74738-0

No. 74738-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COMMUNITY TREASURES d/b/a CONSIGNMENT TREASURES, a Washington not for profit corporation, JOHN EVANS and BONITA BLAISDELL, on behalf of themselves and all others similarly situated,

Appellants,

v.

SAN JUAN COUNTY, a political subdivision of the State of Washington,

Respondent.

REPLY BRIEF OF APPELLANTS

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Statutes and Ordinances

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III. INTRODUCTION

The only issue before this court is whether the County's charge of an application processing fee is a "land use decisions" subject to LUPA. The County dances around this issue, discussing subjects irrelevant to this question—what Plaintiffs are not appealing, whether the processing fees are a tax, the "interlocutory" nature of the processing fee determination—and precious few pages on the only relevant issue.

The County's only argument supporting its assertion that a determination of a processing fee is a land use decision is simply that the fee relates to the decision to issue a permit or to some other decision that impacts development. However, a determination's but-for relationship with a land use decision does not classify that determination as a "land use decision."

Because application processing fees do not impact development, the determination of a processing fee is not a land use decision to which LUPA applies. To hold otherwise would render the authorizing paragraph in RCW 82.02.020 unenforceable.

IV. ARGUMENT

A. Application processing fees are independent of those decisions that impact development.

In the introduction to its brief, the County asserts that application processing fees "cannot be separated from the permit." Br. of Resp. at 1.

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Of course, this statement is erroneous simply because government is not compelled to charge a processing fee in order to make a land use decision. *See* RCW 82.02.020 ("Nothing in this section prohibits [government] from collecting reasonable fees . . . ."). This fact is one of several differences that separate processing fee decisions from the underlying land use decisions. These differences arise out of the all-important difference between the purposes of these decisions: Land use decisions are made to regulate land development, while application fees are imposed purely as a source of revenue.

RCW 82.02.020 limits government's authority to impose taxes, fees, or charges on development. RCW 82.02.020; *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 942, 230 P.3d 1074 (2010). The legislature intended this statute "to stop the imposition of general social costs on developers, while at the same time allowing the continued imposition of costs that are directly attributable to the development." *Citizens for Rational Shore Planning*, 155 Wn. App. at 942 (quoting *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 760 n.14, 49 P.3d 867 (2002)). The statute requires strict compliance with its terms. *Isla Verde*, 146 Wn.2d at 755. Any tax, fee, or charge imposed by government is invalid unless it falls within one of the

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exceptions enumerated in the statute. *Citizens for Rational Shore Planning*, 155 Wn. App. at 657.

In one of these exceptions, RCW 82.02.020 authorizes government to charge fees to process land use applications. RCW 82.02.020. The purpose of these charges is to recover the cost of processing the applications. RCW 82.02.020 (authorizing reasonable fees "to cover the cost . . . of processing applications, inspecting and reviewing plans," and preparing SEPA statements). The government's authorization to charge processing fees is limited to the recovery of those costs. *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 350, 153 P.3d 231 (2007). Thus, as RCW 82.02.020 expressly provides, application processing fees are purely a public finance tool. Processing fees have no direct impact on development.

In contrast, the purpose of a land use decision is to manage the "impact of a development on a community." *James v. County of Kitsap*, 154 Wn.2d 574, 586, 115 P.3d 286 (2005). In fact, land use decisions must specifically relate to these impacts. *See, e.g., Isla Verde*, 146 Wn.2d at 761 (holding development conditions must be tied to "specific, identified impacts" on development). The applicant is applying for a land use decision, not for the privilege of paying a processing fee. Thus, the application fee is not a "land use decision." *See* RCW 36.70C.020(2)(a)

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(defining a "land use decision" as a "determination . . . on [a]n application for a project permit or other governmental approval.").

Because the revenue purpose of application processing fees differs from the land use purpose of a determination on the application, processing fees are different in practice from land use decisions:

- The applicant pays the processing fees before any determination is made on whether the application will be approved or on what permit conditions will be imposed.
- The applicant must pay the processing fees even if the application is denied. In contrast, the applicant may engage in the proposed project only if the application is approved.
- The applicant must pay the processing fees even though the applicant chooses to not use the permit by engaging in the proposed project. In contrast, the applicant must meet the conditions of the permit, including the payment of impact fees, only if the applicant goes through with the project.
- A change in the amount of a processing fee has no impact on the use of land. In contrast, a change in a land use decision directly impacts the use of land.

Therefore, contrary to the County's assertion, the processing fees for an application are separate from the land use determination made as a result

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of the application. They have different purposes and are therefore different in practice.

