No. 93982-9

SUPREME COURT OF THE STATE OF WASHINGTON

Birney Dempcy and Marie Dempcy, husband and wife, and their marital community, Petitioners

v.

Chris Avenius and Nela Avenius, husband and wife, and their marital community, Respondents

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RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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1. Identity of Respondents

Chris Avenius and Nela Avenius, husband and wife, are the sole Respondents involved in this part of the case.

2. Issues Presented for Review

2.1 Should the Court of Appeals' Opinion dated September 26, 2016 and the Court of Appeals' Order Denying Motion for Leave to File Reply Brief and Denying Motion for Reconsideration November 21, 2016, be Considered by the Supreme Court? Answer - No.

2.2 Upon Denial of the Petition for Review, Should the Respondents Be Entitled to an Award of their Additional Attorney Fees? Answer - Yes.

3. Statement of the Case

3.1 Parties and Properties.

The Respondents Christopher and Nela Avenius reside at 425 94th Ave SE, Bellevue, WA 98004 ("Avenius Property"). CP 8. The Petitioners, Birney and Marie Dempcy reside at 429 94th Ave SE, Bellevue, WA 98004 ("Dempcy Property"). CP 8. The Avenius Property is immediately adjacent to and north of the Dempcy Property. CP 11, 17. Both the Avenius Property and the Dempcy Property are part of the Pickle Point Association, a private homeowners association. CP 121, 134-135.

There are a total of 4 properties that are part of the Pickle Point Association. CP 121, 134-135. Those 4 properties are owned by the Petitioners, the Respondents, Jack Shannon (CP 8) and Radek Zemel (CP 8). Mr. Shannon and Mr. Zemel were sued by the Petitioners but that part of the lawsuit is the subject of another unrelated appeal case (Case No. 73369-9-I). Mr. Shannon and Mr. Zemel were not parties in the trial below nor are they parties to this appeal and this Petition. The Pickle Point Association and its members and properties are governed by a set of recorded Declaration of Protective Covenants, Restrictions, Easements, and Agreements for Pickle Point Association recorded in 1990 under King County Recording No. 9006081651 ("Declarations"). CP 121-136.

3.2 Petitioners' Allegations.

The Petitioners alleged that the Respondents' violated Section 2.6 of the Declarations. CP 11-12. Section 2.6 of the Declarations prohibited fences, hedges and mass plantings between the Dempcy Property and the Avenius Property. CP 24, 122-123.

With respect to the alleged violations of Section 2.6 of the Declarations, the Petitioners raised four (4) separate and distinct issues or breaches of the Declarations: (1) and (2) An existing fence and hedge on the boundary between the Avenius Property and the Dempcy Property,

built by a prior owner of the Avenius Property (CP 25); (3) A trellis built by the Respondents on the Avenius Property and somewhat near the common boundary between the Avenius Property and the Dempcy Property (CP 26); and (4) 11 widely spaced trees planted by the Respondents near the common boundary between the Avenius Property and the Dempcy Property (CP 26, 42).

3.3 Trial Court Decision.

After a bench trial, Judge Chad Allred ruled in favor of the Petitioners regarding the existing fence and hedge (they were ordered to be removed because they were in violation of Section 2.6 of the Declarations) (CP 25-26, 55) but he ruled in favor of the Respondents on the trellis and 11 trees (they were allowed to remain in place because they were not in violation of Section 2.6 of the Declarations) (CP 26, 55). These substantive decisions by Judge Allred were not appealed by the Petitioners. Appellants' Brief at Page 1.

In the Order portion of his Memorandum Decision, Judge Allred ordered the fence and hedge to be removed (CP 26) but he also states that "[a]ll other relief requested in the trial before Judge Allred is denied with prejudice." CP 26. The relief denied by Judge Allred included the Petitioners' request to have the Respondents remove their

trellis and 11 trees. CP 24, 26. The Judgment entered on August 4, 2015 by Judge Allred states the same thing. The Respondents must remove their fence and hedge but the Petitioners' attempts to force the Respondents to remove their trellis and 11 trees were denied with prejudice. CP 55.

