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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SUPPLEMENTAL BRIEF OF APPELLEE, TREASURER OF THE COUNTY OF CASS

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NATURE OF THE ACTION

On July 18, 2014, Plaintiffs/Appellants filed the Application for Leave to Appeal in this action in case number 14-181-MZ, (the "Court of Claims Case") in the Michigan Court of Claims (the "Court of Claims" or "Trial Court"), alleging that they were entitled to damages pursuant to MCL 211.781, because Defendant/Appellee ("Treasurer") failed to provide "any notice required under the Act"[1] ("GPTA" or "Tax Foreclosure Act").

The Court of Claims on January 22, 2018, entered an Order and Opinion granting involuntary dismissal. 2 Crooked Creek, LLC ("Crooked") and Russian Ferro Alloys, Inc. ("Russian Ferro") (collectively, "Plaintiffs/Appellants") appealed to the Court of Appeals which affirmed and Plaintiffs/Appellants filed an Application for Leave to Appeal to this Court. On November 20, 2019, this Court ordered the application for leave to appeal be considered and directed the filing of this brief.

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] wherein they were denied relief based upon a finding that proper notice was given. (App 0001b). 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 (App 020a), sought Leave to Appeal to this Court in docket number

[1] The General Property Tax Act - MCL 211.78 *et seq*.
[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.

153797, which was denied (App 0017b), and then sought Certiorari in the U.S. Supreme Court in docket number 17-169, which was also denied (App 0018b). 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 (App 002a). Plaintiffs/Appellants then went back to the Court of Appeals for the second time, (App 020a) 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 (App 001b) and the Court of Appeals in the Circuit Court Case (App 041a).

COUNTER-STATEMENT OF FACTS[4]

I. 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 7.212(C)(6). This Court should note that Plaintiffs/Appellants' brief in support of this application violates MCR 7.212(C)(6) and (7) as incorporated by MCR 7.305(d) and (e) as

[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).
[4] Appellee also relies upon its statement of facts as filed in its Brief in Opposition to Appellants' Application for Leave to Appeal.

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.

To this point, it is important to further bear in mind that the Court of Claims, the trial court record upon which this appeal is being based, specifically stated that it did not find the representations and testimony of Sergei Antipov ("Mr. Antipov") to be credible, let alone compelling (App 002a). False claims were repeatedly made by Mr. Antipov, and they have now been incorporated into the opposing party's briefs. From claims about the value of the property being $3.5 million to taxes owed on the property as of the foreclosure date being $14,000.00, there have been many claims made in Plaintiffs/Appellants' brief which are not supported by the record and which a fair reading of the record will reveal are knowingly false or are taken out of context.

II. 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")[5] (App 0019b; *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, 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 (App 0021b; *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.[6] 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. 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, which showed that as of February 2013, the amount of the taxes owed was $14,743.24. These were taxes assessed on a vacant parcel of property for 2012, and did not include the 2013 and 2014 taxes that included a partially and then

[5] All of the Joint Exhibits (J-1 – J-20) were received in evidence. App 0166b;TR 8: 1-4. The following additional Exhibits were received into evidence during Plaintiffs/Appellants case in chief: App 0215b, 0223b ,0241b, 0243b, 0261b, 0326b;Exhibits P3(TR 83), P6(TR 85), P8(TR 204), P9(TR 57), P11(TR 204), P12(TR 85), P14(TR 65), P16(TR 85), P17(TR 85), and P22(TR 103). 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 **App 0019b-0116b**. References to TR are to the Court of Claims trial transcript, which is stated at **App 0159b-0367b**.

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

almost complete luxury home. The Notice of Forfeiture was sent certified 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). *(*App 0040b**;** *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 App 0040b; *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[7], but was unsuccessful as no one was home and notice was left at that address (See tracking in App 0040b**;** *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 App 0040b**;** *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). (App 0045b; *J-5*) The Certificate of Forfeiture identified the Subject Property by parcel number, street address, and the assessor's description of the real property (App 0040b; *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 (App 0040b, 0019b, 0021b; *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)).

III. The Foreclosure Process.

[7] 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.

