Dist.) (the "Decision"). First, the Second District erroneously held that the foreclosing plaintiff, The Farmers State Bank ("Farmers State"), had to wait for the specific amounts owed to junior lienholders to be determined before the property could be sold. Second, the court of appeals wrongly decided that a foreclosure defendant can wait until *after* a sheriff's sale has occurred to object to issues with the sale that exist before the sale.

For the reasons described more fully below, *amici curiae* respectfully submit that the Court should reverse the Second District's Decision on these issues and restore clarity to the bench and bar by adopting the propositions of law proposed by Farmers State.

II. STATEMENT OF THE FACTS

Amici curiae adopt the Statement of the Facts presented by Farmers State. However, *amici* also briefly note the following general background information.

To provide clear title to purchasers, a foreclosing plaintiff is required to name all lienholders as defendants in a foreclosure action. *Lumbermen's Mtge. Co. v. Stevens*, 46 Ohio App. 5, 187 N.E. 641 (6th Dist. 1932); 69 Ohio Jurisprudence 3d, Mortgages and Deeds of Trust,

Section 396. Because the lien of the foreclosing creditor frequently will consume any and all equity in the property, a junior lienholder often will file an answer to protect its interest, but take no further actions in the case. Trial courts will enter summary judgment on the plaintiff's claims, order foreclosure of the first mortgage, and order the property to be sold.

Foreclosure sales enable liens to be cleansed and troubled property to be restored into the real estate market. The time to take a property to sheriff's sale, and allow the property to be acquired by a new purchaser or by the foreclosing creditor (who may resell the property in the open market) is an important factor in neighboring property values. *See* Hartley, *The Impact of Foreclosures on the Housing Market*, Economic Commentary (October 27, 2010).[2]

There are significant expenses incurred in bringing a property to a sheriff's sale, all of which are taxed as court costs before the first lienholder receives any proceeds. For example, in Darke County, where this case originated, there are both statutory and local fees:

- an appraisal fee;
- a publication fee;
- a deposit for being a successful credit bidder of 4% of the property value (first lienholders only);
- Sheriff's Fees (R.C. 311.17);
- Fees for preparing the deed; and
- Fees for recording and conveying.[3]

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[2] *Available at*: https://www.clevelandfed.org/en/newsroom-and-events/publications/economic-commentary/economic-commentary-archives/2010-economic-commentaries/ec-201015-the-impact-of-foreclosures-on-the-housing-market.aspx (accessed May 2, 2018).

[3] Darke County Local Rules 11(B), *available at* http://media.virbcdn.com/files/5a/cba0c60edca1f4bb-LOCALRULES2017.pdf (accessed April 23, 2018)

The Decision below forces the first lienholder to incur these fees and expenses to bring the foreclosed property to a sheriff's sale, only to subject the (costly) sheriff's sale to *post-hoc* challenges that could have and should have been asserted before the sale takes place. For the reasons described below, to avoid confusion, conflict, and disruption in the foreclosure context, the Court should adopt the propositions of law advanced by Farmers State.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A sheriff's sale can be confirmed even if the underlying foreclosure decree was a non-final order.

Farmers State's first proposition of law asks the Court to adopt a holding that has only been made in conflict by the Decision. Before the Decision, Ohio law was clear – a sheriff's sale can be confirmed even if the underlying decree is a non-final order. This general rule exists for two separate justifications. First, the trial court's jurisdiction to execute the sale is not dependent upon the foreclosure decree being a final appealable order. Second, objections to a sheriff's sale must be made before the sale or they are waived.

A. A foreclosure decree is subject to execution even if it does not qualify as a "final order" as defined by R.C. 2505.02 for purposes of appellate jurisdiction.