This appeal is not the first time a Washington appellate court has addressed whether a determination with arguably a revenue purpose is a land use decision. In *James v. County of Kitsap*, the developers argued that the imposition of an impact fee is a "revenue decision" and not a "land use decision." *See James*, 154 Wn.2d at 583–84. Importantly, the court's analysis of this proposed distinction centered entirely on the purpose of the impact fees at issue in that case. Rather than holding that all conditions of a permit must be land use decisions, the court noted that such conditions "must be tied to a specific, indentified impact of a development on a community." *Id.* at 586 (quoting *Isla Verde*, 146 Wn.2d at 761). This impact "inextricably links the impact fees imposed to the issuance of the building permit." *Id.*; *see also* Br. of App. at 15–16 (discussing analysis in *James*). It is this link that compels appeals of impact fees to be brought under LUPA. *Id.*

The County ignores this analysis when it claims that the simple "linkage between the payment of the fee and permit" makes the determination of a processing fee a land use decision. *See* Br. of Resp. at 25. The County claims that *James* stands for the proposition that all fees that a County may charge relating to a permit are land use decisions,

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whatever their purpose. *See id*. If the *James* court had rested on this simple proposition, it need not have discussed the land use purpose of impact fees so thoroughly.

In its attempt to support its argument that any decision relating in any way to a permit application must be a land use decision, the County cites to a large number of cases it claims address "interlocutory decisions." Every one of the cases that the County cites involved decisions that indisputably affected land use directly. In citing these cases, the County asserts an error in logic: The existence of intermediate land use decisions made during the processing of a permit implies that all intermediate decisions made during the processing of a permit are land use decisions. Again, this error in logic betrays a deeper problem with the County's analysis: It ignores the purposes of the decisions in question.

The County cites the "landmark decision" of *Samuel's Furniture, Inc. v. Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2003), and faults Plaintiffs for ignoring it. *See* Br. of Resp. at 19. But the determinations at issue in *Samuel's Furniture* were indisputably land use decisions subject to LUPA. *See Samuel's Furniture*, 147 Wn.2d at 450 (issuance of fill and grade permit, issuance of building permit, stop work order). The *Samuel's Furniture* court's analysis centered around whether these decisions were "final" decisions triggering LUPA when the Shoreline Management Act

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provided the Department of Ecology with authority to review these decisions. *Samuel's Furniture* is not relevant to the central question here: whether determinations of application processing fees are "land use decisions."

Admittedly there are not many appellate decisions holding that a determination made in connection with the processing of a land use application is not a land use decision. Plaintiffs cited to *Pacific Rock Environmental Enhancement Group v. Clark County*, 92 Wn. App. 777, 964 P.2d 1211 (1998). The County correctly points out that *Pacific Rock* held that discovery orders entered by a hearing examiner are not land use decisions and therefore not appealable under LUPA.[1] *See* Br. of App. at 20.

The County fails to understand the relevance of *Pacific Rock* to Plaintiffs' claims. The court stated, "Because LUPA only provides for review of 'land use decisions,' our review is further narrowed to determining if a prehearing discovery order is a 'land use decision' under the statute." *Pacific Rock*, 92 Wn. App. at 780. The court determined that

[1] Contrary to the County's assertion, Plaintiffs never implied that these decisions are "not subject to appeal, ever." *See* Br. of Resp. at 20. The *Pacific Rock* court was careful to point out that the plaintiff in that case chose to make its appeal under LUPA and limited its analysis accordingly. *See, e.g., Pacific Rock*, 92 Wn. App. at 780 ("PREEG chose, however, to seek review under the terms of LUPA . . . .").

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it was not. *Id.* at 782. The fact that the decision was interlocutory is not relevant. *Id*. ("[PREEG's] argument side-steps the more important fact that LUPA provides for review only of 'land use decisions,' a phrase that is defined and that does not include discovery orders."). Thus, contrary to the County's claim, not all intermediate decisions of a government relating to a permit application are "land use decisions."

The County also supports its position by citing to the San Juan County ordinance requiring payment of application processing fees. *See* Br. of Resp. at 18 (citing SJCC 18.80.020(C)(4)). The ordinance requires payment of the "applicable fee" as part of submitting a complete permit application. SJCC 18.80.020(C)(4). Thus, according to the County, "the payment of the fee is part and parcel of the application." Br. of Resp. at 18.

