

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0746

DAWN COLETTE BLAND and
AUTUMN NICOLE BLAND, wife and
infant daughter of Douglas Wayne Bland;
TROOPER ROBERT JOSEPH ELSWICK;
TROOPER MICHAEL DAVID LYNCH;
TROOPER TIMOTHY LANE BRAGG;
TROOPER CHRISTOPHER LEE CASTO;
TROOPER SHAWN MICHAEL COLEMAN;
TROOPER JEFFREY LEALTON COOPER;
TROOPER BRAD LEE MANKINS;
TROOPER CHRISTOPHER ADAM PARSONS;
TROOPER ROGER DALE BOONE;
TROOPER STEVEN P. OWENS;
and TROOPER ADAM WILSON SCOTT,
and all others similarly situated,

Plaintiffs below, Petitioners,

v.

(Civil Action No. 07-C-02)
(Kanawha County Circuit Court)

STATE OF WEST VIRGINIA;
WEST VIRGINIA STATE POLICE
RETIREMENT SYSTEM; WEST VIRGINIA
CONSOLIDATED PUBLIC RETIREMENT
BOARD, a West Virginia state agency and
public corporate body; WEST VIRGINIA
PUBLIC EMPLOYEES RETIREMENT SYSTEM,
a West Virginia state agency and public
corporate body; TERASA L. MILLER, Acting
Executive Director of West Virginia Consolidated Public
Retirement Board; and WEST VIRGINIA STATE POLICE,
a West Virginia state agency and public corporate body,

Defendants below, Respondents.

PETITIONERS' REPLY BRIEF

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I. ASSIGNMENTS OF ERROR

- A. PETITIONERS' EXHAUSTION OF THEIR ADMINISTRATIVE REMEDIES BEFORE THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD IS NOT RES JUDICATA OR COLLATERAL ESTOPPEL AND DOES NOT BAR THEIR CIVIL ACTION AGAINST THE CPRB AND THE DEFENDANTS FOR DAMAGES AND EQUITABLE RELIEF WHERE IN THE ADMINISTRATIVE PROCEEDING THE CPRB CLAIMED AND IT HAS BEEN HELD THAT IT DID NOT HAVE THE AUTHORITY TO GRANT THE RELIEF REQUESTED OR THE RESOURCES TO ADJUDICATE THE ISSUE PRESENTED.**

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- C. THE TRIAL COURT ERRED IN GRANTING THE MOTIONS TO DISMISS OF THE STATE OF WEST VIRGINIA, WEST VIRGINIA STATE POLICE RETIREMENT SYSTEM AND WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT SYSTEM BECAUSE THEY ARE NECESSARY PARTIES AS SET FORTH IN PETITIONERS' COMPLAINT.**

II. STATEMENT OF THE CASE

1. STATEMENT OF FACTS

The CPRB defendants admit that petitioners' "Procedural History" is "substantially accurate." They take issue with the following statements or arguments that petitioners contended in their brief:

- (a) That the CPRB's November 13, 2002 hearing and vote was a final "decision."
- (b) That the only allegation in petitioners' complaint was that respondent Terasa Miller did not implement the November 13, 2002 decision, which has already been decided by the Circuit Court of Kanawha County. (A.R. 288-292.)
- (c) That the circuit court found that:

- (1) None of petitioners were employed by the WVSP until six months after the effective date of W. Va. Code § 15-2A-3(a).
- (2) Petitioners were provided with enrollment forms providing for Plan B benefits.
- (3) Petitioners are “therefore” charged with knowledge of the law as set forth in W. Va. Code § 15-2A-3(a).
- (4) The CPRB did not make false statements or disseminate false or misleading statements, and petitioners had “failed to show” that there was any misrepresentation on the part of the Board that “induced” them to enroll in Plan B.

Petitioners will address each of these issues in turn:

(a) That the CPRB’s November 13, 2002 hearing and vote was a final “decision.”

