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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

BETTY L. VANDEBERGHE TRUST,
SUSAN L. ELLIOTT, Trustee of the Betty L.
Vandenberghe Trust, and SHANNON I.
CLARKE, SUSAN L. ELLIOTT, STEVEN T.
VANDEBERGHE, individually as
beneficiaries fo the Betty L. Vandenberghe
Trust,

Plaintiffs,

v.

CLACKAMAS COUNTY; STATE OF
OREGON; DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT
OF STATE OF OREGON; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION OF STATE OF OREGON;
and DEPARTMENT OF ADMINISTRATIVE
SERVICES OF STATE OF OREGON,

Defendants.

Case No. CV06110874

STATE OF OREGON'S MOTION TO DISMISS

(Oral argument requested – 30 minutes)

The State requests oral argument and official court reporting services. Approximately 30 minutes should be sufficient.

Pursuant to ORCP 21A(1) and 21(A)(8), defendant, State of Oregon moves to dismiss plaintiffs' complaint because the court lacks subject matter jurisdiction and because plaintiffs have not pleaded ultimate facts sufficient to state a claim for relief. In support of this motion, the

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1 State relies on ORCP 21A(1) and 21A(8), ORS 197.352, the Oregon Administrative Procedures
2 Act ("APA"), the files and record of this case, and the supporting memorandum filed with the
3 State's Motion to Dismiss.

4 DATED this 19th day of April, 2007.

5 Respectfully submitted,

6 HARDY MYERS
7 Attorney General

8 

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Trust,

10 Plaintiffs,

11 v.

12 CLACKAMAS COUNTY; STATE OF
13 OREGON; DEPARTMENT OF LAND
14 CONSERVATION AND DEVELOPMENT
15 OF STATE OF OREGON; LAND
16 CONSERVATION AND DEVELOPMENT
COMMISSION OF STATE OF OREGON;
and DEPARTMENT OF ADMINISTRATIVE
SERVICES OF STATE OF OREGON,

17 Defendants.

Case No. CV06110874

STATE OF OREGON'S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION TO
DISMISS

(Oral argument requested – 30 minutes)

18 **Introduction**

19 After the people enacted Ballot Measure 37 in 2004, the State of Oregon implemented
20 procedures for processing the thousands of claims that have followed. Those procedures,
21 described in detail in the next section of this memorandum, result in a final agency order either
22 denying or approving each Measure 37 claim and, when appropriate, granting relief in the form
23 of a “waiver” of certain land use regulations. As the State advises claimants, those orders – like
24 other final agency orders – are subject to judicial review under the Oregon Administrative
25 Procedures Act (“APA”).

26
Page 1 - STATE OF OREGON'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO
DISMISS

SCP/sek/TRIR4524 DOC

1 In some cases, however, a Measure 37 claimant who is dissatisfied with the agency order
2 chooses to file a Measure 37 complaint in the circuit court, either instead of or in addition to an
3 APA petition for judicial review. That is the approach that plaintiffs have taken in challenging
4 the State’s decision on the Measure 37 claim that is at issue. Instead of petitioning for judicial
5 review of the final order, plaintiffs filed a complaint in which they allege that the final order is
6 legally flawed and seek \$12,579,580 in compensation.

7 This court should dismiss plaintiffs’ complaint. As explained below, the APA provides
8 the exclusive means by which a court may review an agency decision that is encompassed in a
9 final agency order. Consequently, this court lacks jurisdiction over the complaint for
10 compensation and should dismiss it. Moreover, that dismissal should be with prejudice, as the
11 time in which plaintiffs could have petitioned for judicial review under the APA has passed.

12 **Background**

13 **A. Measure 37**

14 Oregon voters enacted Ballot Measure 37 through the initiative process in 2004.
15 Codified as part of Chapter 197, where Oregon’s statewide land use planning statutes are found,
16 Measure 37 permits owners of private real property to seek compensation for reductions in fair
17 market value caused by certain land use regulations. As an alternative to payment, public
18 entities may “waive” – that is, modify, remove or not apply – certain regulations.