This citation is not relevant to the issue on appeal. Plaintiffs do not dispute that the County required payment of the applicable processing fees before it would process Plaintiffs' applications. As this ordinance demonstrates, payment of the processing fee is a precondition to the County's consideration of the application. *See* SJCC 18.80.020(C)(4) ("An application must include the following: . . . (4) The applicable fee. . . ."). Therefore, pursuant to the ordinance, the County cannot render a "determination . . . on . . . [a]n application for a project permit or other

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governmental approval" until the application is complete, including payment of the applicable fee. *See* RCW 36.70C.020 (defining "land use decision"). Determination of the applicable fee, done prior to receiving a complete application, is not itself a "land use decision."

Contrary to the County's assertion, the classification of the application processing fee does not rest merely on the but-for link between the processing fee and the government's land use decision on the application. Because the purpose of the fee is purely to offset the cost of processing applications (revenue) and not to limit development, the determination of the "applicable fee" is not a "land use decision."

B. A three-year statute of limitations applies.

The court in *Henderson Homes v. City of Bothell* held that a three-year statute of limitations applies to the overcharge of impact fees. 124 Wn.2d 240, 248, 877 P.2d 176 (1994). Like the trial court, the County claims that *James v. Kitsap County* overruled this holding not only for impact fees but for all fees that a government may charge in connection with a permit application. *See* Br. of Resp. at 14–15. The County views *James* and *Henderson Homes* through the lens of its argument that all imposed fees related to a permit application are the result of land use decisions.

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As explained *supra*, the *James* court held that impact fees are land use decisions subject to LUPA because of their link "to a specific impact of a development on a community." *James*, 154 Wn.2d at 586. *James* therefore overrules *Henderson Homes* with regard to impact fees and any other land use decision to which LUPA applies. But the holding in *James* is limited to such land use decisions. *Henderson Homes* still applies to overcharges that result from fee determinations that are not land use decisions.

The three-year statute of limitations applies to application processing fee determinations in part because they are not land use decisions.

C. LUPA's policy favoring finality does not apply to application processing fees.

The County argues that the application of LUPA to application processing fees promotes LUPA's policy of finality of land use decisions. Br. of Resp. at 21–22. Once again, the County presumes what it seeks to prove: that application processing fees are in fact land use decisions.

The policy behind LUPA's short limitations period relates to those decisions that have a direct effect on development. *See* Br. of App. at 16–17. In a passage quoted by both parties, *James* makes this very point: "Without notice of these challenges [to impact fees], local jurisdictions

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would be less able to plan and fund construction of necessary public facilities." Br. of App. at 16 & Br. of Resp. at 32–33 (both quoting *James*, 154 Wn.2d at 589).

As explained supra, application processing fees have no direct impact on development. Notice that Plaintiffs do not challenge any decision of the County directly impacting development. They do not challenge the permits that were issued or the conditions attached to those permits. The result of this lawsuit will not have any impact on the use of land. The only impact will be on the County's financing of one of its departments.

Indeed, if the trial court's decision that LUPA applies to the determination of application processing fees stands, the practical result will be that government's processing fees will bear no scrutiny. *See* Br. of App. at 24–29. That decision would bar class action challenges to these fees. *Id.* Of course, it is class action status that the County so vigorously opposes. The amount claimed by the named Plaintiffs in this suit would not be worth the County's effort.

D. Plaintiffs' suit is a claim "for monetary damages or compensation," and therefore excluded from LUPA.

The County challenges the conclusion that suits to recover the overcharge of application processing fees are "claims provided by any law

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for monetary damages or compensation," and therefore excluded from LUPA applicability. *See* Br. of Resp. at 29–31 (discussing RCW 36.70C.030(1)(c)). Again, the County bases this challenge on its assertion that processing fees are land use decisions simply because they relate to an application for a land use decision.

Those appellate cases that have found the "monetary damages or compensation" exclusion inapplicable have involved damages claims that relied upon challenges to decisions affecting real estate development. *See Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006) (nuisance claim relying on finding that permit was improperly issued barred by LUPA); *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010) (damages claim relying on finding that permit was improperly issued barred by LUPA).[2] In these cases, the damages claims allegedly arose out of illegal land use decisions, decisions that were not challenged properly under LUPA.

Conversely, those appellate cases that found the exclusion applicable noted that the claim for monetary damages in those cases did

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[2] The County cites to an unpublished case out of the United States District Court, Eastern District of Washington. *See* Br. of Resp. at 31 (citing *Muffett v. City of Yakima*, 2011 WL 5417158 (E.D.Wash.)). This citation is improper. GR 14.1. However, the court in this case also found that "monetary damages and compensation" exception inapplicable because the plaintiff's suit for damages relied upon a challenge to the issuance of a permit. *Id.* at 4.