The CPRB’s Rule § 162-2-7 provides that the hearing officer shall make a final recommendation to the CPRB as to his findings. Thereafter, “the hearing officer shall present his or her recommended decision to the Board at its next regularly scheduled meeting.” ... “The Board shall take action, in open session, on the recommendation of the hearing officer...” That is exactly what occurred on November 13, 2002. The CPRB heard from the hearing officer, considered the evidence, voted on the issue and decided for petitioners. The CPRB had done all it was to do on the issue. There was no appeal by either party. If it was not a final decision of the CPRB, then what was it? The CPRB later reconsidered the November 13, 2002 decision but that does not erase the decision it did make.

After 11 months of litigation before the administrative staff and hearing officer of the CPRB¹, the CPRB found for the petitioners. This was in a public hearing. After a full-blown public attack on the individual board members, the CPRB did reverse itself without notice or an opportunity for the grievants to appear or participate. This issue was discussed in Petitioners' Brief. (See Petitioners' Brief at pp. 2-7, 19-21 & 24-32.) The Circuit Court of Kanawha County did rule that the CPRB had the discretion to change its mind but the record was supposed to be made of the CPRB's decision.

The CPRB defendants claim that the CPRB's actions in taking up the grievance at a duly constituted and noticed hearing for the specific purpose of deciding the grievance on November 13, 2001, and voting on it and passing it by an 8-5 vote was not a "decision." It was all done in accordance with the CPRB's own rules of procedures, which then required the director of the CPRB to prepare an order and effectuate the order. The circuit court did rule that the CPRB could change its mind. But in determining collateral estoppel, the unorthodox interference and legislative influence over that decision was unfair and the procedure highlights the inequality between the procedures before the CPRB and the procedures before the circuit court.

In order to determine whether collateral estoppel and *res judicata* apply to an administrative decision, the trial court was required to determine the "quality or extensiveness" of the procedures followed in the two courts. Syl. Pt. 2, *State v. Miller*, 194 W.Va 3, 459 S.E.2d 114 (1995).

¹ The respondents, State of West Virginia, West Virginia State Police Retirement System, West Virginia Consolidated Public Retirement Board, West Virginia Public Employees Retirement System, and Terasa L. Miller, are hereinafter referred to generally as the CPRB defendants since there is a companion appeal concerning the West Virginia State Police ("WVSP").

(b) That the only allegation in petitioners' complaint was that respondent Terasa Miller did not implement the November 13, 2002 decision, which has already been decided by the Circuit Court of Kanawha County.

CPRB defendants also complain that there are no specific allegations in the complaint against Terasa Miller and claim that the only allegations are that she failed to implement the November 13, 2002 decision². (*See* Respondents' Brief at pp. 2-3.) The complaint alleges that Ms. Miller was the Executive Director of the CPRB pursuant to W. Va. Code § 5-10D-2(b), and, as such, she was the chief administrative officer. (Complaint, ¶ 36, A.R. 404.) Petitioners alleged that Ms. Miller was and is statutorily required to perform the duties imposed upon her by the "governing statutes" and "as directed by the West Virginia Consolidated Public Retirement Board" and that the duty was "mandatory." (*Id.*, A.R. 404.) Petitioners alleged that Ms. Miller was a public official who has a "non-discretionary, ministerial duty, ... to implement the Board's directives." (*Id.*, ¶ 89, A.R. 415.) Petitioners alleged that the CPRB had and has the responsibility and duty to inform employees of their retirement benefits and to review and advise petitioners of the benefits to which they were entitled and, further, that the West Virginia State Police were entitled to rely upon the same. (*Id.*, A.R. 405.) Then, petitioners alleged:

None of defendants or their predecessors, agents, servants or employees advised plaintiffs that their benefits would be Plan B benefits until several years had expired and after plaintiffs had committed to join and serve as employees of the State Police.

(*Id.*, ¶ 49, A.R. 406.) The Executive Director of the CPRB had the responsibility to execute the administration of the CPRB's duties under published statutes. Ms. Miller admitted that they did not advise the petitioners of Plan B. (*See* Petitioners' Brief at pp. 15-16.)

² The CPRB defendants assert that the November 13, 2002 decision of the CPRB is irrelevant to any issue in the case because the circuit court ruled that the decision did not constitute a "final decision." (Respondents' Brief at p. 2.)