Title Check then conducted a review of the public records as required by MCL 211.78i(6) in order to determine who was entitled to the notice required under the Act, and the addresses of said persons, which again disclosed Crooked at the same address as previously discussed and used in the Notice of Forfeiture. (App 0173b; 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. (App 0054b**;** *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 (App 0054b; *J-7*, App 0246b; 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"). 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**.** (App 0028b; *J-3*)

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. (App 0046b; *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. (App 0046b; *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. (App 0058b; *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 (App 0058b; *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. (App 0058b; *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 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 (App 0077b; *J-11*). The

[8] Mr. Antipov testified in the Court of Claims Case that 50 Baybrook Lane, Oak Brook, IL 60523 is his current residence address. (App 0263b; TR 105:24-25)

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. (App 0077b; *J-11*, App 0246b; 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. (App 0062b; *J-9*, App 0246b; 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. (App 0066b; *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." (App 0066b; *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. (App 0077b; *J-11*, App 0246b; TR 88:23-25).

IV. The Court of Claims Litigation.

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. (App 0368b). 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 the Court of Appeals (App 0374b). 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 (App 0377b). Except for a brief period between issuance of the Opinion by the Court of Appeals affirming the Circuit Court decision in the Circuit Court Case and the filing of the Application for Leave to Appeal to this 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 (See App 017b**)**

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. (App 0378b).

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. Appellants' filed with the Court of Claims, as a potential exhibit, an appraisal in which their appraiser valued the Subject Property at $1.6 million as of the date of the entry of the foreclosure judgme (App 0117b). During the bench trial, Plaintiffs/Appellants called Marty Spaulding, ("Mr. Spaulding"), the owner of Title Check (App 0166b – 0262b; TR 8-104), Mr. Antipov, the owner of Crooked and Russian Ferro, (App 0263b – 0329b; TR 105-171) and Mr. Douglas Anderson, who is an attorney and employed by Crooked and Russian Ferro (App 0330b – 0338b; 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 (App 0339b – 0363b; 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 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 (App 0283b – 0285b TR 125-127). However, 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 January of 2011[9] (App 0273b; 0293b – 0294b; TR 115, TR 135-136). On his cross-examination he was further informed that he had previously filed an Affidavit saying that he had no contact with that address since June of 2011 (App 0292b-0293b 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 (App 0293b; TR 135). In addition, certified copies of Illinois Secretary of State records were admitted into evidence (App 0311b; 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. (App 0294b-0311b; TR 136-153 and certified copies of vehicle registration information).

Mr. Antipov 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. (App 0058b; *J-8*) Each of the three gentlemen, also in their Affidavits,

[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 (App 0293b-0294b TR 134-135).

[10] The reference, again, in the transcript refers to 2013 which refers back to Mr. Antipov's testimony at App 0273b; TR 115 (See fn 10)

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). Mr. Frye was also available to testify as part of Plaintiffs/Appellants case in the Court of Claims.

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 Mr. Frye was going to be the subject of serious lawsuits and would be bankrupted. (App 0313b; 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 and tape of the conversation, he subsequently admitted the phone call and indicated that he might have said something along those lines, but he could not recall it, specifically. (App 0312b-0315b; TR 154-157). Crooked sued Mr. Frye and his company, and lost at the trail level, and the case is in the Michigan Court of Appeals.

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. Further, the Treasurer 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 (App 0390b; p. 7 of Opinion) 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 App 0397b; p.14 of Opinion). Plaintiffs/Appellants' moved for reconsideration and their Motion for Reconsideration was denied by Order dated February 26, 2018 (App 0403b).

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 (App 0404b). Plaintiffs/Appellants have now filed this Application for Leave to Appeal.

ARGUMENT

I. THE STATUTE'S NOTICE REQUIREMENT WAS MET BY ALL ACTIONS TAKEN BY APPELLEE CASS COUNTY.

a. Intent of the Legislature.