A foreclosure decree is a valid order subject to execution even it is not a "final order" under R.C. 2505.02 – the statute that establishes the appellate jurisdiction of Ohio's district courts of appeal. Whether or not a trial court's order is "final" is relevant only to *appellate* subject-matter jurisdiction, not to the trial court's authority to act on or execute that order. *See Lantsberry v. Tilley Lamp Co.*, 27 Ohio St.2d 303, 306, 272 N.E. 2d 127 (1971). This Court explained in *Lantsberry* that "the entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings." *Id.* For example, orders that deny a motion for summary judgment are valid orders even though they generally are not final appealable orders subject to immediate appeal.

See, e.g., Circelli v. Keenan Constr., 165 Ohio App.3d 494, 2006-Ohio-949, 847 N.E.2d 39, ¶ 16 (10th Dist.).

In the foreclosure context, Ohio appellate courts have consistently found that a trial court has jurisdiction to execute on a foreclosure decree that is not "final" for purposes of establishing appellate jurisdiction. *E.g.*, *Zein v. Calabrese*, 8th Dist. Cuyahoga No. 105985, 2017-Ohio-8325, ¶ 15 ("[E]ven if the order of foreclosure was not final, [the trial judge] still possessed the necessary jurisdiction to order the sheriff to sell the real property subject to foreclosure."); *Falls Sav. Bank, F.S.B. v. Cadwell*, 9th Dist. Summit C.A. No. 14644, 1991 Ohio App. LEXIS 416, at *9-10 (Jan. 31, 1991) (affirming confirmation of sale even though foreclosure decree was not a final order subject to appeal); *Mulby v. Poptic*, 8th Dist. Cuyahoga No. 98324, 2012-Ohio-5731, ¶ 15 (holding trial court did not abuse discretion in confirming sheriff's sale because "[w]hether an order is appealable merely relates to this court's jurisdiction to review it at that time; the fact that the order was not appealable does not render it a nullity"); *Third Fed. Savs. & Loans Assn. of Cleveland v. Rains*, 8th Dist. Cuyahoga No. 98592, 2012-Ohio-5708, ¶ 10 ("[R]egardless of whether it could have been appealed, the * * * order of foreclosure still stands as a valid order from which the property was properly sold at sheriff's sale.").

This result is supported by the relevant sections of the Ohio Revised Code addressing judicial sales. R.C. 2329.02 provides that the filing of "any judgment or decree" with a court clerk creates a lien on the property. Then, "[w]hen a mortgage is foreclosed or a specific lien enforced, a sale of the property . . . shall be ordered by the court having jurisdiction . . [.]" R.C. 2323.07. R.C. 2329.02 does not define "any judgment or decree" in this context at all, nor does it add any extra requirement that "any judgment or decree" must also be a "final order" of the sort required for appellate jurisdiction to lie pursuant to R.C. 2505.02. When a statute is

unambiguous, courts must apply the statute by giving effect to its plain meaning, "without adding or deleting any words chosen by the General Assembly." *Ohio v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, ¶ 7. The language "any judgment or decree" is unambiguous, and this Court should not add the word "final" where the General Assembly chose not to include it.

B. Objections to a sheriff's sale must be raised when they can be addressed.

Again, assuming that the foreclosure decree entered by the trial court in this case was *not* a final appealable order, it is axiomatic that "'a party is not permitted to take advantage of an error that he himself invited or induced the court to make.'" *Webber v. Kelly*, 120 Ohio St.3d 440, 2008-Ohio-6695, 900 N.E.2d 175, ¶ 7, quoting *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 2001 Ohio 1281, 751 N.E.2d 1051 (2001). The failure to object to the sheriff's sale before the sale occurs waives such claims, and objections to the propriety of a sheriff's sale must be raised prior to sale. *U.S. Bank, N.A. v. Sanders*, 2017-Ohio-1160, ¶ 24, 88 N.E.3d 445 (8th Dist.); *Citimortgage, Inc. v. Hoge*, 8th Dist. Cuyahoga No. 98597, 2013-Ohio-698, ¶ 10. When a Court has jurisdiction to enter orders (including orders in aid of execution), the failure to register a timely objection waives the issue. *E.g.*, *Trotwood v. Wyatt*, 2d Dist. Montgomery No. 13319, 1993 Ohio App. LEXIS 164 (Jan. 21, 1993) (voidable defects waived on appellate review if not raised below).