3.4 No Award of Attorney Fees.

Following the trial, the Petitioners made a motion for recovery of attorney fees. CP 74-83. Judge Allred ruled that because the Petitioners had prevailed on the fence and hedge but the Respondents had prevailed by successfully defending against the Petitioners' claims to remove the trellis and 11 trees, that neither side prevailed. CP 260. Because neither side prevailed, attorney fees were denied as to both parties. CP 260. It was only this attorney fee determination by Judge Allred that was appealed by the Petitioners. CP 262; Appellants' Brief at Pages 1, 6.

The Court of Appeals in its Opinion dated September 26, 2016 ("Opinion") affirmed the trial court's determination that neither side was entitled to an award of attorney fees. The Petitioners moved for reconsideration. The Court of Appeals denied the Petitioner's motion for

reconsideration by order dated November 21, 2016. This Petition for Review by the Petitioners followed.

4. Argument

The Petitioners claim that the Opinion should be reviewed by the Supreme Court because it is in conflict with decisions of the Supreme Court (RAP 13.4(1)) and because it is in conflict with published decisions of the Court of Appeals (RAP 13.4(2)). There are no such conflicts and therefore the Petition for Review should be denied.

4.1 Opinion Not In Conflict With Any Supreme Court Cases.

The Petitioner cites two (2) Supreme Court cases as being in conflict with the Opinion. Petition for Review at Pages 1-2, Footnote 1. The first, Guillen v. Contreras, 169 Wn.2d 769, 238 P.3d 1168 (2010), as amended (Dec. 21, 2010), is referenced only on Page 2, Footnote 2 of the Petition. The Petitioner merely cites the case in a footnote but makes no argument about it. Guillen arises specifically out of Washington's civil forfeiture law (RCW 69.50). It has nothing to do with the case before this Court. While there is a discussion about which party prevailed, the Supreme Court in Guillen only addressed the narrow issue of which party, the State or the individual, prevailed under the forfeiture statute.

> "' [T]his forfeiture statute recognizes the success of only one party—the claimant. What the seizing agency retains is not relevant. It will never be a substantially prevailing party or prevailing party under RCW 69.50.505(6).' Guillen, 147 Wash.App. at 338, 195 P.3d 90 (Schultheis, C.J., dissenting). Thus, he suggests, quantitative comparison is inappropriate as we are not balancing the comparative success of two parties with an equal statutory interest in attorney fees. We agree. This is an attorney fee provision designed to protect individuals against having their property wrongfully taken by the State."

Guillen v. Contreras, 169 Wn.2d at 776.

> "The legislature used two different phrases in the attorney fee provision to indicate who was entitled to attorney fees: one who "substantially prevails" against the State and one who is a "prevailing party" in a dispute with another person over the ownership of seized property. RCW 69.50.505(6). "[I]t is an 'elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.'" State v. Jackson, 137 Wash.2d 712, 724, 976 P.2d 1229 (1999) (quoting United Parcel Serv., Inc. v. Dep't of Revenue, 102 Wash.2d 355, 362, 687 P.2d 186 (1984)). Interpreting the two phrases to mean the same thing would undermine that principle."

Id. at 776–77. Because Guillen only deals with prevailing party status in a forfeiture action, the Opinion is not in conflict with Guillen.

The second Supreme Court case cited by the Petitioners is Singleton v. Frost, 108 Wn.2d 723, 742 P.2d 1224 (1987). It is cited only at Pages 2 and 18 of their Petition. The Petitioners cite to the Singleton case to support the proposition that an award of attorney fees is mandatory

under RCW 4.84.330. According to the Supreme Court holding in Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009) (discussed in Section 4.3 of this Answer), our case does not fall within RCW 4.84.330. The dispute in our case is which party prevailed. The Singleton case does not address that issue. In Singleton, the holder of a promissory note sued and won, yet the trial court did not award attorney fees to the holder in spite of a prevailing party attorney fee provision in the promissory note. Singleton v. Frost, 108 Wn.2d at 727. There was no dispute as to who was the prevailing party under the promissory note so this Court awarded attorney fees to the holder. The Opinion is clearly not in conflict with the holding in the Singleton case.