(c) That the circuit court found that:

- (1) None of petitioners were employed by the WVSP until six months after the effective date of W. Va. Code § 15-2A-3(a).**
- (2) Petitioners were provided with enrollment forms providing for Plan B benefits.**
- (3) Petitioners are “therefore” charged with knowledge of the law as set fort in W. Va. Code § 15-2A-3(a).**
- (4) The CPRB did not make false statements or disseminate false or misleading statements and petitioners had “failed to show that there was any misrepresentation” on the part of the Board that “induced” them to enroll in Plan B.**

On page 4 of their brief, the CPRB defendants refer this Court to paragraphs 8 and 12 of the November 20, 2008 order, which essentially found that the fault, if any, of the petitioners’ plight was their own because “Petitioners are therefore charged with the knowledge of the law as it [sic] exists in the statute.” (Order dated November 20, 2008, ¶ 8, A.R. 866.) Then, likely because petitioners had already filed their complaint for damages, the order stated, “The Board cannot now be estopped from carrying out the clear mandates of WV Code §15-2A-1, et seq., despite any potential misrepresentations by state police officials.” (*Id.*) And, despite the issue was never tried or relevant to the administrative proceeding, the order added: “Petitioners have failed to show that there was any misrepresentation on the part of the Board that induced them to enroll in Plan B.” (*Id.*, ¶ 12, A.R. 867.)

How with a straight face can respondents argue that petitioners are charged “with the knowledge of the law” when petitioners’ employer, the WVSP, was totally unaware of Plan B

and recruited and hired them under Plan A. And even more outrageous, when the CPRB and its administrative staff were clearly charged with the knowledge of Plan B, they did nothing to inform the WVSP or the employees of the retirement plan until after 2000, six years after Plan B was passed. Ms. Miller admitted she was not aware of the issue with the troopers herself until 2001. Nevertheless, she admitted that agencies and the WVSP are entitled to rely on the accuracy of the CPRB in advising the plan benefits for them and their employees. This issue was discussed in Petitioners' Brief at pp. 15-16.

It must be kept in mind that proceedings before the CPRB were based on and litigated as a grievance requesting the CPRB to transfer petitioners to Plan A. On appeal, the primary issue was whether the CPRB had the authority or jurisdiction to transfer them into Plan A, regardless of anything the CPRB or WVSP or other agencies did to misrepresent the retirement plan. Of course, the circuit court and this Court refused to overrule either the factual or legal decision of the CPRB. But both specifically and implicitly the fact that the CPRB decided it did not have the authority or jurisdiction to transfer petitioners, the CPRB's decision finding itself innocent of any wrongdoing should not be a viable basis for dismissal of the petitioners' claims in this case based upon collateral estoppel and *res judicata*. On the other hand, the lack of quality and fairness in the CPRB's procedures and manner of dealing with the petitioners' grievances are very relevant in determining whether petitioners are precluded from even addressing this issue before the Circuit Court of Kanawha County.

III. ARGUMENT

1. ASSIGNMENTS OF ERROR

- A. **PETITIONERS' EXHAUSTION OF THEIR ADMINISTRATIVE REMEDIES BEFORE THE WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD IS NOT RES JUDICATA OR COLLATERAL ESTOPPEL AND DOES NOT BAR THEIR CIVIL ACTION AGAINST THE CPRB AND THE DEFENDANTS FOR DAMAGES AND EQUITABLE RELIEF WHERE IN THE ADMINISTRATIVE PROCEEDING THE CPRB CLAIMED AND IT HAS BEEN HELD THAT IT DID NOT HAVE THE AUTHORITY TO GRANT THE RELIEF REQUESTED OR THE RESOURCES TO ADJUDICATE THE ISSUE PRESENTED.**

Respondents, State of West Virginia, West Virginia State Police Retirement System, West Virginia Consolidated Public Retirement Board ("CPRB"), West Virginia Public Employees Retirement System, and Terasa L. Miller (hereinafter referred to generally as "CPRB defendants"), seem to have forgotten that the trial court dismissed petitioners' complaint based on West Virginia Rule of Civil Procedure 12(b)(6) motions. Those motions were based exclusively upon collateral estoppel, except motions filed out of time which were based on collateral estoppel and *res judicata*. These respondents also, out of time, claimed that there were no claims stated or that could exist against the State of West Virginia, West Virginia State Police Retirement System, and West Virginia Public Employees Retirement System.