As highlighted above, there are significant expenses incurred and taxed as court costs when a property is taken to judicial sale, including appraisal fees, publication fees, sheriff's fees, and other fees associated with the auction itself. Given that the trial court controls the form and substance of the foreclosure decree, allowing a defendant to ignore the sheriff's sale and then raise new issues as to whether the sale should have occurred is inconsistent with Ohio's recognition of the obligation to raise errors in a timely manner, when they can be addressed.

Amici curiae believe that the law of Ohio is clear – a non-final decree of foreclosure that establishes the first lienholder and the amounts due that lien holder, as well as the priority of the remaining lienholders, is clearly subject to execution even if the amounts due the junior lienholders have not yet been specifically and mechanically determined, and a sheriff's sale arising from that order is not reversible on this basis alone. This concept is consistent with judicial precedent, the Ohio Revised Code, and the policies underpinning judicial sales of secured property.

Proposition of Law No. 2 A foreclosure decree that determines liability and the amount due the first mortgagor and leaves the remaining amounts to mechanical calculation is a final order subject to execution.

In the Decision, the Second District's analysis on whether a non-final order was subject to execution was predicated on an incorrect holding regarding whether the Foreclosure Decree in this case was a final appealable order. If the Second District had performed the correct analysis in evaluating the appeal of the Foreclosure Decree, it would have reached a different conclusion as to the appropriateness of confirming the Sheriff's Sale.[4]

A foreclosure decree that resolves all issues except for the specific amounts due to junior lienholders is a final appealable order. An order is final and subject to immediate appeal if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02(B). A "substantial right" is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). A foreclosure decree "determines the foreclosure action, and generally terminates the debtor's common-law right of equitable

[4] The Second District's conclusion regarding the status of the Foreclosure Decree as a final appealable order was not revisited under the law-of-the-case doctrine. For the reasons stated in Farmers State's brief, *amici curiae* agree that the law-of-the-case doctrine should not have applied in this instance, and that the doctrine does not apply upon review to this Court.

redemption." *Ohio Dept. of Taxation v. Plickert*, 128 Ohio App.3d 445, 447, 715 N.E.2d 239 (1998). "It has generally been the law of Ohio that debtors may immediately appeal an order of foreclosure." *Id.* at 446.

While a foreclosure decree that determines the amount due to all claimants is indeed a final appealable order, *see, e.g. Fifth Third Mtge. Co. v. Goodman Realty Corp.*, 3d Dist. Hancock No. 5-08-30, 2009-Ohio-81 ¶ 20, the lack of a determination of specific amounts due to junior lienholders ***alone*** is not necessarily sufficient to render an order non-final. *See State ex rel. Montgomery v. Ohio Cast Prod., Inc.*, 5th Dist. Stark No. 1999CA00394, 2000 Ohio App. LEXIS 2839, *6–7 (June 26, 2000); *Second Natl. Bank of Warren v. Walling*, 7th Dist. Mahoning No. 01-C.A.-62, 2002-Ohio-3852, ¶ 18–19. In *Walling*, while the Seventh District included "the amounts that are due the various claimants" in a list of issues that must be resolved for a foreclosure order to be "final," the foreclosure decree at issue in the case not only failed to determine the amount due for all outstanding liens, but also did not determine the number or priority of the liens. *Id*. Similarly, in *State ex rel. Montgomery*, the Fifth District held that the foreclosure order at issue was not "final" not only because it did not determine the amounts due to the claimants, but also because the order failed to determine all of the liens, the lien priority, and issue a sale at all. *State ex rel. Montgomery* at *6–7. In this line of cases, the comment that a "final" foreclosure order must determine the amounts due was not part of the courts' holdings. Instead, the holdings that the orders were not "final" were based on multiple factors.