The Petitioners do cite to a third Supreme Court case in their Petition. It is the case of American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 797 P.2d 477 (1990). It is not listed by the Petitioners among the Supreme Court cases in conflict with the Opinion but it is the case upon which the trial judge based his decision and the Opinion followed the Supreme Court's holding in this case.[1]

[1] For clarity, Respondents note that in Footnote 15, the Petitioners claim that the case of JDFJ Corp. v. International Raceway, Inc., 97 Wn. App. 1, 970 P.2d 343 (1999), as amended on reconsideration in part (1999), is a Supreme Court case. It is not.

In American Nursery Products, the appellant (American Nursery) contracted with the respondent (Indian Wells) to provide tree nursery services for the respondent. The respondent was to provide apple trees to the appellant and the appellant was to grow them and ultimately deliver them to the respondent's orchard after they had matured. The contract contained an exclusionary clause that excluded consequential damages in the event of a breach. The appellant failed to deliver all of the contracted for trees and the respondent failed to pay the full amount due under the contract. Both sides filed claims against the other. The Washington Supreme Court held in favor of the respondent and awarded damages. However, the Supreme Court also found for the appellant that the exclusionary clause applied and therefore the respondent could not recover consequential damages. Both parties sought appellate attorney fees under RAP 18.1 as the prevailing party. The Supreme Court held:

> "However, because both parties have prevailed on major issues, neither qualifies as the prevailing party under the contract. See Sardam v. Morford, 51 Wash.App. 908, 756 P.2d 174 (1988). We decline to award attorney fees on appeal."

American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477, 487 (1990). See also, City of Lakewood v. Koenig, 160 Wn. App. 883, 896, 250 P.3d 113, 120 (2011).

Based on the foregoing, the Petitioners' argument that the Opinion is in conflict with any Supreme Court cases should be rejected.

4.2 Opinion Not In Conflict With Any Published Court of Appeals Cases.

The Petitioners claim that the Opinion is in conflict with Marassi v. Lau, 71 Wn. App. 912, 859 P.2d 605 (1993), abrogated on other grounds, Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009). Petitioners assert that Marassi holds that a defendant cannot be a prevailing party if he does not bring an affirmative claim against the plaintiff. Petition for Review at Page 1, Footnote 1. That is not the holding in Marassi. Marassi is a case in which the defendant (Dynasty) did not bring a claim against the plaintiff (Marassi). The Marassi court stated:

> "Applying the proportionality rule to the claims litigated at trial, the Marassis recovered on only two claims of seven presented, receiving a $15,000 judgment in their favor for damages to the north slope of their property and an order of specific performance valued at approximately $6,000. For those two claims, the Marassis are the prevailing parties and are entitled to attorney fees for those claims. Dynasty is the prevailing party for the five remaining claims and is entitled to receive reasonable attorney fees for its effort on those claims."

Marassi v. Lau, 71 Wn. App. at 920. Contrary to the Petitioners' claim, it is clear that the court in Marassi did hold that a defendant who did not bring a claim could be a prevailing party.

As for the applicability of the proportionality rule in Marassi, it should only come into play if the major issue analysis would lead to an unfair result such as in a case where a party receives a judgment on just a very few of many claims brought by the claimant.

> "The net affirmative judgment rule, however, may not lead to a fair or just result in situations where a party receives an affirmative judgment on only a few claims. Marassi, 71 Wash.App. at 916, 859 P.2d 605. In Marassi, the plaintiff prevailed on only two of the original 12 separate and distinct claims. Marassi, 71 Wash.App. at 916, 859 P.2d 605. The court, therefore, developed a proportionality approach for such situations."

Phillips Bldg. Co. v. An, 81 Wn. App. 696, 702, 915 P.2d 1146, 1149 (1996) (emphasis added). This of course is not one of those situations. Unlike in Marassi, here there were ultimately 4 issues before Judge Allred and the Petitioners prevailed on two (the fence and hedge) and the Respondents prevailed on two (trellis and 11 trees). CP 24, 259-260. The undisputed (and un-appealed) finding of Judge Allred was that all 4 of the foregoing issues were "major." CP 260. In our case, there is no

unfairness in adhering to the rule that when both sides prevail on major issues, that there is no prevailing party and thus no award of attorney fees.

