**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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**2 CROOKED CREEK, LLC, an Indiana limited liability company, and RUSSIAN FERRO ALLOYS. INC., an Indiana Corporation,**

Plaintiffs/Appellants,

v

**TREASURER OF THE COUNTY OF CASS,**

Defendant/Appellee.

**Michigan Supreme Court No. 159856**

**Court of Appeals Case No. 342797**

**Court of Claims: 14-000181-MZ**

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# DEFENDANT/APPELLEE TREASURER OF THE COUNTY OF CASS' ANSWER TO APPLICATION FOR LEAVE TO APPEAL OF PLAINTIFFS/APPELLANTS

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED[1]

**I. DID THE TRIAL COURT PROPERLY DETERMINE THAT DEFENDANT/APPELLEE GAVE PROPER NOTICE UNDER THE TAX FORECLOSURE PROVISIONS OF THE MICHIGAN GENERAL PROPERTY TAX ACT AND DUE PROCESS?**

The Court of Claims answers, "Yes."

The Court of Appeals answers, "Yes."

Defendants/Appellees answers, "Yes."

Respondent/Appellant answers, "No."

**II. DID THE COURT OF CLAIMS CORRECTLY HOLD THAT THERE WAS NO EVIDENCE PRESENTED AS TO THE SUBJECT PROPERTY'S FAIR MARKET VALUE AS OF THE DATE OF THE FORECLOSURE JUDGMENT?**

The Court of Claims answers, "Yes."

The Court of Appeals answers, "Yes."

Defendants/Appellees answers, "Yes."

Respondent/Appellant answers, "No."

[1] While Respondent/Appellant seeks to present this as a single mixed question of statutory compliance and constitutional compliance, it is clear that there are two separate and distinct questions presented as indicated in Petitioner/Appellee's Counter-Statement of Questions Presented. This blurring of questions presented leads Respondent/Appellants to make inconsistent arguments of law and statutory construction, and arguments that, quite frankly, run counter to one another when examined in detail, as will be done in the Argument section of this Brief. Ultimately the Court of Appeals holding only addressed the second question, finding that whether or not Appellants were granted constitutional due process, not whether each and every provision of the Michigan General Property Tax Act was satisfied was the controlling inquiry in this matter.

## NATURE OF THE ACTION

On July 18, 2014, Plaintiffs/Appellants filed the Complaint in the instant action in case number 14-181-MZ, in the Michigan Court of Claims (the "Court of Claims" or "Trial Court"), alleging that they were entitled to damages pursuant to MCL 211.78l, because Defendant/Appellee ("Treasurer") failed to provide the notice in a tax foreclosure proceeding (the "Court of Claims Case") as required by the General Property Tax Act ("GPTA") or Tax Foreclosure Act.

The Court of Claims on January 22, 2018, entered an Order and Opinion granting involuntary dismissal. It was based upon an oral motion for Directed Verdict made at the completion of Plaintiffs/Appellants' 2 Crooked Creek, LLC ("Crooked") and Russian Ferro Alloys, Inc.'s ("Russian Ferro") (collectively, "Plaintiffs/Appellants") proofs at trial in the Court of Claims. Plaintiffs/Appellants then moved for reconsideration, which motion was denied. Plaintiffs/Appellants appealed to the Court of Appeals which affirmed and have now filed this Application for Leave to Appeal to this Court.

## CHARACTER OF THE PLEADINGS AND PROCEEDINGS

Plaintiffs/Appellants have litigated and appealed the issue of whether proper notice was given to Crooked and Russian Ferro in more forums than one would think is possible, based upon the laws of *res judicata*, collateral estoppel and stare decisis. Plaintiffs/Appellants first litigated many of these same claims via a Motion to Set Aside Judgment (the "Motion to Set Aside") dated June 27, 2014 in the Cass County Circuit Court ("the Circuit Court Case")[2]

[2] The Circuit Court case is the 2011 and prior years' real property tax foreclosure case in Cass County Circuit Court, File No. 13-430-CH.

wherein they were denied relief based upon a finding that proper notice was given. (***Exhibit 1***). They appealed the decision of the Cass County Circuit Court in the Circuit Court Case to the Michigan Court of Appeals, in docket number 324519, (the "Circuit Court Case Appeal") which affirmed the Trial Court (***Exhibit 2***), sought Leave to Appeal to this Court in docket number 153797, which was denied (***Exhibit 3***), and then sought Certiorari in the U.S. Supreme Court in docket number 17-169, which was also denied (***Exhibit 4***). After the Court of Appeals affirmed the decision in the Circuit Court Case, the Treasurer filed a Motion for Summary Disposition in the Court of Claims Case, based upon collateral estoppel and *res judicata*. The Michigan Court of Claims denied the Treasurer's Motion for Summary Disposition. The Court of Claims Case was subsequently tried in a bench trial before the Hon. Michael J. Talbot on September 25, 2017. After Plaintiffs/Appellants had rested their case, the Treasurer moved for a Directed Verdict[3]. After the parties briefed the matter and provided written arguments to the Court of Claims, both for and against Directed Verdict, the Court of Claims granted Involuntary Dismissal and issued a written opinion (***Exhibit 5***). Plaintiffs/Appellants then went back to the Court of Appeals for the second time, (***Exhibit 6)*** re-litigating issues that have previously been decided, not only in the Court of Claims Case, but also previously decided adversely to Plaintiffs/Appellants by the Cass County Circuit Court (see Exhibit 2) and the Court of Appeals in the Circuit Court Case (See Exhibit 1). The parties are now back in this Court for the second time, with Plaintiffs/Appellants attempting to obtain leave to appeal in order to re-litigate previously decided issues and claims that they did not "actually receive" proper notice.

[3] As Judge Talbot correctly pointed out in his written decision, the proper motion was one for Involuntary Dismissal as it was a bench trial and not a jury trial. (compare MCR 2.504(B)(2) and MCR 2.516).

## CONSOLIDATED STATEMENT OF FACTS AND COUNTER-STATEMENT OF FACTS

### A. Legal Standards Regarding Statement of Facts.

A brief must contain a statement of facts – "A clear, concise, and chronological narrative" of [a]ll material facts, both favorable and unfavorable…fairly stated without argument or bias. MCR 7.212c(6). This Court should note that Plaintiffs/Appellants' brief in support of this application violates MCR 7.212c(6) and (7) as incorporated by MCR 7.305(d) and € as the Statement of Facts portion of their brief cites exhibits and facts not part of the record below, and emits unfavorable facts. See *Kieta v Thomas M. Cooley Law School*, 290 Mich App 144, 146 n 1; 799 NW2d 579 (2010); *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 269; 548 NW2d 698 (1996). Moreover, a claim of error fails where the party asserting the claim "presents it as a mere conclusory statement without citation to the record, legal authority, or any meaningful argument." *Ewald v. Ewald*, 292 Mich App 706, 726; 810 NW2d 396 (2011); see also *DeGeorge v Warheit*, 276 Mich App 587, 596; 741 NW2d 384 (2007) ("The appellant may not merely announce his or her position and leave it to this Court to discover and rationalize the basis for those claims.") Plaintiffs/Appellants make many misrepresentations and omissions in the Statement of Facts and additional facts found in the Argument portion of its brief. A Counter-Statement of Facts is set forth below.