The CPRB defendants argue and believe that the CPRB is the real party in interest and the other defendants are unnecessary or no claim is stated or could be stated against them by these petitioners. Petitioners will address the other defendants later, but for the sake of argument will address the CPRB defendants' arguments, assuming it is the real party in interest in this case.³

³ The West Virginia State Police (hereinafter "WVSP") is subject to a separate appeal. No. 11-0747.

Petitioners appeal is based upon the trial court's error in granting the CPRB's Rule 12(b)(6) motion to dismiss the CPRB and its Executive Director, Terasa Miller, on the bases of collateral estoppel and *res judicata*. To the extent that the CPRB or Executive Director Miller are agents of the State of West Virginia, then the collateral estoppel and *res judicata* argument would also apply to the State as well. The trial court dismissed the remaining CPRB defendants because they were not necessary parties.

Petitioners complain that the CPRB claimed in all prior proceedings that it had no jurisdiction or authority to place petitioners in Plan A, and, if it had no jurisdiction to provide the relief requested in the grievance, then the other findings cannot have any issue preclusive effect upon petitioners' claims in this case. The CPRB defendants do not address this issue in their response.

CPRB defendants argue that the proceedings before it are "substantially similar to those used in a court," the "quality or extensiveness of the procedures" in its grievance proceedings are essentially the same, that its procedures are not **tailored** to the prompt, inexpensive determination and, therefore, petitioners "had a full and fair opportunity to litigate" the matters in dispute before the CPRB concerning the CPRB's own alleged acts and omissions. However, the CPRB argued to this Court previously that its procedures were not adequate to address the issues raised in the grievance and simply that the CPRB did not have the statutory authority to place petitioners in Plan A. Syl. Pt. 2, *State v. Miller*, 194 W.Va 3, 459 S.E.2d 114 (1995).

In petitioners brief, petitioners detailed the lack of discovery procedures, the heavy weight given the appointed hearing officer employed and paid by the CPRB to hear and decide this case, and the fact that the CPRB is required to agree with the hearing officer unless it finds the hearing officer has abused his discretion. On appeal, the CPRB's decision was likewise only

reversible if they are clearly wrong. The Rules of Evidence do not apply to the CPRB. (*See* Petitioners' Brief at pp. 26-27.)

The CPRB does not provide this Court with any substantive basis in opposition to petitioners' points. It claims that its procedures were neither prompt nor inexpensive. But that is not the test. The test, as laid down in the above case law, is that where the procedures are "tailored" to being prompt and inexpensive then the proceedings should not impose issue preclusion.

The CPRB argues that petitioners do not understand the "identity" of the cause of action requirement as identified in *Beahm v. 7-Eleven, Inc.*, 223 W.Va. 269, 672 S.E.2d 598 (2008). In essence, respondents argue that so long as facts support any cause of action before any agency or court the litigant is precluded from bringing any other cause of action. This Court, in *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997), explained the concept of the same cause of action. In that case, the Court found that while two lawsuits dealt with the same underlying debt, since the plaintiff had alleged fraud the claims were clearly different and distinct. While there may be facts that overlap under the grievance proceeding, obviously a negligence or wrongful act cause of action requires additional facts that are not necessary in order to prove a right to relief in the grievance proceeding. The question too is whether petitioners could really raise and litigate any of these issues where the CPRB claimed it had no jurisdiction to provide petitioners with any relief whatsoever. Further, in *Blake, supra*, 201 W.Va. at 478, 498 S.E.2d at 50, this Court stated that "even though the requirements of *res judicata* may be satisfied, we do 'not rigidly enforce [this doctrine] where to do so would plainly defeat the ends of justice.'"

In addition, all defendants in the case at bar contended petitioners had to exhaust administrative remedies before bringing any civil action. In fact, they filed motions to dismiss this action on that basis. The trial court granted that relief until the grievance was appealed and finalized before petitioners could even proceed with this action. How then could petitioners possibly have litigated or brought this case in conjunction with the grievance?