The Petitioners claim that the Opinion is in conflict with Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn. App. 762, 677 P.2d 773 (1984). Petitioners claim that Silverdale holds that a defendant cannot be a prevailing party if it does not file a counterclaim. Petition for Review at Page 1, Footnote 1. In Silverdale, however, the defendant (Wick) filed a counterclaim for promissory estoppel. "L & N contends the trial court erred in concluding it is liable to Wick based on promissory estoppel. We disagree." Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn. App. at 771.

The Petitioners cite to Silverdale and Guillen as cases that state that a party can be a prevailing party even if that party did not receive all of the relief it requested. Petition for Review at Page 2, Footnote 2. It is unclear why those cases are cited and why this issue was raised by the Petitioners. The Respondents agree that it is possible for one to be a prevailing party even if it does not obtain all of the relief it requested. However, that is not at issue in this case.

The Petitioners also claim that Stott v. Cervantes, 23 Wn. App. 346, 595 P.2d 563 (1979), holds that a party can be a prevailing party even

though it did not recover all that they sought. However, that is not the holding in the Stott case.

> "The definition of who is a 'prevailing party' for an award of costs should be the same in determining the "prevailing party" for an award of attorney's fees. . . . Since the Stotts were the prevailing parties, which the trial court recognized for the purpose of recovering costs, they must also be considered the prevailing parties for the purpose of recovering attorney's fees."

Stott v. Cervantes, 23 Wn. App. at 349. This is the actual holding of the Stott case. There was no dispute about which party was the prevailing party in the Stott case. The trial court inexplicably found that the Stotts prevailed for purposes of recovering costs but not for attorney fees. The Court of Appeals reversed for that reason.

The Petitioners claim that the Opinion is in conflict with Marine Enterprises, Inc. v. Security Pacific Trading Corp., 50 Wn. App. 768, 750 P.2d 1290 (1988). Petitioners argue that Marine Enterprises holds that a defendant must defeat all of the plaintiff's claims in order to be deemed the prevailing party for attorney fees. Petition for Review at Page 2, Footnote 3. This is the same argument raised above by the Petitioners when citing the Silverdale and Guillen cases but the citation to the Marine Enterprises case is not well founded. The Marine Enterprises case was a contract interpretation case that focused on the specific

attorney fee clause in the contract between the parties. There was nothing in the Marine Enterprises decision about the defendant having to defeat all of the plaintiff's claims to be deemed the "substantially" prevailing party.

> "In the case sub judice, MEI and SPTC contracted that if neither wholly prevailed, then the substantially prevailing party would be awarded attorney's fees. When the court determined that MEI was the "prevailing party" and granted it $33,000 in attorney's fees, the court ignored the parties' specific contract language regarding attorney's fees. The court should have determined which party was the "substantially prevailing party" since neither party wholly prevailed. "Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed." Schauerman v. Haag, 68 Wash.2d 868, 873, 416 P.2d 88 (1966). Thus, MEI's reliance on cases holding that the prevailing party is the party with an affirmative judgment rendered in his favor at the conclusion of the case is misplaced. See American Fed. Sav. & Loan Ass'n v. McCaffrey, 107 Wash.2d 181, 728 P.2d 155 (1986); Ennis v. Ring, 56 Wash.2d 465, 353 P.2d 950 (1959); Moritzky v. Heberlein, 40 Wash.App. 181, 183, 697 P.2d 1023 (1985). MEI brought suit for $600,000, lost on all major issues, materially breached the contract and was awarded a net judgment of $5,701 for services rendered. SPTC successfully defended all claims, did not materially breach the contract, and was awarded $5,424. MEI is not the substantially prevailing party."

Marine Enterprises, Inc. v. Sec. Pac. Trading Corp., 50 Wn. App. 768, 773–74, 750 P.2d 1290, 1293 (1988) (emphasis added).