### B. History of the Property.

On July 16, 2010, Crooked, pursuant to a Trustee's Deed recorded on July 20, 2010, at Liber 1013, Page 102, Cass County Records (hereinafter the "Deed"), purchased the property located at 61320 Crooked Creek Road, Cassopolis, MI 49031 ("Subject Property")[4] (See Exhibit

[4] All of the Joint Exhibits (J-1 – J-20) were received in evidence. TR 8: 1-4. The following additional Exhibits were received into evidence during Plaintiffs/Appellants case in chief: Exhibits P3(TR 83), P6(TR 85), P8(TR 204),

7, J-1). As part of the recorded Deed, a request was made to send the subsequent tax bills for the Subject Property to: 2 Crooked Creek, LLC, 36 Bradford Lane, Chicago, IL 60523, which according to the Deed is the address of Crooked.

In addition to the Deed, Sergei Antipov ("Mr. Antipov"), as Manager of Kava Management Company, LLC, signed the Real Estate Agreement on behalf of Crooked, setting forth certain restrictions with regard to the Subject Property (the "Real Estate Agreement"). In the Real Estate Agreement, Crooked listed its address as 36 Bradford Lane, Chicago, IL 60523 (See Exhibit 7, *J-2*). Crooked recorded the Real Estate Agreement with the Cass County Register of Deeds office on July 20, 2010, at Liber 1013, Page 95.

Crooked failed to pay the 2011 (summer and winter) real property taxes for the Subject Property.[5] Treasurer initiated forfeiture and foreclosure proceedings under the GPTA as to the Subject Property, along with 578 other properties, through the filing of a Complaint for Foreclosure in the Circuit Court Case, after the 2011 real estate taxes became delinquent. (***Exhibit 8***, without Attachment A thereto).

**C. Forfeiture Process.**

On or about January 14, 2013, Title Check, LLC, as agent of Treasurer, (hereinafter referred to as "Title Check") sent a Notice of Forfeiture with regard to the 2011 real property taxes related to the Subject Property as required by MCL 211.78f. That notice was sent certified

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P9(TR 57), P11(TR 204), P12(TR 85), P14(TR 65), P16(TR 85), P17(TR 85), and P22(TR 103). Also, the certified copies of vehicle registration information from Illinois were admitted into evidence as impeachment exhibits (TR 152). Only those Plaintiffs/Appellants exhibits (identified as P-___) which are listed above were admitted into evidence at trial and as a result, no other Plaintiffs/Appellants' exhibits are part of the record. Plaintiffs/Appellants cite to a number of these unadmitted exhibits in their brief. The admitted Trial Court Exhibits are part of the Record on Appeal and are not attached hereto. Copies of Trial Court Joint Exhibits J-1 – J20 are attached hereto as ***Exhibit 7***. References to TR are to the Court of Claims trial transcript.

[5] Crooked has also failed to pay 2012, 2013, 2014, 2015, 2016, 2017, and 2018 real property taxes for the Subject Property.

mail, return receipt requested, to 36 Bradford Lane, Chicago, IL 60523 – the address as per Crooked's request in the Deed and also based upon the address identified in the tax records per MCL 211.78e(2). *(*See Exhibit 7, J-4) The zip code of 60523, which was contained in both the Deed and the Real Estate Agreement, is a zip code for Oak Brook, IL and not Chicago, Illinois. (See tracking in Exhibit 7, *J-4*).

On January 16, 2013, an attempt was made to deliver the certified mail Notice of Forfeiture, to the address of 36 Bradford Lane, Oak Brook, IL 60523[6], but was unsuccessful as no one was home and notice was left at that address (See tracking in Exhibit 7, *J-4*). When no one went to the post office to sign for the certified mail by February 1, 2013, it was deemed to be "unclaimed" and marked "unable to forward." The certified mail receipt was returned to Title Check as being "returned to sender" on February 15, 2013. (See tracking in Exhibit 7, *J-4*)

On April 9, 2013, Treasurer prepared a Certificate of Forfeiture, as required by MCL 211.78g, and that Certificate of Forfeiture was recorded with the Cass County Register of Deeds on April 12, 2013, at Liber 1058, Page 832, as required by MCL 211.78g(2). (See Exhibit 7, *J-5*) The Certificate of Forfeiture identified the Subject Property by parcel number, street address, and the assessor's description of the real property (See Exhibit 7, *J-4*). Further, the Certificate of Forfeiture set forth the owner, as identified the tax records, as 2 Crooked Creek, LLC, 36 Bradford Lane, Chicago, IL 60523, which is the address set forth in the Deed and the Real Estate Agreement (See Exhibit 7, *J-4*, *J-1*, *J-2*). The Certificate of Forfeiture is not required by the statute to be served as the Notice of Forfeiture gives notice of the forfeiture. (See MCL 211.78f(1) &(2) & MCL 211.78g(2)).

[6] Delivery was attempted in Oak Brook because delivery by the US Postal Service is driven by the zip code and not the name of the city in the address.

**D. The Foreclosure Process.**

Title Check then conducted a review of the public records as required by MCL 211.78i(6) to determine those persons entitled to notice, which again disclosed the same address as previously discussed and used in the Notice of Forfeiture. (TR 15: 20-23).

Although not required by statute, on or about May 5, 2013, Title Check sent, by regular first class mail, a Notice of Inspection Deadline, stating that the Subject Property would be inspected, and notice would be posted, beginning June 17, 2013. (See Exhibit 7, *J-7*) This first class mail notice contained the parcel ID number, street address, assessor's legal description, as well as an admonition that the real estate taxes were in the process of being foreclosed. Instead of sending the Notice of Inspection Deadline to the Chicago, Illinois address which was returned, the Notice of Inspection Deadline was sent to Oak Brook, Illinois. (Title Check changed the city based upon information contained in the return of the prior certified Notice of Forfeiture). The Notice of Inspection Deadline was delivered was not returned to sender (See Exhibit 7, *J-7*, TR 88:23-25).

On or about June 5, 2013, the Cass County Treasurer filed her Petition for Foreclosure, 2011 and Prior Years' Real Property Taxes, with the Circuit Court for the County of Cass, in the Circuit Court Case (case number 13-430-CH), seeking to foreclose against certain real properties for delinquent taxes, interest, penalties and fees (the "Petition").[7]

As required by MCL 211.78i(1), the Treasurer initiated and conducted a title search of the Subject Property, which revealed the Deed, the Real Estate Agreement, an easement in favor of Indiana Michigan Power Company, and the Forfeiture Certificate previously filed by Treasurer. (See Exhibit 7, *J-3*)

[7] See attached Exhibit 8.