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not rely upon a challenge to a land use decision. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013) (exclusion applicable to inverse condemnation claim based on granted variance when not challenging the variance); *Woods View III v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015) (exclusion applicable because damages claim was for permit issuance delay and not challenge to issuance itself). Notice that these cases related to land use decisions. However, the plaintiffs in these cases, like Plaintiffs here, did not allege that the land use decisions were improperly made. Therefore, LUPA did not apply.

The County argues that Justice Sanders' dissent in *James* demonstrates that the majority found the "monetary damages and compensation" exclusion inapplicable to an impact fee challenge. *See* Br. of Resp. at 30 (citing *James*, 154 Wn.2d at 590–96 (J. Sanders dissenting)). This argument is addressed in Plaintiffs' opening brief. *See* Br. of App. at 521–23. However, as pointed out in the opening brief, the "holding" asserted by the County—that the exclusion does not apply to a challenge to impact fees because the impositions of impact fees are land use decisions—would be consistent with the other cases addressing this exclusion. *Id.* at 523–24.

The success of Plaintiffs' claim will have absolutely no impact on any decision affecting development. Plaintiffs are not challenging the

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permits that were granted to them in any way. Under *Lackey* and *Woods View III*, Plaintiffs' claim is excluded from LUPA pursuant to RCW 36.70C.030(1)(c) as a claim for "monetary damages and compensation."

E. Whether the County's overcharge of application processing fees is a tax is not relevant to this appeal.

The County spends many pages asserting that the application processing fees at issue in this case are not a tax. *See* Br. of App. at 8–17. The County does not explain at all why this tax/fee distinction is important.

It is Plaintiffs' assertion that the overcharge of these fees is an improper tax. *See Hillis Holmes, Inc. v. Snohomish Cty*, 97 Wn.2d 804, 810–11, 650 P.2d 193 (1982); *see also Margola Assoc. v. City of Seattle*, 121 Wn.2d 625, 640, 854 P.2d 23 (1993) (holding overcharged fees are taxes). But, as mentioned in Plaintiffs' opening brief, the tax/fee distinction is one without a practical impact on this case. *See* Br. of App. at 9 n.4; *see also Hillis Holmes*, 97 Wn.2d at 409 ("Under RCW 82.02.020 an application of Hillis Homes' tax/regulation distinction is not necessary since regardless of whether a payment is characterized as a tax or a regulatory fee, it is prohibited unless specifically excepted."). The three-year statute of limitations applies whichever label is placed on the overcharge. *Henderson Homes*, 124 Wn.2d at 248.

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F. Plaintiffs can prove the overcharge of application processing fees using aggregate values.

Although not relevant to the issue before this court, the County provides much briefing meant to challenge Plaintiffs' underlying case. The trial court has made no decisions on the merits of the underlying issue. However, because the County addressed the merits, Plaintiffs will respond briefly here.

Upon remand to the trial court after reversal of its decision that LUPA applies to Plaintiffs' claims, the County will have the burden of demonstrating that the application processing fees it charges are reasonable and that they are no higher than necessary to recover the costs of processing the applications. *Home Builders Ass'n of Kitsap County v. City of Bainbridge Island*, 137 Wn. App. 338, 350–51, 153 P.3d 231 (2007). Plaintiffs claim that, over a period of years, the County has overcharged these fees, and in so doing, have collected more than $1 million than the costs that the County has incurred processing the applications. *See* Br. of App. at 6. Plaintiffs claim that these fees are not reasonable and therefore violate RCW 82.02.020. *Id.*

The County makes contradictory statements regarding Plaintiffs' case. On the one hand, the County claims, "Plaintiffs must show on a permit by permit basis that the amount charged does not cover the cost of

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processing the permit[,] reviewing plans and conducting necessary environmental review." Br. of Resp. at 5. The County faults Plaintiffs for not alleging "why the price paid for any one permit was more than the County's cost to process the permit and related environmental review as authorized by RCW 82.02.020." *Id.* at 4. On the other hand, the County cites *United States v. Sperry* to assert that "a fee does not require 'mathematical precision' among each category or class of user, and fees can be based upon a 'practical basis,' or 'averages.'" Br. of Resp. at 13 (citing *United States v. Sperry Corp*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989)).

Plaintiffs assert that it need not prove an overcharge on a permit-by-permit basis, but rather that the total fee structure is not reasonable under RCW 82.02.020 to recover the appropriate costs incurred. Plaintiffs' theory of the case comports with *Sperry* and is consistent with *Home Builders*. What constitutes a "reasonable" fee structure is for the trial court to determine upon remand.