4.3 Citation to RCW 4.84.330 by the Petitioners is Misplaced.

The Petitioners claim that under RCW 4.84.330 they are the prevailing party and that being awarded attorney fees is mandatory. Petition for Review at Page 18. As part of this same argument, the Petitioners appear to claim that there is a conflict with the case holding in Walji v. Candyco, Inc., 57 Wn. App. 284, 787 P.2d 946 (1990). However, the Supreme Court has held that RCW 4.84.330 is not applicable in a case where there is a bilateral attorney fee provision such as set forth in Section 6.1 of the Declarations.

> "Here, the attorney fees provisions at issue are unilateral. . . Therefore, RCW 4.84.330 applies."

Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 489, 200 P.3d 683, 686 (2009) (Citations omitted). The Supreme Court went on to state:

> "By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision. It does so by expressly awarding fees to the prevailing party in a contract action. It further protects its bilateral intent by defining a prevailing party as one that receives a final judgment. This language must be read into a contract that awards fees to one party any time an action occurs, regardless of whether that party prevails or whether there is a final judgment."

Id. at 489. As for the holding in Walji, the Supreme Court addressed it in the Wachovia case and stated that it was limited to determining whether a voluntary dismissal of a claim equated to a final judgment for purposes of an attorney fee award. Our case does not involve a voluntary dismissal of any claim so the Petitioners' argument that the Opinion is in conflict with the Walji case does not make sense.

4.4 The Opinion Did Not Create a New "Way" of Determining Prevailing Parties.

The Petitioners make much of a supposed new approach to determining prevailing parties in the Opinion. The Petitioners' position is unfounded. The Opinion did not make any new law. The Opinion used the word "ways" one time. It should be looked at in context.

> "This case did not involve multiple distinct and severable claims made by each party. Instead, the Dempcys claimed that the Aveniuses violated the CC&Rs in multiple ways. They were successful in part and unsuccessful in part. The applicable rule here is that stated in Marassi: where both parties prevail on major issues, an attorney fee award is not appropriate. 71 Wn. App. At 916. The trial court properly applied the Marassi rule to these facts."

Opinion at Page 6 (emphasis added). The Petitioners overlook the holding of the case to focus on the use of a single word by the Court of Appeals. The real holding of the Opinion is set forth in the highlighted sentence

above. The one-time use of the word "ways" was just the Court of Appeals explaining what the Petitioners claimed in the lawsuit. The Court could have just as easily stated that the Petitioners alleged "multiple violations of the same Declaration" as opposed to "multiple ways." The point made by the Court of Appeals was just that the Petitioners cited to a single Declaration section that was violated in multiple different ways by the Respondents. Four to be exact – the Respondents' fence, hedge, trellis and 11 trees. In its holding, the Opinion followed established case law that states that if both parties prevail on major issues, then it is not appropriate to award attorney fees to either party. Such a holding is in line with the Supreme Court case ignored by the Petitioners, American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wn. 2d 217, 234-35, 797 P.2d 477, 487 (1990).

4.5 Court of Appeals Reference to Discretion was Proper.

The Court of Appeals in its Opinion at Page 5 stated that based "on the record" before the Court of Appeals, "the trial court did not abuse its discretion in ruling that both sides prevailed on major issues." This reference to discretion has nothing to do with the amount of attorney fees. However, because the Petitioners continue to incorrectly state the standard of review and they failed to provide a sufficient record to the Court of

Appeals to dispute the finding of fact made by Judge Allred, they now claim to be confused about the use of the term "discretion" in the Opinion at Page 5.

The definitive (and undisputed) finding of fact is set forth in Judge Allred's Order Denying Motions for Attorney Fees:

> "Neither side disputes that removing the fence and hedge was a major issue. But the Dempcys argue that their request to remove the trellis and 11 trees was not significant (thus, the Aveniuses did not prevail on a major issue). This is inconsistent with the Dempcys' arguments at trial, where they vigorously urged removing the trellis and trees based on the restrictive covenant. The Court finds that the request to remove the trellis and trees was a major issue."