On or about the May 28, 2013, a document entitled "Mortgage" between Kava Holdings, LLC, an Alaska limited liability company, whose address is 50 Baybrook Lane, Oak Brook, IL 60523[8], as Mortgagor, and Russian Ferro Alloys, Inc., an Indiana corporation, with an address of 4220 Edison Lakes Parkway, Suite 210, Mishawaka, IN 46545, as Lender, was signed by Mr. Antipov, as Manager of Kava Management, LLC. Mr. Antipov identified himself in the Mortgage to be the Manager of both, Kava Holdings, LLC, and Crooked—who was not identified anywhere in the body of the document—as the record deed holder for the Subject Property. (See Exhibit 7, *J-6*) **The "Mortgage" was not recorded until July 10, 2013**, more than two months after the record date established by MCL 211.78i(1) for initiation of the title search by the Treasurer. (See Exhibit 7, *J-6*)

On June 18, 2013, Katelin Makay ("Ms. Makay"), an independent land examiner contracted by Title Check visited the Subject Property and noted that the Subject Property appeared to be occupied, but she was not able to personally meet with the occupant. (See Exhibit 7, *J-8*) During her on-site inspection, Ms. Makay completed a form regarding the inspection (hereinafter referred to as "the Inspection Worksheet") relative to the Subject Property and posted a copy of the Show Cause Hearing and Judicial Foreclosure Hearing Notice on a window adjacent to the front door of the residence located on the Subject Property, and took a picture of that posting (See Exhibit 7, *J-8*). The Inspection Worksheet does not indicate that there is a mobile home on Property, as has been alleged below by Plaintiffs/Appellants, but only contains a place for such indication with an unchecked box on the top left of the form. (See Exhibit 7, *J-8*).

On or about August 20, 2013, Title Check sent by first class mail another notice (not required by statute) to Crooked at the 36 Bradford Lane, Oak Brook, IL 60523-2322 address

[8] Mr. Antipov testified in the Court of Claims Case that 50 Baybrook Lane, Oak Brook, IL 60523 is his current residence address. (TR 105:24-25)

giving Crooked notice of the Show Cause Hearing which was scheduled for January 15, 2014, and the Judicial Foreclosure Hearing scheduled for February 18, 2014 (See Exhibit 7, *J-11*). The Show Cause and Foreclosure Hearing notice indicated that that there is no method to regain your property after the foreclosure is final and that the foreclosure would be final on March 31, 2014. This notice was delivered and not returned. (See Exhibit 7, *J-11*, TR 88:23-25).

On or about October 30, 2013, Title Check sent yet another notice (again, not required by statute) by first class mail, indicating that the Subject Property was scheduled for publication between December of 2013 and February of 2014, and again indicated that the Subject Property was in the process of foreclosure for unpaid 2011 and/or previous years' property taxes. This notice was sent to 2 Crooked Creek, 36 Bradford Lane, Oak Brook, IL 60523-2322 and was delivered and not returned. (See Exhibit 7, *J-9*, TR 88:23-25).

On or about December 6, 2013, Title Check sent, via certified mail, the statutorily required Notice of the Show Cause Hearing and Judicial Foreclosure Hearing (see MCL 211.78j). This notice was sent to 2 Crooked Creek, LLC, 36 Bradford Lane, Oak Brook, IL 60523-2322, and contained: (1) the name of the taxpayer; (2) the property ID number; (3) the assessor's legal description; (4) the street address of the Subject Property; and (5) an admonition that on March 1, 2013, the real property was forfeited and that, unless the taxes, penalties, interest and fees are paid on or before March 31, 2014, the taxpayer would lose its interest in the Subject Property and title to the Subject Property would absolutely vest in the Cass County Treasurer. The notice gave both the Show Cause Hearing date of January 15, 2014, and the February 18, 2014, date of the foreclosure hearing in the Cass County Law and Courts building. (See Exhibit 7, *J-10*) Information from the U.S. Postal Service indicates that: 1) on December 10, 2013, an attempt to deliver the certified mail at the 36 Bradford Lane, Oak Brook, IL 60523-

2322 address was made, 2) notice was left, 3) that the certified mail was unclaimed as of December 31, 2013, and 4) was thereafter returned to sender as "Return to Sender – Refused-Unable to Forward." (See Exhibit 7, *J-10*)

Even though not required by statute, on December 20, 2013, another copy of the same Notice of Show Cause Hearing and Judicial Foreclosure Hearing was sent first class mail to 2 Crooked Creek, 36 Bradford Lane, Oak Brook, IL 60523-2322. The first class Notice of Show Cause and Judicial Foreclosure Hearing was delivered and was not returned. (See Exhibit 7, *J-11*, TR 88:23-25).

**E. The Show Cause Hearing.**

On January 15, 2014, between the hours of 10:00 a.m. and 2:00 p.m. at 120 N. Broadway, Kincheloe Room, Cass County Building, Cass County, Cassopolis, MI 49031, the Show Cause Hearing was held, and no one appeared on behalf of Crooked.

**F. The Foreclosure Hearing.**

On February 18, 2014, the Foreclosure Hearing for the 2011 and earlier years' taxes was held before the Cass County Circuit Court in the Circuit Court Case. At that Foreclosure Hearing, the Affidavit of Service of Notice of Show Cause Hearing was filed with the Circuit Court, showing 1) that the Notice of Show Cause Hearing and Judicial Foreclosure Hearing was served, both via certified mail and first class mail, with regard to the Subject Property, to 2 Crooked Creek, LLC, 36 Bradford Lane, Oak Brook, IL 60523, and 2) that the certified mail was returned as "Refused." At the Foreclosure Hearing, the Circuit Court was also presented with two (2) Affidavits of Publication, showing that the requisite notices had been published in the Dowagiac Daily News on December 19, 2013, December 26, 2013, and January 2, 2014, in compliance with the statute. (See Exhibit 7, *J-12*) Finally, at the Foreclosure Hearing, a Proof of

Service was filed, showing the personal visit to the Subject Property, as well as the posting of the documents in a conspicuous manner on the Subject Property, signed by Ms. Makay in compliance with the statute. (See Exhibit 7, *J-8*)

No one appeared at the Foreclosure Hearing on behalf of Crooked and after completing the Foreclosure Hearing, the Circuit Court signed a Judgment of Foreclosure-2011 and Prior Years Real Property Taxes and the Judgment of Foreclosure which was filed and entered on February 18, 2014 (the "Judgment"). (See Exhibit 7, *J-13*)

### G. The Circuit Court Case, Post-Judgment Motion to Set Aside the Tax Foreclosure Judgment and Subsequent Appeals.

Despite having failed to retrieve all of the statutory certified mail notices, all of the regular mail notices having been delivered and not returned, having the Subject Property posted, his contractor having filed an Affidavit in the Circuit Court Case stating that he saw the posted notice and notified Crooked (TR 153-154), and having had all of the mail notices delivered to the address provided by Crooked as the proper address for tax bills, Mr. Antipov now asserts that Crooked first learned about the foreclosure after the redemption period had expired (TR 129-130).

On July 3, 2014, Plaintiffs/Appellants filed the Motion to Set Aside seeking to set aside the February 18, 2014 Foreclosure Judgment based upon claimed lack of notice in the Circuit Court Case. A written brief in opposition to the Motion was filed by the Treasurer, on August 18, 2014, oral arguments were subsequently heard on the Motion to Set Aside, and on September 12, 2014, the Circuit Court issued a well written opinion denying the Motion to Set Aside, and making findings of fact regarding the sufficiency of the notice provided by the Treasurer (see Exhibit 1). On October 17, 2014, the Circuit Court issued an order denying Plaintiffs/Appellants' Motion to Set Aside. Plaintiffs/Appellants filed an Application for Leave to Appeal to the Court

of Appeals in the Circuit Court Case Appeal. The Court of Appeals granted Leave to Appeal by Order dated February 13, 2015. The Court of Appeals affirmed the Circuit Court in an unpublished opinion in the Prior Appeal (the "Circuit Court Case Appeal Opinion"). The Circuit Court Case Appellate Opinion, in its statement of facts, takes notice of the posting that occurred and of the fact that James Frye attested that he was on the Property, saw the posting, and directly contacted a representative of Crooked by telephone and advised them of the posted notice. (See Exhibit 1 at pg 3).