The Michigan General Property Tax Act is a unified system for the assessment and collection of real property taxes throughout the State and must be read as a whole, in order that the unified system of tax assessment and collection may be undertaken as the Legislature intended.. Because of the importance of this statute, it has also been frequently interpreted. The Appellees, through their Counsel, are attempting an end-run around well-established interpretations of this statutory system in order to turn MCL 211.78 *et seq* completely on its head and change its obvious meaning. They start by citing only isolated portions of MCL 211.78 *et seq* and do not read the Act in its entirety or MCL 211.78l in conjunction with the other provisions of the Act. MCL 211.78*l*(1) provides in relevant part as follows:

> "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 any notice required under this act shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this section." [*emphasis added*]

It is clear when reading the entirety of MCL 211.78*l*, that it is only "any notice required under the act" that is at issue. As a result, this Court's first obligation is to determine what notice is required under the act.

The Court must first seek to understand the Legislature's overall intention. This intention is directly expressed in MCL 211.78(2) which limits the causes of action that are available under the act including MCL 211.78*l*. MCL 211.78(2) states as follows:

> "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, any cause of action under MCL 211.78*l*, is limited by MCL 211.78(2) to a failure of the state or political subdivision to follow a requirement of the act which results in a deprivation of due process under the Michigan State Constitution of 1963 or the constitution of the United State. Since the Court of Appeals has previously specifically held that due process had been met, failing to "actually receive" those notices (as opposed to the notices being given) does not result in a cause of action under MCL 211.78*l* because such notices, based on MCL 211.78(2) are not "notices required under this Act to provide due process of law. This is so because the notices

were given and, as the Court of Claims found, were "constructively received" and that the notices given satisfied the requirements of due process as per a prior ruling of the Court of Appeals.

MCL 211.78(2) clearly sets forward the Legislature's intent that the notice required under the act, which gives rise to any cause of action under the act or any claim under the act, is only to be considered if such notice fails to meet the minimum due process requirements under the Michigan State Constitution of 1963 or the Constitution of the United States. The Court must next analyze what type of requirements for notice exist under the act. Clearly, one of the notices required under the act is the posting of property that is subject to the foreclosure. MCL 211.78*i*(3) states as follows:

> "The foreclosing governmental unit or its authorized representative or authorized agent shall make a personal visit to each parcel of property forfeited to the county treasurer under section 78g to ascertain whether or not the property is occupied. If the property appears to be occupied, the foreclosing governmental unit or its authorized representative shall do all of the following:
> (a) Attempt to personally serve upon a person occupying the property notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k.
> ***
> (d) If the foreclosing governmental unit or its authorized representative is not able to personally meet with the occupant, the foreclosing governmental unit or its authorized representative shall place the notice in a conspicuous manner on the property and shall also place in a conspicuous manner on the property a notice that explains, in plain English that the property will be foreclosed unless forfeited unpaid delinquent taxes, interest, penalties, and fees are paid, the time within which forfeited unpaid delinquent taxes, interest, penalties, and fees must be paid, and the names, addresses, and telephone numbers of agencies or other resources that may be available to assist the occupant to avoid loss of the property. If this state is the foreclosing governmental unit within a county, the department of treasury shall perform the personal visit to each parcel of property under this subsection on behalf of this state." [*emphasis added*]

As can be seen from the foregoing, one of the notices that is required by the statute is either personally serving the occupant (if the occupant is present when the site visit occurs) or in the alternative, the posting of notice (if the occupant is unable to be contacted and personally met with by the authorized governmental representative) at the property. As the Court of Claims found in its opinion, the posting was done in accordance with the statute controlling this case. The trial court specifically found the posting of notice at the property being foreclosed, which was owned and controlled by Appellants, constituted receipt of one of the notices required under the statute. As a result, the trial court specifically found that the owner of the property had "received one of the notices required under the act" which was sufficient to comply with the requirements of MCL 211.78*l*(1). Thus, even ignoring the due process limitations on causes of actions or claims under the tax foreclosure provisions of the GPTA as set forth in MCL 211.78(2), it is clear that there is a factual basis for the trial court's determination that the posting was properly completed under the statute, and as a result notice was <u>received</u> by Appellants. (See attached App 019b-0116b– Joint Trial Exhibit J-8)