CP 260. The Petitioners have presented no evidence from the trial court to dispute this finding. The trial transcript was not submitted to the Court of Appeals. None of the evidence submitted to Judge Allred at trial was submitted to the Court of Appeals. The Court of Appeals even stated:

> "However, the record does not contain a transcript of the trial pertaining to these claims. Our review is limited to the pleadings in the record and the trial court's oral ruling, memorandum decision and order."

Opinion at Page 5.

This statement about both sides prevailing on major issues is critical for several reasons. First, it is a finding of fact made by Judge Allred. This is not a legal conclusion. Second, the finding was

unchallenged by the Petitioners. Because the Petitioners did not challenge Judge Allred's factual findings, they are verities on appeal. Kyle v. Williams, 139 Wn. App. 348, 353, 161 P.3d 1036 (2007).

By now claiming confusion about the use of the term "discretion" in the Opinion, the Petitioners again seek to try an end run to attack Judge Allred's finding of fact that both sides prevailed on major issues even though they failed to appeal Judge Allred's finding of fact and failed to provide a sufficient record of this issue to the Court of Appeals.

Moreover, the Petitioners continue to cite to an incorrect standard of review. They claim that the determination of whether attorney fees are to be awarded is a question of law. Petition for Review at Page 19. It is not. This case involves the interpretation of whether one side or the other is the prevailing party, not the meaning of an attorney fee statute.

> "The determination of the prevailing party is often reviewed quite closely on appeal, and at least one court has described it as a mixed question of law and fact to be reviewed under the error of law standard. Sardam v. Morford, 51 Wash.App. 908, 911, 756 P.2d 174 (1988)."

Eagle Point Condominium Owners Association v. Coy, 102 Wn. App. 697, 706, 9 P.3d 898, 904 (2000). See also, Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., 168 Wn. App. 86, 98, 285 P.3d 70, 78, review denied, 175 Wn.2d 1015, 287

P.3d 10 (2012). In such cases involving a mixed question of fact and law, the appellate courts should not retry the facts de novo, but instead should apply the law to the facts found by the trial judge. Renton Education Association v. Public Employment Relations Commission, 101 Wn.2d 435, 441, 680 P.2d 40 (1984). The Court of Appeals agreed with the Respondents that the issue before the court was the determination of the prevailing party and that that was a mixed question of law and fact to be determined under the error of law standard. Opinion at Page 3. The specific (and unchallenged) fact found by Judge Allred was that both sides prevailed on major issues. Based on this unchallenged finding of fact, Judge Allred correctly applied the law and determined that neither side would be awarded their attorney fees.

4.6 Respondents Should be Awarded Their Attorney Fees for Answering the Petition for Review.

Pursuant to RAP 18.1(j), the Respondents request an award of attorney fees for having had to answer this Petition for Review. The Court of Appeals determined that the Respondents were the prevailing party on appeal. Opinion at Page 6-7. Therefore, upon denial of the Petition for Review, the Respondents should be awarded their attorney fees for having had to answer this Petition.

5. Conclusion

The Respondents have shown that the Opinion does not conflict with any decision of the Supreme Court. The Respondents have further shown that there is no conflict with any published Courts of Appeal cases. Without having presented a sufficient record to the appellate courts, the Petitioners attempt to once again try to reverse the trial judge's unchallenged finding of fact that both side prevailed on major issues should be rejected. Finally, the Opinion does not create a new and unprecedented way to determine the prevailing party for attorney fee purposes. In fact, the Opinion is in line with the Supreme Court cases addressing the issues raised by the Petitioners. Based on the foregoing, the Supreme Court should deny the Petition for Review, find that the Respondents are the prevailing party on appeal (as did the Court of Appeals) and award the Respondents their attorney fees for having had to answer this Petition.

DATED this 19th day of January, 2017.

Respectfully Submitted,

Allen R. Sakai

CERTIFICATE OF SERVICE

I certify that on the 19th day of January, 2017 I caused a true and correct copy of this RESPONDENTS' ANSWER TO PETITION FOR REVIEW to be served on the following in the manner indicated below:

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