The claims in the Circuit Court Case Opinion are identified as 1) the failure to receive constitutionally sufficient notice, 2) the fact that 36 Bradford Lane was claimed not to be an address that was sufficiently calculated to inform Crooked of the pending foreclosure, 3) that the Treasurer failed to conduct a business records search as required by statute, 4) that the mortgage recorded by Russian Ferro required that they also receive notice, and 5) that Title Check had actual knowledge of how to contact Crooked. (See Exhibit 2 at pg 5). The Court of Appeals in its Opinion made the following findings:

1. The Trial Court correctly held that the Plaintiffs/Appellants' due process rights were not violated (See Exhibit 2 at pg 6).
2. The Constitution does not require strict compliance with all of the statutory notice requirements – noting that the GPTA (MCL 211.78(2)) does not create any rights or causes of action beyond those afforded by constitutional due process (See Exhibit 2 at pg 7).
3. By recording the Certificate of Foreclosure before Russian Ferro recorded its mortgage, that the Treasurer had no duty to send Russian Ferro any further notice of the foreclosure proceedings (See Exhibit 2 at pg 7).

4. The posting of notice and the fact that at least three witnesses indicated they saw the posting, indicating that under the circumstances of this case, notice was reasonably calculated to appraise the interested parties of the pendency of the action. Citing *Sidun*, 481 Mich App at 509 (See Exhibit 2 at pg 8).
5. Due process in this case does not require that Crooked receive actual notice but only that the Treasurer took reasonable additional steps to notify Crooked after the certified mail notices were returned (See Exhibit 2 at pg 7).
6. The Treasurer performed constitutionally sufficient follow-up measures to provide Crooked with notice necessary to satisfy the minimum requirements of due process (See Exhibit 2 at pg 8).

The Plaintiffs/Appellants then sought Leave to Appeal to the Michigan Supreme Court which was denied. (See Exhibit 3). Plaintiffs/Appellants also sought certiorari from the United States Supreme Court which was denied. (See Exhibit 4).

**H. <u>The Court of Claims Litigation</u>.**

On July 18, 2014, Plaintiffs/Appellants filed a Complaint in the Court of Claims Case. In the Complaint, Plaintiffs/Appellants claimed that (1) there was no such address as 36 Bradford Lane, Chicago, IL 60502; (2) the Treasurer failed to comply with any notice requirements set forth in MCL 211.78i; (3) Plaintiffs/Appellants never received any notices; (4) they are entitled to damages against the Treasurer based on failure to receive notice under the GPTA; and (5) the Treasurer took Plaintiffs/Appellants property interest without due process of law. (***Exhibit 9***). After an Answer was filed by the Treasurer and some initial discovery was conducted, a Motion to Stay Proceedings was filed by Treasurer on February 23, 2015, due to the fact that the parties were litigating the same issues in the Circuit Court Action which was under appeal to this Court

(***Exhibit 10***). On March 20, 2015, the Court of Claims stayed the Court of Claims Action, pending decision of this Court in the appeal of the Circuit Court Case (***Exhibit 11***). Except for a brief period between issuance of the Opinion by this Court affirming the Circuit Court decision in the Circuit Court Case and the filing of the Application for Leave to Appeal to the Michigan Supreme Court, the Court of Claims Case remained stayed until May 3, 2017, one day after this Court denied reconsideration of its denial of Plaintiffs/Appellants' Application for Leave to Appeal in the Circuit Court case (***Exhibit 12***)**.**

On May 23, 2017, the Treasurer filed a Motion and Brief for Summary Disposition in the Michigan Court of Claims, based on the argument that the findings of fact and conclusions of law contained in the Circuit Court Case, as appealed to the Court of Appeals and this Court, constituted *res judicata* and/or that Plaintiffs/Appellants were collaterally estopped from challenging those findings. On June 29, 2017, the Court of Claims entered an Order denying the Treasurer's Motion for Summary Disposition, based on an Opinion issued the same date. (***Exhibit 13***).

After a Motion for Reconsideration was denied on July 11, 2017, and the parties filed witness and exhibit lists and trial briefs, the Court of Claims Case was ultimately tried before the Hon. Michael Talbot in a bench trial on September 25 2017. During the bench trial, Plaintiffs/Appellants called Marty Spaulding, ("Mr. Spaulding"), the owner of Title Check (TR 8-104), Mr. Antipov, the owner of Crooked and Russian Ferro, (TR 105-171) and Mr. Douglas Anderson, who is an attorney and employed by Crooked and Russian Ferro (TR 172-180). In addition, Ms. Shannon Jackson, an employee of Title Check, was called to testify at trial as part of Plaintiffs/Appellants case in chief (TR 181-205). In addition to that testimony, the Court

admitted the previously enumerated exhibits, (including all of the notices sent, and evidence of the posting of the Property and publication). (See the foreclosure process above and footnote 3).

Mr. Antipov, of course, testified that he never received or saw any of the notices and that neither he nor anyone else at Crooked knew of the foreclosure prior to the foreclosure hearing and until after the redemption period had run on March 31, 2014 (TR 125-127). On cross-examination, Mr. Antipov was impeached regarding his credibility. He testified that he had no contact with the property located at 36 Bradford Lane, Oak Brook, IL 60523, and never used that address for anything since that time, since January of 2011[9] (TR 115, TR 135-136). On cross-examination he was advised that he had previously filed an Affidavit saying that he had no contact with that address since June of 2011 (TR 134-135)[10], and subsequently it was discovered that he had contact with that address and may have lived or continued to rent that address until at least August of 2011 (TR 135). In addition, certified copies of Illinois Secretary of State records were admitted into evidence (TR 153), which showed that Mr. Antipov had several motor vehicles and trailers registered with the State of Illinois at the address of 36 Bradford Lane, Oak Brook, IL 60523, as late as 2017. (TR 136-153 and certified copies of vehicle registration information).

He was also impeached regarding his knowledge of the posting of the foreclosure notice. Mr. James Frye, general contractor with a construction company for the house on the Subject Property and two other sub-contractors, filed Affidavits (in the Circuit Court Case), stating that they saw the posting of the copy of the Show Cause Hearing and Judicial Foreclosure Hearing Notice on the window adjacent to the front door of the residence located on the Subject Property.

[9] The question actually refers to 2013, but this appears to be either an error in transcription or an error by the questioner, which no one noticed. Based upon Mr. Antipov's Affidavit, the proper year is 2011 (TR 134-135).
[10] The reference, again, in the transcript refers to 2013 which refers back to Mr. Antipov's testimony at TR 115 (See fn 8)

(*J-8*) Each of the three gentlemen, also in their Affidavits, stated that Mr. Frye, in the presence of the other two gentlemen, had contacted a representative of Crooked by phone to inform them of the fact that they had a tax notice posting on the door. The fact of the posting and the Affidavits was discussed with Mr. Antipov during cross-examination. (TR 154).