19 A landowner qualifies for Measure 37 relief if: (1) a public entity enacts or enforces a
20 “land use regulation” that (2) restricts the owner’s use of private real property and (3) has the
21 effect of reducing the fair market value of the private real property. ORS 197.352(1). Section 3
22 of Measure 37 provides that certain land use regulations shall not be a basis for a claim under
23 section 1. Section 5 requires landowners to assert claims within two years of the effective date
24 of Measure 37 (December 2, 2004) or the date on which a land use regulation is applied “as an
25 approval criteria” on a specific land use application, whichever is later.

1 After determining that an owner submitted a timely, valid claim, the public entity has the
2 option to pay “just compensation”¹ or to “modify, remove, or not to [sic] apply” land use
3 regulations to the extent necessary “to allow the owner to use the property for a use permitted at
4 the time the owner acquired the property.” ORS 197.352(8); *see also* ORS 197.352(10).
5 Allowing the owner to use the property in a way that would otherwise be prohibited is commonly
6 referred to as granting a Measure 37 “waiver.” The Department of Land Conservation and
7 Development (“DLCD”) is exercising the waiver option.²

8 Measure 37 does not specify any procedure for claim processing, but permits public
9 entities to adopt procedures. ORS 197.352(7) The State’s Department of Administrative
10 Services (“DAS”) adopted procedural rules, found at OAR 125-145-0010 to 125-145-0105, that
11 set minimum requirements for the content of a Measure 37 claim against the State.

12 When DAS receives a claim, it provides written notice of the claim to neighboring
13 landowners, certain neighborhood or community organizations, and anyone who requests notice.
14 OAR 125-145-0080. This provision is consistent with the notice provisions of ORS 215.416
15 regarding notice of permits. Persons receiving notice, or any other person, may submit
16 comments, evidence and information within ten days. OAR 125-145-0080(2), (3).

17 DAS forwards Measure 37 claims to the state agency that enacted or enforced a relevant
18 land use regulation, *i.e.* the “regulating entity,” in this case DLCD. OAR 125-145-0090. The
19 regulating entity reviews and analyzes the claim, gathers additional information if necessary and
20 available, and issues a draft report. Draft reports explain the preliminary determination of the
21 statutory criteria for relief, including timeliness of the claim, ownership, the land use regulations
22 that are the basis of the claim, the effect of relevant land use regulations on the property’s fair
23 market value, and applicable exemptions, if any.

24

25 ¹ Section 2 of Measure 37 defines “just compensation.” ORS 197.352(2).

26 ² DLCD can pay compensation only if and when the legislature appropriates funds for that
purpose. *See* OAR 660-002-0010(8)(c).

1 The draft report is made public on the internet and copies are mailed to the claimant, and
2 any persons who submitted comments or requested notice. OAR 125-145-0100. After a ten-day
3 comment period, and based in part on the comments received, the regulating entity and DAS
4 issue a final report and order. DLCD serves the final report and order on any persons who
5 received copies of the draft report or submitted comments on the draft report. DLCD also makes
6 the final orders public by posting them on the internet.

7 Section 6 of Measure 37 provides that “[i]f a land use regulation continues to apply to the
8 subject property more than 180 days after * * * written demand for compensation * * *, the
9 present owner * * * shall have a cause of action for compensation under this section in the circuit
10 court.” ORS 197.352(6). This section essentially imposes a 180-day deadline for public entities
11 to decide claims. In the event a public entity appropriately waives restrictive land use
12 regulations in accordance with section 8 or 10, no cause of action accrues.

13 **B. Plaintiffs’ Measure 37 claim**

14 Plaintiffs allege in their complaint that as trustee and beneficiaries of the Betty L.
15 Vandenberghe Trust, they are the present owners of 14.84 acres located in Clackamas County
16 (“property”). (Complaint ¶¶ 1A, B, C, Ex A). Plaintiffs allege further that on September 8, 2005
17 they made a written demand for compensation to the State pursuant to Measure 37 based on their
18 purported ownership of the property. (Complaint ¶ 5A, Ex. C). On June 6, 2006, DLCD issued
19 Final Order M122232 wherein it approved the claim before it in accordance with the Measure 37
20 (Complaint, ¶ 5C Ex. C, E).