Under Appellants view of MCL 211.78*l*, all that would be required for any taxpayer to avoid foreclosure and consequently forever avoid paying their taxes would be simply to either <u>refuse</u> or leave <u>unclaimed</u> (as occurred in this case) the certified letter notices sent, and then come to Court with a witness, (albeit it one that the trial court determined was "not credible" such as was the case here) to claim that that they never "<u>actually received</u> the mailed notices" and never "<u>actually saw</u> the posted notice" and never "actually saw the publications". As a result of the foregoing under Appellants reading of the statute, any time that the certified mail letters are returned to the foreclosing unit of government, the taxpayer, *ipso facto*, has a valid defense to any foreclosure. This would render foreclosure for non-payment of taxes virtually impossible

whenever the taxpayer wished to avoid foreclosure, an outcome clearly not intended by the Legislature, particularly in light of the Legislature's stated intent in MCL 211.78(2).

b. Plaintiffs/Appellants torturous fixation on attempting to define words with common meanings.

Plaintiffs/Appellants have spent many pages attempting to define in a manner advantageous to them, words that have common meanings. Their fixation on the word "any" is somewhat astounding.[11] A review of Black's Law Dictionary, 5th edition (1979), clearly resolves this issue. Black's Law Dictionary, 5th edition, provides as follows:

> Any. "Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity.
>
> ***
>
> Word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every', as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute." [citations omitted] [emphasis added]

It is clear that in the context of its use in MCL 211.78l(1), the word "any" has the meaning "one out of many" or "one" under the statute, only one of the various types of notices is required to constitute notice to a person in litigation. This analysis is further buttressed by the provisions of MCL 211.78k(5)(f) which clearly states that even if the person did not receive any of the notices involved, if that person appears at the hearing, they are deemed to have received proper notice of the hearing.[12] As a result, it is clear that the Legislature intended that "any notice" be a reference to any one of the notices and not multiple notices.

Plaintiffs/Appellants also seem fixated on the word "notice" and whether it includes the various types of notices to be provided both actual and constructive. In fact,

[11] It is almost as big of a discussion as that related to the meaning of what "is" is in recent political history.

[12] It should be noted that pursuant to MCL 211.78k(5)(f)(i) recording of the notice of forfeiture constitutes constructive notice of the hearing for parties inquiring an interest in the property. Parties such as Russian Ferro who acquired an interest in the property after the notice of foreclosure is recorded under section 78g of the Act, are governed by this provision.

Plaintiffs/Appellants are quick to insert the term "actual notice" as though it appeared in that form in the statute. (for example, see Appellants brief pps 6,7,11) However, MCL 211.78l, in relevant part, provides as follows:

> "who claims that he or she did not receive any notice required under this act"

Like the word "any", Black's Law Dictionary, 5th edition (1979), clearly define the term "notice" and states that the word "notice" encompasses many different types of notice. The definition states:

> "Information; the result of observation, whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge. Intelligence by whatever means communicated.
>
> ***
>
> Notice is knowledge of facts which would naturally lead an honest and prudent person to make inquiry, and does not necessarily mean knowledge of all of the facts.
>
> ***
>
> A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it. Restatement, Second, Agency §9. Notice may be either (1) statutory, *i.e.*, made so by legislative enactment; (2) actual, which brings the knowledge of a fact directly home to the party; or (3) constructive. Constructive notice may be subdivided into: *(a)* Where there exists actual notice of matter, to which equity has added constructive notice of facts, which an inquiry after such matter would have elicited; and *(b)* where there has been a designated abstinence from inquiry for the very purpose of escaping notice." [citations omitted] [emphasis added]
>
> ***

It is clear that the word "notice", as used in MCL 211.78l, includes both actual notice and constructive notice. This reading of MCL 211.78l is buttressed by the fact that as specifically set forth in MCL 211.78k(5)(f)(i), when identifying the findings regarding notice for the judgment, that:

> "The person had constructive notice of the hearing under this section by acquiring an interest in the property after the date the notice of forfeiture is recorded under section 78g."

As a result, the notice that is discussed in the Act and the notice required under the Act, include constructive notice as one of the acceptable ways of providing the notice required under the Act. Had the legislature wished to exclude constructive notice, or treat it differently from other forms of notice in MCL 211.78l, it certainly knew how to refer to it by name.