At trial, evidence was also submitted that, March 31, 2014, Mr. Antipov contacted Mr. Frye by phone and advised him that he did not want to see anybody in the hospital or anywhere else and that he was going to be the subject of serious lawsuits and would be bankrupted. (TR 155). While Mr. Antipov originally denied the phone call ever occurred, and denied saying that he didn't want to see nobody in the hospital or somewhere else, when presented with the transcribed message, he subsequently admitted the phone call and indicated that he might have said something along those lines, but he could not recall it, specifically. (TR 154-157).

Crooked subsequently sued Mr. Frye and his company, Shoreline Development Co., Inc. ("the Frye Litigation") claiming that Mr. Frye had falsely signed the Affidavit. In the course of that litigation, Crooked not only took the depositions of all three individuals that signed the Affidavits, (Mr. Frye and the two other contractors) but also of the Treasurer and even of Thomas G. King, one of the attorneys for the Treasurer. Mr. Frye counter-sued in the Frye Litigation for payment under the construction contract. Crooked's claims in the Frye Litigation were subsequently dismissed in the Circuit Court. Crooked has now appealed (on delayed leave) that dismissal to the Court of Appeals in docket number 341274, and that appeal (after a short trip to this Court in docket number 158101) is still pending. Plaintiffs/Appellants have continued to challenge Mr. Frye's Affidavit regarding the veracity of the posting in this case.

At the end of Plaintiffs/Appellants' case in chief in the Court of Claims Case, Treasurer moved for a "Directed Verdict" based upon the fact that the testimony, cross-examination and

the jointly admitted exhibits, showed that proper notice was, in fact, given and showed compliance with the foreclosure requirements set forth in the GPTA, and that Plaintiffs/Appellants' claims of defects in the notice had not been proven. The Court took the motion under advisement and required the parties to file briefs regarding the motion. On January 22, 2018, the Court of Claims issued an Order and Opinion, after finding that Title Check had sent all of the notices (Exhibit 5, p. 7) granting Directed Verdict to Treasurer in the Court of Claims Case based upon the fact that Crooked received notice under the GPTA and that no one presented any evidence of the Subject Property's value as of the date of foreclosure. The Court also specifically found in the opinion, that Mr. Antipov's testimony that he never received any notice of any kind was not credible (see Exhibit 5, p.14). Plaintiffs/Appellants' moved for reconsideration and their Motion for Reconsideration was denied by Order dated February 26, 2018 (***Exhibit 14***).

Plaintiffs/Appellants then appealed to the Court of Appeals. Treasurer filed a cross-appeal challenging the denial of her Motion for Summary Disposition by the Court of Claims. The Court of Appeals affirmed the decision of the Court of Claims in a now published opinion (***Exhibit 15***).

Plaintiffs/Appellants have now filed this Application for Leave to Appeal.

## STANDARD OF REVIEW

After a Trial Court grants a motion for Involuntary Dismissal, this Court reviews that decision under the "clearly erroneous standard." *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995); *Rodenhiser v. Duenas*, 296 Mich App 268, 272; 818 N.W.2d 465 (2012). As the Court of Claims was sitting without a jury pursuant to MCR 2.517, the judge acted as the finder of fact. The Trial Court's factual findings are similarly reviewed for clear error by this

Court. *Chelsea Inv Group LLC v Chelsea*, 266 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court . . . is left with the definite and firm conviction that a mistake has been made." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003).

Further, even "[t]he erroneous admission of evidence is not a basis for reversal unless allowing the lower court's judgment to stand would be 'inconsistent with substantial justice.'" *Albro v Drayer*, 303 Mich App 758, 765; 846 NW2d 70 (2014) quoting MCR 2.613(A). Thus, evidentiary error does not require reversal if it was harmless. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 652; 705 NW2d 549 (2005). In matters regarding findings of witness truthfulness and credibility, this Court "should give special deference to the Trial Court's findings when they are based upon its assessment of the witnesses' credibility." *Schulte's Real Estate Co v Curis*, 169 Mich App 378, 385–386; 425 NW2d 559 (1988).

Matters of statutory interpretation are reviewed *de novo*. *Hecht v Nat'l Academies, Inc*, 499 Mich 586, 604–605; 886 NW2d 135 (2016). The "construction and interpretation of court rules is a question of law that we review de novo." *Barclay v Crown Building & Development, Inc*, 241 Mich. App. 639, 642 (2000). "The rules governing the interpretation of statutes apply with equal force to the interpretation of court rules." *Yudashkin v Holden*, 247 Mich. App. 642, 649 (2001). If the plain and ordinary meaning of the language employed is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used. *Id*. 247 Mich. App. at 649-650.

The issues and circumstances raised in the Application for Leave to Appeal to this Court have been addressed twice now in the Court of Appeals: once in an unpublished opinion in 2016, after which an Application for Leave to Appeal was filed with this Court and denied, and a Petition for Writ of Certiorari was filed with the U.S. Supreme Court and denied, and another this year that was granted publication status. Both Court of Appeals decisions are attached hereto as Exhibits. Though unpublished opinions are not considered to be binding, they are still final rulings by that court and may be cited by a court for instructive and persuasive authority. *Cox v Hartman*, 322 Mich App 292; 911 NW2d 219, 228 (2017). Furthermore, MCR 2.613(c) explicitly states "[f]indings of fact by the Trial Court may not be set aside unless clearly erroneous." When considering the findings of other courts, the doctrine of *res judicata* bars re-litigation of the same claims between the same parties when the facts or evidence required in the two actions are identical. *Old Kent Bank of Holland v Chaddock, Winter & Alberts*, 197 Mich App 372, 379; 495 NW2d 808 (1992). The doctrine of collateral estoppel bars re-litigation of any issues in new proceedings that have previously been actually and necessarily determined in prior proceedings. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990).

## ARGUMENT

### I. All Courts Hearing this Matter Correctly Held that the Treasurer gave Proper Notice to Crooked and that Crooked Failed to Show Treasurer did not Satisfy the "Any Notice" Requirement of the Statute or that Due Process was Otherwise Deprived.

Plaintiffs/Appellants are relying on an argument that is fundamentally unsound and requires a purposeful misinterpretation of the law to be found credible. The Tax Foreclosure Act and the due process requirements of the Constitution have been met, as determined repeatedly, but Plaintiffs/Appellants continue to argue that the Treasurer must prove that Crooked **actually**

**received the mailed notice** of the foreclosure proceedings against the Subject Property. This standard is completely implausible and impractical, as any taxpayer would now have the option to avoid foreclosure by doing as little as refusing or failing to sign for certified mail sent to them and then denying receipt of the mail.

However, it is not simply the position of Defendants/Appellees that the standard being advocated by the Plaintiffs/Appellants is flawed. The very cases addressing the Tax Foreclosure Act and Constitutional due process upon which Plaintiffs/Appellants rely make it clear that Defendants/Appellees satisfied the actions required of them. The case law demonstrates the Plaintiffs/Appellants' argument is flawed. The primary case the Plaintiffs/Appellants rely upon, *Perfecting Church*, explicitly held that "[d]ue process does not require that a property owner receive actual notice before the government may take his property." *Wayne County Treasurer v. Perfecting Church*, 478 Mich. 1, 9; 732 N.W.2d 458 (2007), citing *Jones v Flowers*, 547 U.S. 220, 226; 126 S. Ct. 1708 (2006). By arguing an interpretation of *Perfecting Church* that actual notice to a property owner is required under the Tax Foreclosure Act, the Plaintiffs/Appellants are asking this Court to deliberately misread its own holding in that case and the proposition for which it stands.