The County claims that Plaintiffs' theory of the case involves the use of "general accounting numbers," an approach expressly rejected in *Home Builders*. *See* Br. of Resp. at 15–16 (quoting *Home Builders*, 137 Wn. App. at 349– 50). The County misunderstands *Home Builders*.

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An issue in *Home Builders* was whether or not the set of costs to be considered when determining whether the fees imposed by the City of Bainbridge Island complied with RCW 82.02.020 included "all costs the City attributes to its building and planning department." *Home Builders*, 137 Wn. App. at 249. The trial court in that case accepted a set of costs that comported with "guidelines for cost accounting and cost allocation for government agencies." *Id.*

The appellate court rejected this approach. *Id.* at 350. It held that the set of costs to consider must be limited to those listed in RCW 82.02.020. *Id.* In so holding, it stated, "Thus, the trial court erred when it reached its decision on the reasonableness of the City's permit fees based on general accounting and cost allocation principles and the City's costs of regulation, instead of focusing on evidence of costs the legislature specifically allowed in RCW 82.02.020." *Id.*

The County appears to latch onto the phrasing of this last sentence, stating,

> [T]he approach of using general accounting numbers was expressly rejected in *Home Builders* . . . . This means that the approach alleged in the Complaint of an overall budget shortfall is not the right approach[;] instead there must be allegations and evidence that the fee charged to each person was an overcharge.

See Br. of App. at 15. But this is not what *Home Builders* stands for. The appellate court simply rejected use of cost allocations used in generally-

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accepted accounting practices in the set of costs to consider when determining the reasonableness of the fees. It did not reject an averaging approach to determine reasonableness. In fact, as the County points out itself, it would not be reasonable to expect the County to justify every application processing fee based on the exact costs incurred processing that application.

If anything, the holding in *Home Builders* indicates that the County expense numbers, listed in Plaintiffs' opening brief, are too high because they include cost allocations not listed in RCW 82.02.020. This holding only serves to increase the amount of the overcharge.

G. Plaintiffs did not appeal the dismissal of Bonita Blaisdell or the conditional use permit claim.

The County also spends several pages describing in detail the trial court's February 10, 2016, decision to dismiss Bonita Blaisdell and to dismiss the claim regarding the conditional use permit. *See* Br. of Resp. at 1–4, 6. Plaintiffs expressly limited their appeal to not include those aspects of the February 10, 2016, summary judgment order. *See* Br. of App. at 4, 4 n.1. All of Plaintiffs' other claims remain but for the trial court's decision to dismiss under LUPA.

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V. CONCLUSION

In Washington, government's authorization to tax and to charge fees for its services is limited by statute. Citizens of the state must have reasonable recourse when government exceeds its statutory authorization.

San Juan County has exceeded its authorization under RCW 82.02.020 to charge reasonable fees to recover the costs of processing permit applications. Since the County exceeded this authorization through many overcharges in the 10's or 100's of dollars, the only reasonable check on San Juan County's illegal charging is through a class-action suit. Plaintiffs intend to hold San Juan County accountable for its application processing fees through such a suit.

San Juan County is attempting to hide behind the LUPA statute by claiming that, since processing fees are prerequisites for obtaining land use decisions, processing fee determinations are also land use decisions. Class action suits are not a practical possibility under LUPA. If San Juan County is successful in its claim, there will be no reasonable avenue for the County's citizens to hold the County to the limits imposed by the legislature through RCW 82.02.020.

Certainly legitimate land use decisions are not amenable to class action suits. Each land use determination is unique. And, land use

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decisions should be finalized in a relatively short period of time. LUPA promotes these policies.

In contrast, processing fee determinations are amenable to class action status. Plaintiffs in a class that pay those fees are similarly situated. And, any decision on whether government has overcharged its citizens for the processing of land use applications will have no effect on land use.

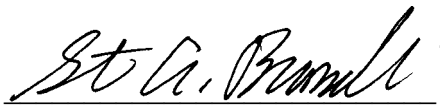
Application fee determinations are not land use decisions as that term is defined in RCW 36.70C.020(2). Further, suits alleging overcharge of these fees are "claims provided by any law for monetary damages or compensation," excepted from LUPA under RCW 36.70C.030(1)(c).

This court should reverse the trial court's decision that LUPA applies to Plaintiffs' suit and remand for further proceedings.

Respectfully submitted,

BRANDLI LAW PLLC

Dated: July 1, 2016

By: 

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