In addition, the word "received" has the following common meaning: "To get or be given (something)". See: Merriam-Webster Lerners Dictionary (online). One of the synonyms for received is "be given". When read with this definition and using the synonym, the provisions of MCL 211.78l now make sense and are consistent with the remaining provisions of the Act. If the portion of MCL 211.78l(1) being discussed were read using the synonym, it would read as follows:

> "who claims that he or she was not given any notice required under this act."
> [changing only the word did not "receive" to "was not given"]

The entire Act, including MCL 211.78i and MCL 211.78k is focused on the Treasurer's obligations to give the notice and not as Plaintiffs/Appellants would argue on "actual" receipt by Plaintiffs/Appellants. This is consistent with the requirements of MCL 211.78(2) which indicates it was the intention of the Legislature not to provide any recovery or any cause of action beyond what is required by due process of law. Due process of law and the Act, both require that notice be given, not necessarily that it be received.

c. The GPTA defines the right to notice for parties and as a result, what constitutes "any notice required under this Act" and what unrecorded interests are entitled to notice.

As discussed in *Sidun v Wayne Co Treasurer*, in order to identify all interest-holders in the property under MCL 211.78i(1), the county treasurer was required to consult the deed to the property. 481 Mich 503, 513; 751 NW2d 453 (2008). In addition, under MCL 211.78i(6), the owner of an interest in the Subject Property is entitled to notice of the foreclosure hearing and

the show-cause hearings only if his or her interest is identifiable by reference to any of the sources listed in the statute before the date that the county treasurer records the certificate of forfeiture. MCL 211.78i(6) states:

> (6) The owner of a property interest is entitled to notice under this section of the show cause hearing under section 78j and the foreclosure hearing under section 78k if that owner's interest was identifiable by reference to any of the following sources before the date that the county treasurer records the certificate required under section 78g(2):
>
> (a) Land title records in the office of the county register of deeds.
>
> (b) Tax records in the office of the county treasurer.
>
> (c) Tax records in the office of the local assessor.
>
> (d) Tax records in the office of the local treasurer.

These affirmative steps must be taken in order to ensure that even certain unrecorded interests that the county or local officials are aware of will still receive notice. However, that does not mean that holding an unrecorded interest entitles you to this notice as the Plaintiff/Appellants argue. That unrecorded interest must still be made known to the officials charged giving the notice by being disclosed in the records identified in MCL 211.78i(6).

The statute makes it clear that any property interests that can be found in the land title records or tax records of those county and local offices will be entitled to notice. Plaintiff/Appellants would not have even had a recorded interest to be entitled to notice. They could have had an unrecorded mortgage or be purchasing on an unrecorded land contract so long as they disclosed this interest and addresses so that it was found within those files. All other parties that held interest and were in those files were contacted, and Plaintiff/Appellants would have been no different had they had actually disclosed their interest by the Title Search Record Date.

Were an entity to have an unrecorded mortgage on a property it could record the mortgage with the county register of deeds or advise the county treasurer (or even their local treasurer or assessor) of their interest on or before the record date, and be entitled to notice under the Act. Under the plain language of MCL 211.78i(6), this would be enough to entitle them to notice. The Plaintiff/Appellants redefine what is required under the Act and hope the Court will require county treasurers to somehow seek out unrecorded interests and conduct daily title searches up until the date of the hearing in the hope that they might find an additional name and address to notice. There is no reasonable manner in which such a task could be undertaken by the local governments. Putting the onus on the county treasurers to find secret interests and secret addresses is to place too great a burden on them and not one required by the Act itself.

Despite the arguments to the contrary by Plaintiff/Appellants, some affirmative steps must be taken on their own behalf to at least let the treasurer know by the recorded date, of their secret interest and address[13]. To be compliant with MCL 211.78i(6) and thus have ensured that there would be notice to their preferred point of contact, Plaintiff/Appellants simply had to write a letter to their local assessor informing them of an unrecorded interest and asking to be informed of any potential foreclosure sale that could happen. Even if they did not believe it was likely to occur, absent such information, the County Treasurer has no way of finding their unrecorded and undisclosed interests and addresses.

[13] After the record date, any title search by the holder of the unrecorded interest would disclose the certificate of forfeiture which would have been previously recorded.

d. The Courts have interpreted "sufficiency" in a manner that Appellee Cass County has clearly met.