Such dollar-amount calculations of the amounts due to each lien holder are ministerial and not required for a foreclosure decree to be a final order. *Wells Fargo Bank, N.A. v. Maxfield*, 2016-Ohio-8102, 75 N.E.3d 864 (12th Dist.). In *Maxfield*, the debtor argued that a foreclosure decree was not a final order because it did not specify the amounts due to the county treasurer

and Ohio Department of Taxation, relying on the Second District's dismissal of the first appeal in this case. The Twelfth District opined that the Second District in *Sponaugle* misapplied the law. *Maxfield* at ¶ 27. It instead held that the calculations of the amounts due were ministerial and that the foreclosure decree was a final appealable order. *Id.* at ¶ 29–30.

Indeed, the establishment of lien priority is sufficient to make a foreclosure decree a final appealable order, even if the actual amounts due are not calculated. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 20 ("Although [trial court] did not specify the actual amounts due, they did state what the mortgagors would be liable for. Each party's rights and responsibilities were fully set forth — all that remained was for the trial court to perform the ministerial task of calculating the final amounts [due]."). *See also Sellman v. Schaaf*, 17 Ohio App.2d 69, 78, 244 N.E.2d 494 (3d Dist. 1969) ("In foreclosure the essential prayer is for the order of foreclosure. Once this is determined the rest of the case is simply in furtherance of this order").

Similarly, where "the general equities of the case have been found" and the court orders an accounting to determine the amounts due, the order is a final order subject to immediate appeal. *Shuster v. North Am. Mtge. Loan Co.*, 139 Ohio St. 315, 329-330, 40 N.E.2d 130 (1942) ("[W]hile a further order of the court will be necessary to carry into effect the rights settled by the decree, such further order is merely auxiliary to or in execution of the decree of the court made on the merits of the case."). In *State ex rel. K-W Ignition Co. v. Meals*, 93 Ohio St. 391, 392, 113 N.E. 258 (1916), the trial court granted judgment for the plaintiff on a breach-of-contract claim and further ordered an accounting to determine how many products were manufactured in breach to determine the amount of damages. The court's order was a final appealable order because the further order to determine the amount of damages was "merely

auxiliary" to the merits of the case. *Id.* at 395. Further, in *Link v. Matthews*, 3d Dist. Allen No. 1-08-61, 2009-Ohio-1920, ¶ 27, the Third District held that a foreclosure order was final even though it did not determine the priority of the liens because the order nonetheless affected the debtor's right to the property.

Public policy also encourages the result that a foreclosure decree that does not calculate all amounts due is nonetheless a final appealable order – both from the perspective of the debtor, the mortgagor, the subsequent purchaser, and the courts. When a debtor cannot appeal directly from a foreclosure judgment, "the Sheriff would presumably carry out the trial court's order of sale, and [the debtor] would have no practical recourse." *Link* at ¶ 27. And the Eleventh District reasoned in *Plickert,* 128 Ohio App.3d at 447,

> [Law] that debtors may immediately appeal an order of foreclosure * * * draw[s] considerable support from common sense. A mistake in the foreclosure decree is more efficiently rectified by an immediate appeal. It would save the debtor a considerable amount of worry if the appeal is immediate, rather than making him wait until there is a judgment confirming the sale of his property to some other person. It would save the purchaser from the uncertainty of an appeal from the judgment confirming his bid on the foreclosed property, during which his down payment on the purchase price is held in escrow. It would prevent the sheriff from wasting his resources on unnecessary sale proceedings. And, it would save the court from wasting its time and energy minding the matter and reviewing and approving the final sale.