21 The basis of Plaintiffs’ complaint is their disagreement with DLCD’s final order
22 continuing to apply land use regulations in effect from April 29, 1964 through April 15, 1994 to
23 the subject property. As set forth in Exhibit E of the Complaint, DLCD determined that Susan
24 Elliott acquired the subject property as trustee of the Betty L. Vandenberghe Trust (“Trust”) after
25 the property was transferred to the trust in 1994. (See Exs. C, and E, p6, n2) DLCD ascertained

1 from Susan Elliot's claim and the evidence before it that Ms. Elliot had acquired a present
2 ownership interest in the property as of April 15, 1984. (Complaint, Ex. E, p. 5) Plaintiffs allege
3 that the Final Order is erroneous because each one is a present owner of the subject property and
4 has a continuous ownership interest dating back to April 29, 1964 (See Complaint, ¶¶ 3 A,B,C;
5 6A, Ex. E).

6 Argument

7 **A. Plaintiffs may seek review of the final order only under the APA and this court**
8 **lacks jurisdiction over their Measure 37 complaint.**

9 Plaintiffs raise only one claim in their complaint, a claim for compensation under section
10 6 of Measure 37. They allege:

11 5.

12 C. On or about July 17, 2006, the Defendants by and through
13 the Department of Administration of Services, the Department of
14 Land Conservation and Development of the State of Oregon and
15 the Land Conservation and Development Commission enforced the
16 EFU land use regulations or restrictions upon the Property adopted
17 and applied to the property after April 29, 1964 through to April 15,
18 1994 (allowing a waiver of land-use restrictions after April 15,
19 1994) and issued Final Order, denying Plaintiff's claim under ORS
20 197.352 for just compensation or a waiver of the heretofore
21 identified land use regulations or restrictions, a true copy is
22 attached hereto as Exhibit E, finding in part...[Plaintiffs'
23 emphasis]

24 (Complaint). To illustrate the basis of their alleged injury and right to relief, Plaintiffs attach
25 their request to the DLCD pursuant to Measure 37 (Exhibit C) and the agency's decision in its
26 Final Order (Exhibit E).

Plaintiffs' claim in litigation is merely a request to the court to accept an argument that
DLCD rejected in its Final Order— that plaintiffs possess a present ownership interest in the
property that dates back to a time before current land use regulations that now restrict the
property were adopted or enacted. The complaint is clearly a challenge to the correctness of the

1 final order that is attached to the Complaint and incorporated therein by reference. As explained
2 below, however, the APA sets forth the exclusive method for such a challenge. ORS 183.480
3 (2)(“Judicial review of final orders of agencies shall be *solely* as provided by ORS 183.482,
4 183.484, 183.490 and 183.500”; emphasis added). Because the complaint does not challenge the
5 final order under the APA, this court lacks jurisdiction.

6 The Oregon Court of Appeals consistently has held that the APA establishes the
7 exclusive method to challenge decisions made by state agencies. *See e.g., Eppler v. Board of*
8 *Tax Service Examiners*, 189 Or App 216, 220 (2003); *Lake County v. State of Oregon*, 142 Or
9 App 162, 165 (1996) (“ORS 183.480 (2) and numerous decisions of this court make clear that
10 judicial review of final agency orders shall be solely as provided in the APA”); *Mendieta v.*
11 *Division of State Lands*, 148 Or App 586, 599-600 (1997), *rev dismissed*, 328 Or 331 (1999)
12 (where “redress would have been available under ORS 183.484, had plaintiffs timely filed their
13 petition for judicial review[,]” the Court of Appeals held, “the trial court erred in granting
14 plaintiffs relief under ORS 183.490 and ORS 28.010”); *FOPPO v. County of Marion*, 193 Or
15 App 93, 97 (1988), *rev denied*, 307 Or 326 (1989) (“PERS is subject to the APA; therefore, the
16 APA provides the exclusive methods for its actions and for review of those actions”); *Bay River,*
17 *Inc. v. Environmental Quality Comm’n*, 26 Or App 717, 720, *rev denied*, 276 Or 555 (1976).