The Michigan Supreme 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 our Supreme Court, (see *Sidun v Wayne County Treasurer*, 481 Mich 503 (2008); *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 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*, 339 US 306 (1958) which noted that notices must be such that they are reasonably calculated to appraise a Plaintiff of the hearings".[14]

As outlined above, it is the Tax Foreclosure Statute itself which establishes the notices that are required under the Act and what the Treasurer must do to satisfy the requirements of the Act relative to notice. The Act provides for certain searches, notices and postings, as well as publication, with the information searches set forth in the statute (MCL 211.78i(6)). These

[14] It is interesting to note that in *Republic Bank v Genesee Co Treasurer*, *supra*, the Michigan Supreme Court indicates 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 Republic Bank who wished the notice be sent to a different office. (See also: *First Nat'l Bank of Chicago v Dept of Treasury*, 485 Mich 980 (2009) for the same result).

searches are 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. (See MCL 211.78i(2) [emphasis added].

The case law and the statute itself are very clear. There are certain things which must be done by the Treasurer to satisfy the Tax Foreclosure Act regarding notice required under the Act. Of course, Constitutional due process guarantees may require that additional steps be taken to attempt to notify a property owner that they are in danger of losing their property[15]. In addition, even if the Treasurer were to miss one of the many steps provided for by the Tax Foreclosure Act, it could still meet both statutory and due process muster. *Republic Bank v Genesee Co Treasurer, supra;* MCL 211.78(2). *However*, 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. Such a standard is an impossibility given a taxpayer's right to refuse or leave unclaimed the certified mail notices. "Received", as used in MCL 211.78l must necessarily mean that the taxpayer was "given" the notice required by and in the manner required by the Act.

e. Mr. Antipov received notice as shown by the record and his own lack of any credible evidence to the contrary.

Crooked's argument on whether it received adequate notice under the Tax Foreclosure Act or Constitutional due process seems to begin and end with Mr. Antipov's testimony that he did not receive any notice of tax foreclosure proceedings. As discussed above, Crooked's position is flawed as a matter of law to the extent it argues "proving" (presumably only through

[15] See *Jones v Flowers*, 547 US 220, 234-236 (2006) and *Siden, supra*.

Mr. Antipov's own self-serving testimony) Crooked did not receive "actual" notice is sufficient to demonstrate it did not receive the notice that is required under the Tax Foreclosure Act and our Constitution.

The Treasurer was able to show that she gave the notices required by statute (see App 019b-0117b; *J-1* to *J-20*). It was Crooked's burden to demonstrate it was not given "any notice required under the Act" and, as a result, was denied due process of law[16]. Understanding that if the notice required by due process is given, then actual receipt is not required under the law (see: *Dow v Michigan, supra*). In this case, Crooked completely failed to even attempt to satisfy its burden. The testimony and evidence which was presented to the Trial Court in fact, demonstrated that adequate notice had been given (see: App 019b-0117b; *J-1* through *J-20*). This evidence was not rebutted in any meaningful way by either of the Plaintiffs/Appellants. Pursuant to the unopposed motion of the Appellee, the joint exhibits of the parties, App 019b-0117b; *J-1* through *J-20* were admitted into evidence at the commencement of trial in this matter. As can be seen from the following paragraphs, these exhibits along with the testimony of Mr. Spaulding and Ms. Shannon Jackson, uncontrovertibly demonstrates several important facts.

The Treasurer, through her authorized representative Title Check, conducted a search of the records of the County Register of Deeds (App 0028b**;** *J-3*) and the records of the Treasurer, the local Assessor and the local Treasurer were searched, in order to determine owners of a property interest entitled to notice under the Act (MCL 211.78c(1) and (6)). Appellants presented no testimony or evidence that the local title search or record search was not done or that they contained any address for Crooked other than that used by the County Treasurer.

[16] 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.