### A. Compliance with Statutory Notice Requirements and Due Process Notice Requirements

This case is predicated upon the proper interpretation of MCL 211.78l. It provides in relevant part:

> "(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a parcel of property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive <u>any notice required under this act</u>[11] shall not bring an action for possession of the property against any subsequent owner, but

[11] The "Act" refers to the Tax Foreclosure Act; MCL 211.78 et seq.

> may only bring an action to recover monetary damages as provided in this section.
> (2) The court of claims has original and exclusive jurisdiction in any action to recover monetary damages under this section." MCL 211.78l (1)(2). [*emphasis added*]

The question becomes what is the "any notice" that is "required" to be given to Plaintiffs/Appellants "under this Act"? In reviewing this question, the Treasurer agrees that giving meaning to all words of the statute and the intent of the legislature is the proper analysis. In order to determine what notice is required by the Act, one must first refer to the Act itself. What was intended by the legislature in adopting the Act? Although Plaintiffs/ Appellants profess in the Application for Leave to Appeal to be following this line of inquiry, they wholly fail to cite or even discuss the most obvious indicator of the legislative's intention when adopting MCL 211.78l. The legislature directly stated its intention and that statement is found in the provisions of MCL 211.78(2) which state:

> "(2) It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated." [*emphasis added*]

As a result of the foregoing, it is clear that "any notice required under this Act", as stated in MCL 211.78l(1), which gives rise to a claim or cause of action under MCL 211.78l was intended by the legislature to be limited to the notice required by the due process clauses of the Michigan Constitution of 1963 and the U.S. Constitution. (See: MCL 211.78(2)).

MCL 211.78l and MCL 211.78(2) must be read together in order to give them their full meaning. As referenced above, when the plain and ordinary meaning of the language employed is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used. *Yudashkin*, 247 Mich. App. at 649-650. It is abundantly clear that the statements made in MCL 211.78l and 211.78(2) limit the claims that can be made by Plaintiffs/Appellees in this case to those regarding their receipt of due process of law under both the Michigan Constitution and the United States Constitution.

This Court has previously held that in order to determine what notice is required by the Act, one must first determine what notice is required by the due process clauses of the Michigan Constitution and the United States Constitution. *In re Petition of Wayne County Treasurer* (*Perfecting Church)*, 478 Mich 1 at 10 (2007). The due process clause of the Michigan Constitution is to be construed to be as identical to and not more broadly read that the due process clause of the U.S. Constitution. See: *In re Wayne Co Treasurer (Westhaven Manor),* 265 Mich App 285 (2005) and cases cited therein. This Court in the case of *Republic Bank v Genesee Co Treasurer*, 471 Mich 732 (2005) has indicated that this notice must be sufficient to meet constitutional standards and went on to describe the kind of notice that would satisfy due process requirements:

> "Personal service is not required. Notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice. Mailing should be registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record of mailing and receipt or non-receipt provided. Such would be the efforts of one desirous of actually informing another might reasonably employ. If the state exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period." 396 Mich at 211. [emphasis added] [citing *Dow v Michigan*, 396 Mich 192 (1976)]

The "reasonably calculated to reach the person" standard has also been used repeatedly by this Court, (see *Sidun v Wayne County Treasurer*, 481 Mich 503 (2008); *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mh 420 (2000) and *Dow*, supra). This due process standard has also been enunciated in repeated federal cases too numerous to cite and follows similar language found in the case of *Mullane v Central Hanover Bank & Trust*, 339S 306 (1958) which noted that notices must be such that they are reasonably calculated to appraise a Plaintiff of the hearings.

This Court has previously indicated that reliance on an address provided in a mortgage recorded by the bank's predecessor in interest was sufficient to provide due process notice, even though that bank subsequently merged with another bank who wished the notice be sent to a different office[12]. *Republic Bank v Genesee Co Treasurer*, 471 Mich 732 (2005), see also *First Nat'l Bank of Chicago v Dept of Treasury*, 485 Mich 980 (2009). Following that same notion, the tax foreclosure statute provides for certain searches, notices and postings, as well as publication, with the searches set forth in the statute being (MCL 211.78i(6)) designed to determine those persons with an interest in the property and their addresses so as to obtain addresses reasonably calculated to appraise those owners of a property interest, of the show cause hearing, and the foreclosure hearing as provided for in MCL 211.78j and MCL 211.78k. MCL 211.78i(2).

Far from treating the Act as a "dead letter" or reading out terms as being surplusage, the rulings on this matter have been consistent with the plain language of the law and the legislative intent behind it. The case law and the statute itself are very clear. The Treasurer must take certain actions to satisfy the Tax Foreclosure Act regarding notice. Constitutional due process guarantees may require that additional steps be taken to attempt to notify a property owner that

[12] In this case, the Treasurer relied upon a "send tax bills" address for Crooked set forth in the Deed and the same address for Crooked in a recorded Real Estate Agreement.

they are in danger of losing their property, such as sending by ordinary mail, which was done in this case. See: *Jones v Flowers, supra*. Further, even if the Treasurer were to fail to take one of the various actions provided for by the Tax Foreclosure Act, the Treasurer could still meet the requirements of both state and due process. *Republic Bank v Genesee Co Treasurer, supra;* MCL 211.78(2). Neither the Tax Foreclosure Statute nor due process requires that the Treasurer prove that Crooked "actually received" all of the notices provided to property owners before they lose their property for failure to pay property taxes as the Plaintiffs/Appellants would argue in this case, as doing so would be impossible in the face of even the unsubstantiated and not credible protestations of the tax payer and the failure to sign for the certified notices.

**B. Plaintiffs/Appellants Failed to demonstrate that they did not Receive Any Notice under the Act.**

In their Application for Leave to Appeal, Plaintiffs/Appellants argue that MCL 211.78l was intended to provide a damages remedy for owners who had not actually received notice of the foreclosure of their property and provides for a cause of action or claim that goes well beyond being afforded due process. Even if this analysis of MCL 211.78l is correct, in the face of the contrary provisions of MCL 211.78(2) and case law, Plaintiffs/Appellants' argument relies almost solely on the testimony of Mr. Antipov that Plaintiffs/Appellants did not receive any notice of the tax foreclosure proceedings as required under the Tax Foreclosure Act. Though this is clearly a self-serving statement, it is still worth addressing. As stated previously, the Tax Foreclosure Statute standard and the due process requirements are one in the same; that which is necessary to satisfy due process. MCL 211.78(2); *Republic Bank v Genesee Co Treasurer, supra.* The Treasurer in this case showed that she gave the notices required by statute (see Exhibit 7). Because of this prima facie showing, it becomes Plaintiff/Appellants' burden to demonstrate they did not receive "any notice" required under the Tax Foreclosure Act. While as

stated previously, proof of "actual receipt" is not required under the law to satisfy due process, (*Dow v Michigan*, 396 Mich 192 (1976)), here, Plaintiffs/Appellants completely failed to satisfy their burden in showing lack of notice, barely even attempting to do so. The testimony and evidence which was presented to Court of Claims demonstrated that adequate notice had been given (see: Exhibit 7), and the evidence was not rebutted in any meaningful way.