18 The exclusive nature of the APA remedy applies even where plaintiffs attempt to use
19 other statutory causes of action to get relief from an agency decision. For example, in *Bay River*,
20 the Court of Appeals rejected an argument that the Declaratory Judgment Act, ORS 28.010 *et*
21 *seq*, provides a remedy with respect to agency orders in addition to the remedies provided under
22 the APA. The circuit court in that case had granted the plaintiff an injunction and declaratory
23 relief with respect to its application for a subsurface sewage disposal system feasibility permit –
24 a matter within the Department of Environmental Quality’s purview. The Court of Appeals
25 reversed and remanded, ordering the circuit court to vacate the judgment and dismiss the

1 complaint. The appellate court explained that Bay River could not circumvent APA review
2 merely by raising its complaint about agency actions in the context of another statute:

3 The Oregon Administrative Procedures Act, ORS 183.310
4 et seq, establishes a comprehensive pattern for the judicial review
5 of administrative decisions. The various APA statutes governing
6 judicial review provide the *sole and exclusive methods of obtaining*
7 *judicial review*.

8 This is sufficient answer to Bay River’s contention that
9 since it couched its complaint in equitable terms and sought a
10 declaratory judgment, the circuit court obtained jurisdiction
11 pursuant to ORS 28.010. A party cannot ignore the judicial review
12 provisions of the APA in favor of a general equitable or
13 declaratory remedy.

14 *Bay River*, 26 Or App at 720 (emphasis added; citation omitted). *See also Eppler*, 189 Or App at
15 222 (“plaintiffs’ sole recourse [in arguing that state licensing requirements were preempted by
16 federal law] was to raise their preemption claim in the contested case proceeding before the
17 board and seek judicial review, under the APA, of any adverse ruling by the board”); *Lake*
18 *County*, 142 Or App at 165-66 (1996) (declaratory relief not available where plaintiffs could
19 have sought judicial review of an agency order under the APA).

20 The Court of Appeals also has rejected the argument that the Oregon Tort Claims Act
21 (“OTCA”), ORS 30.265 et seq., provides a remedy with respect to agency orders that is
22 cumulative to the APA remedy. In *Clarke Electric, Inc. v. State Highway Division*, 93 Or App
23 693 (1988), the plaintiff contractor sued under the OTCA for harm allegedly arising from the
24 Highway Division’s rejection of the plaintiff’s bid on a contract. The Court of Appeals held that
25 the Division’s rejection of the plaintiff’s bid was a final order in other than a contested case and,
26 therefore, that the plaintiff should have sought judicial review under the APA. *Id.*, 93 Or App at
27 696-97. The court specifically rejected the plaintiff’s argument that, because it sought damages,
28 it was entitled to proceed directly under the OTCA:

29 Finally, plaintiff argues that it is seeking damages in tort under the
30 Oregon Tort Claims Act, ORS 30.265, not review of the Division's

1 order and, therefore, that the time limitations of the APA are not
2 applicable. However, defendant's alleged liability in tort is
3 premised on a finding that defendant's order rejecting the bid was
4 improper. That order was a final order in other than a contested
5 case, and the exclusive procedure for review of such an order is
6 under the APA. Consequently, the trial court did not err in granting
7 Division's motion to dismiss for failure to comply with the APA
8 time limitations for judicial review.

9 *Id.* at 697 (citations omitted).³

10 Thus, the plaintiff in *Clarke Electric* could not circumvent APA review of an agency
11 order by seeking monetary damages under the OTCA, just as the plaintiffs in the Declaratory
12 Judgment Act cases cited above could not avoid APA review merely by seeking declaratory
13 relief with respect to agency actions. The same principle applies to section 6 of Measure 37 –
14 although it, too, creates a statutory cause of action, people who contest the legality of an agency
15 order on a Measure 37 claim must seek judicial review under the APA.