Title Check sent the statutorily required (see MCL 211.78f(1)) Notice of Forfeiture by certified mail with regard to the 2011 real property taxes related to the Subject Property to those persons entitled to notice at the addresses contained in the records required to be searched (see: MCL 211.78i(6) on or about January 14, 2013. (App 0040b; *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 Crooked on the Deed and in the Real Estate Agreement was in fact located in Oak Brook, Illinois, and not in Chicago, Illinois, but that because the zip code 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 went unclaimed, it was returned to Title Check on February 15, 2013 as "unclaimed". Mr. Spaulding testified Title Check also undertook a number of actions and sent multiple additional notices in an effort to notify Crooked that it was in danger of losing the Subject Property due to delinquent property taxes from 2011, and corrected their information so that all future notices reflected the city in Crooked's address as Oak Brook and not Chicago. (App 0207b, 0232b, 0244b; 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. *(*App 0045b; *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. (App 0054b; *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. (App 0058b; *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. (App 0062b; *J-9*). On December 20, 2013, a notice of the Show Cause Hearing and Judicial Foreclosure Hearing (see MCL 211.78i(2)) was sent by Title Check via certified mail to the Oak Brook, Illinois address of Crooked. (App 0066b; *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. *(*App 0077b; *J-11).*

The testimony of Mr. Spaulding and Title Check employee Shannon Jackson was that to the extent certified mail was not was not signed for, the notices were returned as "refused" or "unclaimed". All of the first class mail notices were delivered and not returned. Both of these witnesses testified they reasonably believed the 36 Bradford Lane address to be a good address for Crooked, one reasonably calculated to give notice to Crooked. 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)[17]. (App 0081b; *J-12*)

The Appellants presented no credible testimony or evidence which demonstrated the Bradford Lane address utilized for notice purposes was not notice reasonably calculated to inform Crooked 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 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 Crooked had wanted to attack the veracity of admitted Exhibit (App 0058b**;** *J-8*) showing Ms. Makay had

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

posted the Subject Property (and a picture of the posting), it could have called her to testify and impeach the statements in the posting form[18]. Likewise it 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, Crooked either completely failed to challenge App 019b-0117b; *J-1 through J-20*, or failed miserably in its 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 (though the Treasurer would assert that the admitted exhibits in this matter and Mr. Spaulding's testimony proved that due process notice was given). Mr. Antipov's own testimony and his actions toward other witnesses, particularly Mr. Frye, also show his disdain for the process and the un-credible nature of his claims.

II. THE STATUTE'S INTENT IS FOR CONSTRUCTIVE NOTICE TO BE EQUIVALENT TO ACTUAL NOTICE.

a. Michigan wanted to limit the notice owed to parties to mirror that owed under a Due Process Analysis.

"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. MCL 211.78l and MCL 211.78(2) must be read together in order to give them their full meaning. 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

[18] Ms. Makay was present at trial and could have been called by Plaintiffs/Appellants as part of their case in chief. The Treasurer was also present.

the words are used. *Id.* at 649-650. It is easily seen that the statements made in MCL 211.78l and 211.78(2) limit the claims that can be made by 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 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 Mich 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.

The Treasurer must take certain actions to satisfy the Tax Foreclosure Act regarding notice, particularly where Constitutional due process guarantees may require that additional steps be taken to attempt to notify a property owner that they are in danger of losing their property. These steps could include sending a notice by ordinary mail, which was done in this case. See: *Jones v Flowers, supra*. Additionally, 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). From the facts that have been entered into the record repeatedly throughout this process, the Treasurer here meets the requirements of both state and federally mandated due process.

MCL 211.78l does not use the term "actual" notice anywhere within its language. Instead, the statute uses the term "any notice required under the Act". As stated previously in section I.b. of this brief, the term "notice" includes constructive and not just actual notice as claimed by Plaintiffs/Appellants. "[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). Interpreting MCL 211.78l to require actual notice would render the Legislature's choice of the word "any" nugatory and would add an additional burden into the statute that was not intended to be there. "Constructive notice" is defined as notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 654; 822 NW2d 190 (2012) citing *Converse v Blumrich*, 14 Mich 109, 120 (1866). Thus, in addition to being within the definition of "notice", "constructive notice" is a legally accepted form of notice and is a proper form of "any notice" under MCL 211.78l.

b. This Court has said that adequacy of notice is governed by Due Process.

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). 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[19]. *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).