Pursuant to the unopposed motion of the Treasurer, the joint Court of Claims exhibits of the parties, *Exhibits J-1* through *J-20* were admitted into evidence at the commencement of trial in this matter. (See Exhibit 7) As can be seen from the following paragraphs, these admitted exhibits in the Court of Claims, along with the testimony of Mr. Spaulding and Ms. Shannon Jackson, uncontrovertibly demonstrated several key facts that the Plaintiffs/Appellants conveniently ignore in order to make their case to the Court.

The Treasurer, through her authorized representative Title Check, conducted a search of the records of the County Register of Deeds (See Exhibit 7, *J-3*) the Treasurer, the local Assessor and the local Treasurer, in order to determine owners of a property interest entitled to notice under the Act (MCL 211.78c(1) and (6)). Plaintiff/Appellants presented no testimony or evidence that the local record search was not done or that it contained any address for 2 Crooked Creek, LLC other than that set forth above. As per MCL 211.78f(1), Title Check sent the statutorily required Notice of Forfeiture by certified mail with regard to the 2011 real property taxes related to the Subject Property on or about January 14, 2013. (See Exhibit 7, *J-4*).

Title Check's president, Mr. Spaulding, testified that it was subsequently learned that the street address and zip code in the address provided by 2 Crooked Creek, LLC on the Deed and in the Real Estate Agreement was in fact located in Oak Brook, Illinois, and not in Chicago, Illinois. However, because the zip code provided was the Oak Brook zip code, the notice was

taken by the postal service to and attempted delivery made at the correct Oak Brook address. When the certified mailing was not claimed, it was returned to Title Check on February 15, 2013 as "unclaimed." Title Check also took a number of steps and sent multiple additional notices in an effort to notify Plaintiffs/Appellants that the danger of losing the Subject Property due to delinquent property taxes from 2011 was imminent. Title Check further corrected their information so that all future notices reflected the city in Crooked's address as Oak Brook and not Chicago. (TR 49, 74, 86).

The Treasurer prepared a Certificate of Forfeiture, (MCL 211.78g), and that Certificate of Forfeiture was recorded with the Cass County Register of Deeds on April 12, 2013. The previously conducted title search showed the previously recorded Certificate of Forfeiture (see Exhibit 7, J-5). On or about May 5, 2013, Title Check sent, by regular first class mail, a Notice of Inspection Deadline, stating that the Subject Property would be inspected and notice would be posted, beginning June 17, 2013. (See Exhibit 7, J-7). On June 18, 2013 pursuant to MCL 211.78i(3), Katelin Makay ("Ms. Makay") completed a form regarding the inspection of the Subject Property and posted a copy of the Show Cause Hearing and Judicial Foreclosure Hearing notice on a window adjacent to the front door of the residence and took a picture of the posting that day. (See Exhibit 7, J-8).

On or about October 30, 2013, Title Check sent another notice by first class mail to the Oak Brook, Illinois address, indicating that the Subject Property was scheduled for publication between December of 2013 and February of 2014, and again indicating that the Subject Property was in the process of foreclosure for unpaid 2011 and/or previous years' property taxes. (See Exhibit 7, J-9). As per MCL 211.78i(2), on December 20, 2013, a notice of the Show Cause Hearing and Judicial Foreclosure Hearing was sent by Title Check via certified mail to the Oak

Brook, Illinois address of Crooked. (See Exhibit 7, J-10). On December 20, 2013, a copy of the same notice of Show Cause Hearing and Judicial Foreclosure Hearing was also sent by Title Check via first class mail to the same Oak Brook, Illinois address. *(*See Exhibit 7, J-11*).*

The testimony of Mr. Spaulding and Title Check employee Shannon Jackson was that the certified mail was not signed for, the notices were returned as either "refused" or "unclaimed," neither of which meant that the taxpayer was not receiving mail at that address. In addition, all of the first class mail notices were delivered and **not returned**. These witnesses testified they reasonably believed the 36 Bradford Lane address to be a good address for Crooked, and one reasonably calculated to give notice to that entity. See also *Jones v Flowers, supra*. In addition, notices were also published in the Dowagiac Daily News on December 19 and 26, 2013, and January 2, 2014 pursuant to MCL 211.78i(5)[13]. (See Exhibit 7, J-12). The Plaintiffs/Appellants presented no credible testimony or evidence which demonstrated the Bradford Lane address utilized for notice purposes was not, under the searches done, notice reasonably calculated to inform 2 Crooked Creek, LLC of the proceedings being pursued to foreclose against the Subject Property, as that statement is set forth in the statute and as required by due process. The Plaintiffs/Appellants additionally did not provide any evidence or testimony that the foreclosure notice requirements of the Tax Foreclosure Act were not complied with or that due process was not satisfied.

If Plaintiffs/Appellants had wanted to attack the veracity of admitted Exhibit *J-8* showing Ms. Makay had posted the Subject Property (and a picture of the posting), they could have called her to testify and impeach the statements in the posting form. They could have called the Treasurer, or examined Mr. Spaulding with additional questions, if it believed it could show there was some part of the Tax Foreclosure Act that was not followed, however, they either

[13] The statute was subsequently amended to require only 2 publications instead of 3.

completely failed to challenge Exhibits *J-1 through J-20*, or failed in their attempts. It was Crooked's burden in the Court of Claims Case to demonstrate that it was not afforded proper notice, not the Treasurer's to demonstrate that it was. Plaintiffs/Appellants are hoping that this Court will overlook both their sloppy attempts to repurpose the Tax Foreclosure Act for their own means and their failure to adequately try the case before the Court of Claims.

All of the above evidence that proper notice was given is in direct opposition to the contrary protestations of Mr. Sergei Antipov, a witness that the Court of Claims specifically found not to be credible, that he never received "any actual notice" of the foreclosure.

In addition, as the Court of Claims expressly found, the property was posted with the notice required by the statute and Crooked, as owner of and in possession of the property, is deemed to have received the notice via the posting. As a result, at a minimum, Crooked received actual notice of the foreclosure via the posting of the notice on the property.

### C. The Term "Unrecorded" was properly used and construed in the Context of the Tax Foreclosure Act.

The Plaintiffs/Appellants argue that the term "unrecorded" has been deemed to be surplusage, as the outcome does not benefit the Plaintiffs/Appellants[14]. In their circular argument, the fact that they claim they did not receive "actual notice" is enough to ensure that Russian Ferro Alloys, Inc.'s filing of a mortgage after the Treasurer, through Title Check, ran its record search is enough to guarantee they should be allowed to "bring an action to recover monetary damages as provided in this section." MCL 211.78l(1). The Court of Appeals, relying on existing case law, correctly determined that because Plaintiffs/Appellants did not record their mortgage until after the Certificate of Forfeiture was recorded and the record search was done

[14] An example of an unrecorded interest in the property requiring notice would be an unrecorded land contract which the land contract vendee has provided to the Treasurer and is in the Treasurer's tax files and thus covered by MCL 211.78i(6)(b). As a result, the language is not surplusage when used in MCL 211.78l(1) as Plaintiffs/Appellants claim if not applied to unrecorded mortgages not entitled to notice.

then there was no additional burden placed on the Treasurer to continually conduct multiple searches to discover the controlling mortgage. See *First Nat'l Bank of Chicago v Dep't of Treasury*, 280 Mich 980; 774 NW2d 912 (2009); *Republic Bank v Genesee Co Treasurer*, 471 Mich 732, 738; 690 NW2d 917 (2005).