CPRB defendants argue that the dismissal of Terasa Miller is justified because the only allegation in plaintiffs' complaint was that she failed to reduce the CPRB's decision to a written order. As set out in "Statement of Facts," above, the Executive Director of the CPRB has statutory duties and responsibilities, including the admitted duty to inform the agencies and the employees of any legislative changes in retirement plans and to routinely advise them of benefits due them under their employment. The Executive Director has all executive power of the CPRB. While the CPRB itself is a necessary party, the Executive Director is also a necessary party. Therefore, the allegations against her or her predecessors or successors have not been litigated with respect to damages or equitable relief. She is a necessary party to provide the relief requested.

The CPRB defendants admit that in the administrative proceedings, "all potential factual disputes were resolved in Petitioners' favor and they have no basis for complaint on this point as the CPRB's procedure was to their advantage." (Respondents' Brief at p. 14.) But, as petitioners pointed out in their brief, the CPRB claimed it had no jurisdiction to do anything to change petitioners to Plan A; therefore, all the other findings and holdings, including such things as "petitioners were charged with knowledge," that there was "no fault by the CPRB," etc., were transparent attempts to immunize the CPRB from this litigation. For example, why conduct over

100 hearings to decide that there was nothing the CPRB could do when it had already decided it both could and could not fix the problem?

Respondents then argue that the circuit court could have reversed the CPRB's order if it found it "clearly wrong" or "arbitrary, capricious, or characterized by an abuse of discretion." (Respondents' Brief at 15.) For example, as soon as the circuit court reviewed the petitioners' appeal from the CPRB, the circuit court looked at the CPRB's position and crafted a certified question asking whether the CPRB had jurisdiction to change petitioners' retirement. That was the circuit court's primary finding and the CPRB argued that position from the time it held its second hearing on January 22, 2003, reversing its November 13, 2002 decision, up to and including its argument to the West Virginia Supreme Court. This issue was discussed in Petitioners' Brief at pp. 6, 8, 18 & 30-32. The CPRB defendants argue that the circuit court could have reversed the CPRB's order based upon "virtually any of the Petitioners' arguments had the court deemed them meritorious." However, if the CPRB did not have jurisdiction as the circuit court found, how could it then order the CPRB to enroll petitioners into Plan A? (*See* Respondents' Brief at pp. 15-16.) The CPRB argues that petitioners requested the CPRB to grant them relief based upon many grounds, some of which are the same basis or similar basis as brought in the subject litigation. (*Id.* at pp. 16-17.) However, that alone does not invoke a collateral estoppel or *res judicata* bar to litigate their claims in the circuit court, particularly where the administrative body's procedures are inadequate.

The CPRB defendants claim that the evidentiary hearings employed by the CPRB "[were] not, in fact, prompt and inexpensive." (*Id.* at p. 18.) Therefore, the CPRB argues that the proceedings were "not tailored to the prompt, inexpensive determination of small claims." (*Id.*) Petitioners agree that they were not prompt; it took years trying to exhaust their

administrative remedies. Neither were they inexpensive. But the question is whether they were “tailored” to be. (*See* Petitioners’ Brief at pp. 18 & 23-24.) Petitioners have discussed in detail the inadequacy of the CPRB’s procedures to address petitioners’ claims as raised and the fact that the CPRB actually argued before the circuit court and supreme court that they were inadequate in order to deflect the Court from considering them. (*Id.* at p. 27.)

The CPRB claims there is no statute or case law that would seek to create an actionable duty on the CPRB to inform petitioners what their benefits were. This is not true. The CPRB is designated with *all* the responsibility to administer *all* aspects of the retirement plans, including the preparation of information for new employees, review of the statutes and new legislation, providing and keeping the various agencies updated on legislative changes, and also routinely advising employees of their status and benefits.⁴ It was admitted by the CPRB that it did not do these acts. (*Id.* at pp. 13-16.) The CPRB points to the WVSP as the agency that failed to inform the recruits and new employees, but the CPRB also admitted that the WVSP and the troopers were entitled to rely upon the CPRB for the accuracy of that information. Here, the WVSP was not informed and the recruits and troopers were not informed. (*Id.* at pp. 15-16.) The respondents argue that on their Rule 12(b)(6) motions to dismiss, regardless of whether, “for the sake of argument, the elements of such a duty would have to be established in detail in order to determine causation under the actual circumstances at issue...” (Respondents’ Brief at p. 21.) Of course, the CPRB’s duty was established by the West Virginia statute and by admissions of the parties and the inaccuracies as alleged in the complaint.