Under that logic, 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). This notice is satisfied by "constructive notice" which both complies with the statutory requirements and due process under both the U.S. and Michigan Constitutions.

If a party received notice constructively, as it "is notice that is imputed to a person concerning all matters properly of record, whether there is actual knowledge of such matters of not." *Richards v Tibaldi*, 272 Mich App 522, 540; 726 NW2d 770 (2006); citing 1 Cameron, Michigan Real Property Law (3d ed.), § 11.23, p. 397. Even without "actual notice", "constructive notice" comports with Due Process of the same efficacy as "actual notice".

III. PLAINTIFF/APPELLANTS RECEIVED ALL NOTICE THAT WAS REQUIRED UNDER MICHIGAN AND FEDERAL LAW AND THEIR UNRECORDED INTEREST ONLY ENTITLES THEM TO NOTICE IF IT HAS BEEN BROUGHT TO THE ATTENTION OF THE COUNTY OR LOCAL TREASURERS OR ASSESSOR.

Under MCL 211.78i(6), the owner is entitled to notice of the foreclosure hearing and the show-cause hearings only if his interest as identifiable by reference to any of the sources listed in the statute before the date that the county treasurer records the certificate of forfeiture. The state "has no proper interest in taking a person's property for nonpayment of taxes without proper

[19] 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.

notice and opportunity for a hearing at which the person can contest the state's right to foreclose and cure any default determined." *Dow v Michigan*, 396 Mich 192, 210; 240 NW2d 450 (1976) (applying *Mullane v Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652). Due process, is a baseline regarding adequate notice to owners of soon-to-be foreclosed property. But here, the Treasurer exceeded this baseline and the notice required to be given by statute by sending additional notices not required by statute.

This Court has previously made clear, that "[d]ue process does not require that a property owner receive actual notice before the government may take his property." *Wayne Co Treasurer v Perfecting Church (In re Treasurer of Wayne Foreclosure)*, 478 Mich 1, 9; 732 NW2d 458 (2007) citing *Jones v Flowers*, 547 US 220, 226; 126 S Ct 1708, 1713-1714 (2006). The County Treasurer not only did what was required under state law, but made additional regular mail attempts.

The Plaintiff/Appellants failed to take any steps to provide any alternate addresses or in the case of Russian Ferro, even information on their interest to the Treasurer so that they might receive notice on their interests, yet still now seek damages for their own failures. There has been nothing that would have precluded Plaintiff/Appellants from having their address in the assessor's files or those of the local or county treasurer. Treasurers are not clairvoyant and without the information being in one of the search locations, have no way of knowing about unrecorded interests or changes in addresses.

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

damages and value must relate to the value as of the date of entry of the Judgment of Foreclosure minus the amount of any taxes owed as of that date. 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/Appellants 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 market value of the Subject Property or 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 as of the date that the foreclosure judgment was entered.

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 of the Subject Property and the amounts spent on construction of a residence at the Subject Property. There was also testimony as to 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 and that the notice of forfeiture, given well before the foreclosure judgment was entered, shows the amount of taxes owed on the foreclosure date. These claims are 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 and there was no evidence of damages presented.

Both Mr. Antipov and Mr. Anderson agree that the mortgage on the Subject Property had nothing to do with the purchase price[20] of the Subject Property, but instead the loan funds from one Appellant to the other were used to purchase a completely different property. (App 0334b; 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. (App 0276b, 0331b; 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 fair 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. 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 valuation expert was that the fair market value of the Subject Property was substantially less than the Plaintiffs/Appellants now claim. (App 0117b, unadmitted Exhibit P-43) (TR 173:12-20)[21].

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

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

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

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 strictly a condemnation case, but a statutory valuation requiring valuing the property on a specific date. 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 if the testimony constituted a fair market value as of some indeterminate date, there is no testimony that it was 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 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, let alone the amount of damages after deduction of taxes owed as of the foreclosure date, 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, Appellee, Treasurer of the County of Cass, respectfully requests that this Honorable Court deny the Application for Leave to Appeal and grant her such other and further relief, including costs and attorney's fees, as may be just and proper.

Respectfully submitted,

KREIS, ENDERLE,
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/S/ *Thomas G. King*_____

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