The statute reads" [t]he county treasurer shall notify the person or holders of undischarged mortgages if delinquent taxes on the property or properties are returned within that year." MCL 211.78a(4). This language is again read in conjunction with MCL 211.78l, with the notice that is "required under this act." Though the Treasurer did not have the affirmative duty to give mail notice under this particular portion of the Tax Foreclosure Act based upon the fact that the mortgage was not of record on the search date, the notice required by the Act (constructive notice) was in fact, given when the Treasurer recorded the Certificate of Forfeiture which would more than comport with the intention of the legislature in this particular Act. By recording the Certificate of Forfeiture, the Treasurer gave constructive notice to anyone seeking to perfect any interest in the property (such as a mortgage) of the pending notice of the tax foreclosure. Plaintiffs/Appellants failed at any point to run their own title search, and as a result, failed to see the notice given, and are now attempting to find a way to reverse engineer their claim and find a hook by which this Court will hear their complaints. This issue has repeatedly been addressed by the courts of this state and in each instance, the courts have found that a mortgagee, whose mortgage has been recorded after the date of the filing of the Certificate of Forfeiture, is not entitled to additional notice under the act beyond that afforded by said recorded Certificate of Forfeiture. See: *First National Bank of Chicago v Dep't of Treasury*, 485 Mich 980; 774 NW2d 912 (2009).

## II. The Court of Claims Correctly Held that there was no Evidence Presented as to the Subject Property's Fair Market Value as of the date of the Foreclosure Judgment.

Fair market value is typically defined by courts as being the price an item of a particular make, model, size, material or condition will sell for on the open market in the geographic area involved. See e.g. *Kilpatrick v. Michigan D't of Social Services*, 126 Mich. App. 559, 563; 337 N.W.2d 576 (Mich. App. 1983). The Tax Foreclosure Act further specifies that the evidence of value must relate to the value at the date of entry of the Judgment of Foreclosure. MCL 211.78l(4), provides as follows:

> "Any monetary damages recoverable under this section shall be determined as of the date a judgment for foreclosure is entered under section 78k and shall not exceed the fair market value of the interest in the property held by the person bringing the action under this section on that date, less any taxes, interest, penalties, and fees owed on the property as of that date."

The Plaintiffs/Appellees would have the Court divine the monetary damages as provided for in MCL 211.78l(4) from various statements made regarding the cost of the improvements and property, or the amount of the Russian Ferro Alloys Inc mortgage and without any reference to any specified date as required by the Act. However, MCL 211.78l(4) is very specific as to what is to be valued and the date on which it is to be valued.

Plaintiffs/Appellants argue that that the Court of Claims misinterpreted MCL 211.78l(4) when it determined that they failed to present any evidence of the value of the Subject Property <u>at the time of foreclosure</u>.

What the Plaintiffs/Appellants have claimed are their proof of damages are the non-responsive statements from Mr. Antipov and Mr. Anderson about "ball-park" numbers spent on the purchase and construction of a residence at the Subject Property and the amount of the mortgage held by Russian Ferro Alloys, Inc. on the property. They now boldly claim that these

non-responsive answers and statements constitute actual evidence of the fair market value of the Subject Property as of the date of the foreclosure judgment. This claim is simply not accurate. No one has given any estimation of the fair market value of the property as of the date of the Judgment of Foreclosure.

Both Mr. Antipov and Mr. Anderson agree that the mortgage on the Subject Property had nothing to do with the purchase price[15] of the Subject Property, but instead the loan funds from one Appellant to the other were used to purchase a completely different property. (TR 176: 3-30). All Mr. Antipov and Mr. Anderson actually testified to regarding the Subject Property's value was that "something like" $3.4 million dollars was spent on the Subject Property at indeterminate dates prior to the foreclosure. (TR 118:18-20; 173:12-23). This testimony lacks definition and specificity about what was actually spent on the Subject Property, fails to provide what the actual market value was for the Subject Property and perhaps most critically fails to provide any sense of what the fair market value was at the time of foreclosure, and after deducting the taxes, interest, penalties and fees owed on the Property as of that date. Plaintiffs/Appellants had a purported real property appraiser conduct an examination of the Subject Property and render an opinion as to its fair market value, listed that expert and exchanged the expert's report and opinion of value, but Plaintiffs/Appellants' failed to present any testimony from that person during their case in chief or otherwise provide any documentary evidence or testimony of any nature as to fair market value as of the date of the foreclosure judgment date, likely because that opinion in the report prepared by their alleged real estate

[15] Counsel believes the court reporter inaccurately recorded the phrase purchase price as "push point" in the transcript.

valuation expert was that the fair market value of the Subject Property was substantially less than the Plaintiffs/Appellants now claim. (unadmitted Exhibit P-13) (TR 173:12-20)[16].

The *HR Terryberry* case held that a property owner may testify as to what their opinion of value of their real property. However that holding was explicitly limited to condemnation cases, with the Court stating that "in Michigan, evidence in condemnation cases has been more liberally received than in other cases". *Grand Rapids v. H.R. Terryberry Co.*, 122 Mich. App. 750, 755; 333 N.W.2d 123 (Mich. App. 1983), citing *In re Memorial Hall Site*, 316 Mich 215, 220; 25 NW2d 174 (1946). The case at bar is not a condemnation case and an owner's subjective musings about what was spent on the purchase of the property and the construction of the house is not the same as providing evidence of fair market value at the time of foreclosure. In addition, even if the testimony constituted a fair market value as of some indeterminate date, there is no testimony that it was even an opinion of value of the property on the date of the Judgment of Foreclosure, or that it took into consideration those factors set forth in MCL 211.78l(4).

Similarly, the *Antisdale* case did not involve a tax foreclosure case, but rather expressed the holding that in tax valuation cases the true cash value of property may be determined by a market based approach, the capitalization of income approach and the cost less depreciation approach. *Antisdale v. Galesburg*, 420 Mich. 265, 276-77; 362 N.W.2d 632 (Mich. App. 1984). Of these methods only a market based approach can render a value of the Subject Property at the time of foreclosure with the deductions as required by statute. MCL 211.78l(4). Mr. Antipov's and Mr. Anderson's indefinite statements of amounts spent on purchase and construction without temporal context and without any supporting basis for the resulting value of the property with the

[16] This trial tactic has now left Plaintiffs/Appellants without any proof of damages that complies with that required by MCL 211.78l(4).

improvements, do not form a sufficient basis for the Trial Court to have determined a fair market value for the subject property at the time of foreclosure in this matter and so the Plaintiffs/Appellants' proofs on that issue were insufficient to sustain a judgment in their favor.

## CONCLUSION

For the reasons set forth in this Brief, Defendant/Appellee, Treasurer of the County of Cass, respectfully request that this Honorable Court deny Plaintiffs/Appellants' Application for Leave to Appeal, or in the alternative that it affirm the decisions of the Court of Claims and Court of Appeals and grant her such other and further relief, including costs and attorney's fees, as may be just and proper.

Respectfully submitted,

KREIS, ENDERLE,
HUDGINS & BORSOS, P.C.

Dated: July 25, 2019

/S/ *Thomas G. King*
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