⁴ *See* W. Va. Code §§ 5-10D-1 *et seq.*, 15-2-26, 15-2A-3(c)&(d). Also, the CPRB admitted it had this responsibility. (*See* Respondents’ Brief at pp. 13-17.)

B. WHERE A PARTY HAS MADE KNOWN THAT THEY HAD NO NOTICE OF MOTION AND DEFENSES AND WHERE THEY WERE FILED OUT OF TIME WITHOUT LEAVE OF COURT, THE COURT SHOULD NOT PROCEED WITH DECIDING THE MOTIONS WITHOUT PROVIDING THE OBJECTING PARTY AN OPPORTUNITY TO RESPOND AND ARGUE IN RESPONSE.

CPRB defendants argue that petitioners had an obligation to make “a clear objection on the record, at the time of hearing.” (Respondents’ Brief at p. 22.) The petitioners would definitely have made an objection on the record in the absence of the obvious and clear agreement of the parties and the court not to proceed with the motions at issue. Petitioners have adequately addressed their objection to the CPRB renegeing on their agreement with respect to out-of-time motions to dismiss.

C. THE TRIAL COURT ERRED IN GRANTING THE MOTIONS TO DISMISS OF THE STATE OF WEST VIRGINIA, WEST VIRGINIA STATE POLICE RETIREMENT SYSTEM AND WEST VIRGINIA PUBLIC EMPLOYEES RETIREMENT SYSTEM BECAUSE THEY ARE NECESSARY PARTIES AS SET FORTH IN PETITIONERS’ COMPLAINT.

(1) State of West Virginia

The complaint alleges that the other respondents, including the CPRB and its Executive Director, are agents of the State of West Virginia. The State is the named insured on the State’s liability insurance policy. The respondents argue that it is not proper to name and prosecute a case against the State where the State’s agencies are the actors. However, in West Virginia, both agents and principles are liable for the acts of the agents.

(2) West Virginia State Police Retirement System and West Virginia Public Employees Retirement System

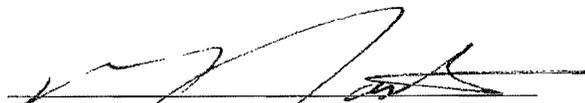
The reason that these defendants were joined in this action is because there was a transition from the West Virginia State Police Retirement System (SPRS) into the West Virginia Public Employees Retirement System (PERS), wherein the CPRB took over the administration of the WVSP's own retirement system. This system had been in existence for decades and was managed by the WVSP. It was admitted by the CPRB in this case that it was not adequately funded and the petitioners contend, pursuant to Syl. Pts. 5, 14 & 25, *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988) and Syl. Pt. 2, *State ex rel. v. Sims*, 204 W.Va. 442, 513 S.E.2d 669 (1998), that the CPRB, its Executive Director, should be required to bring an enforcement action as the State of West Virginia and the retirement plans should be required to fund the WVSP retirement system as contemplated by the above case. They are necessary parties for petitioners to be entitled to full relief.

IV. CONCLUSION

The CPRB defendants' motions should not have been dismissed and it was error for the circuit court to dismiss any of them. The order should be reversed and the case be remanded for further proceedings.

DAWN COLETTE BLAND and
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DOCKET NO. 11-0746

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Executive Director of West Virginia Consolidated Public
Retirement Board; and WEST VIRGINIA STATE POLICE,
a West Virginia state agency and public corporate body,

Defendants below, Respondents.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Plaintiffs below/Petitioners, do hereby certify that true
and accurate copies of the foregoing "Petitioners' Reply Brief" were served upon:

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in envelopes properly addressed, stamped and deposited in the regular course of the United States Mail this 5th day of October, 2011.



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