One of the purposes behind the final-order rule is to encourage the "prompt and orderly disposal of litigation." *Sellman*, 17 Ohio App.2d at 73, quoting 2 Ohio Jurisprudence 2d 598, Section 32. Ohio courts can more efficiently resolve foreclosure disputes by hearing appeals before the subject property is sold. Making appeal possible before the sale also helps protect the rights of bona fide purchasers who buy the property at the sheriff's sale.

On that note, two Ohio statutes demonstrate that once a sheriff's sale has occurred, no attack on the underlying proceedings affects title. R.C. 2329.45 provides that "if a judgment in satisfaction of which lands; or tenements are sold is reversed on appeal, such reversal shall not defeat or affect the title of the purchaser." R.C. 2325.03 provides the same:

> The title to property, which title is the subject of a final judgment or order sought to be vacated, modified, or set aside by any type of proceeding or attack and which title has, by, in consequence of, or in reliance upon the final judgment or order, passed to a purchaser in good faith, shall not be affected by the proceeding or attack; nor shall the title to property that is sold before judgment under an attachment be affected by the proceeding or attack. "Purchaser in good faith," as used in this section, includes a purchaser at a duly confirmed judicial sale.

With these statutes, the General Assembly has recognized that, unless a sheriff's sale is stopped before it occurs, or confirmation is stayed, title to the underlying property is not to be affected. The Second District erred in holding otherwise.

As discussed above, junior lienholders are required to be named in the action so that a sheriff's sale is capable of providing clean title to the purchaser. But in the case of lienholders who are capable of appraising their likelihood of recovery, the cost of participation in the action is sometimes not an economically fruitful activity, other than by filing an answer requesting that the lien be protected. Once the priority has been established, and the property is going to sale, these issues can be more economically resolved by addressing the amount due to junior lienholders *if any proceeds remain after the sale* (an unusual occurrence).

Judge Hall's dissent in the Decision highlighted these concerns: "American Budget filed an answer [], not a cross-claim, and its prayer for relief asked only that its lien be recognized and its priority determined. I cannot find any reference, anywhere in our record, that the existence or amount of the [junior] lien ever was in actual dispute." Decision, ¶ 39 (internal citations omitted). Judge Hall appropriately noted that, after *Roznowski*, so long as the remaining tasks

are "ministerial," a foreclosure decree should be considered a final appealable order. Decision, ¶ 40; citing *Roznowski*, 139 Ohio St.3d 299 at ¶ 20. The same result should be required here. A foreclosure decree which establishes the amounts due to the first lienholder and the priority of all lienholders is a final, appealable order.

IV. CONCLUSION

The erroneous Decision below poses serious consequences to the Ohio real estate market. Foreclosures only occur when there has been a breach of an agreement between the mortgagor and the mortgagee. At that point, resorting to the secured property is often the only resource the mortgagee has. The Second District's Decision elevates form over substance in a way contrary to other Ohio appellate decisions, the Revised Code, and sound public policy. Once the first lienholder has been conclusively established, and the priority of lienholders established, the trial court has jurisdiction to take the property to sale, even if the foreclosure decree does not definitively establish the specific amounts due to junior lienholders. Even if this were to pose some issue, the foreclosure defendant must raise the issue *before the sale* in order to preserve it. This Court should adopt Farmers State's first proposition of law, and hold that even if a foreclosure decree does not meet the definition of a "final order" pursuant to R.C. 2505.02, it is still subject to execution.

Relatedly, the Second District's hyper technical view of what is required to be contained in a foreclosure decree in order for the decree to meet the definition of a "final order" is also contrary to this Court's precedent, as well as the Revised Code. A foreclosure decree that identifies the priority of lienholders and enters judgment on behalf of the primary lienholder does not lose its status as a final order merely because it fails to specify all amounts due to junior lienholders. Anything else elevates form over substance.

Amici curiae respectfully submit that the Decision should be reversed pursuant to the propositions of law proposed by Farmers State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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