16 Plaintiffs' decision not to seek APA relief is fatal to their complaint. The APA provides
17 that "[p]etitions for review shall be filed within 60 days only following the date the order is
18 served." ORS 183.484(2) (emphasis added). Timely filing of a petition for judicial review is a
19 jurisdictional requirement, as the Court of Appeals recently explained:

20 ORS 183.484(1) confers on certain circuit courts jurisdiction for
21 judicial review of orders in other than contested cases. ORS
22 183.484(2) then provides that '[p]etitions for review shall be filed
23 within 60 days only following the date the order is served.' The
24 timely filing of a petition for judicial review of agency action is a
25 jurisdictional requirement. *Ososke v. DMV*, 320 Or 657, 659-60,
26 891 P2d 633 (1995). Accordingly, the failure to comply with that
27 requirement is a matter that cannot be waived and may be raised
28 for the first time on appeal. As we held in *Hood River County v.*
29 *Stevenson*, 177 Or App 78, 81, 33 P3d 325 (2001), "[a]
30 jurisdictional question need not be preserved by a party, much less
31 raised at a specific point in a proceeding, for a court to consider it.
32 Courts have an obligation to consider jurisdictional issues *sua*
33 *sponte*["]

34 *G A S P. v. Environmental Quality Commission*, 201 Or App 362, 366 (2005).

35 ³ See also *Muller v. Dept. of Agriculture*, 164 Or App 11, 15-16 (1999) (plaintiff could not
36 avoid APA review by suing for damages in tort when "his entitlement to damages depend[ed] on
the validity of" an agency's denial of a permit application).

1 The final order in this case issued and was served on June 6, 2006, more than 60 days
2 ago. Because plaintiffs did not petition for judicial review within the 60-day APA limitations
3 period, they cannot now amend their complaint to include a petition for judicial review.
4 Accordingly, the court should dismiss this case with prejudice.

5 For the same reason that this court lacks jurisdiction, plaintiffs have failed to state a claim
6 upon which relief can be granted. Plaintiffs can have a Measure 37 compensation claim only if
7 they appropriately made a written demand for compensation pursuant to Measure 37 and the
8 State *wrongfully* continued to apply land use regulations to the subject property more than 180
9 days after the demand for compensation was made. In other words, plaintiffs must establish that
10 the State erred by denying the claim in its entirety. But, that decision can be made only by
11 judicial review of the final order under the APA, which plaintiffs have not sought. Because
12 plaintiffs cannot properly assert in this forum that the State’s final order erroneously denied the
13 claim, they have not stated a claim upon which relief can be granted. For that reason, too, the
14 complaint should be dismissed.

15 **B. Plaintiffs cannot state a claim for compensation because the State has the option of**
16 **“waiving” certain land use regulations in lieu of paying compensation.**

17 Even if this court determines that it has jurisdiction, it should dismiss the complaint
18 because the State has discretion to “waive” land use regulations in lieu of paying compensation,
19 which Plaintiffs admit in their complaint (Complaint ¶ 7). This means that plaintiffs have not
20 stated – and cannot state – a Measure 37 claim for compensation. As explained below, Measure
21 37 grants *the public entity*, not Measure 37 claimants, the option to determine whether to pay
22 compensation or to “modify, remove, or not apply” land use regulations. ORS 197.352(8), (10).

23 In interpreting statutes adopted through the initiative process, like Measure 37, Oregon
24 courts apply the same methodology as they apply in construing statutes adopted by the
25 Legislative Assembly. *Stranahan v Fred Meyer, Inc.*, 331 Or 38 (2000); *PGE v. Bureau of*

1 *Labor and Industries*, 317 Or 606, 612 n 4 (1993). The objective is to discern the intent of those
2 who enacted the law, in this case, the Oregon voters. “The best evidence of the voters’ intent is
3 the text of the provision itself. * * * The context of the language of the ballot measure may also
4 be considered[.]” *Stranahan*, 331 Or at 56 (quoting *Roseburg School Dist. v. City of Roseburg*,
5 316 Or 374, 378 (1993)). If the text and context of the statute reveal the clear intent of the
6 voters, “further inquiry is unnecessary.” *PGE*, 317 Or at 611; *see also Stranahan*, 331 Or at 56.

7 The language and structure of Measure 37 clearly show that the voters intended to give
8 public entities, and not claimants, the choice between paying compensation and not applying
9 land use regulations. The statute provides:

10 (8) Notwithstanding any other state statute or the
11 availability of funds under subsection (10) of this section, in lieu of
12 payment of just compensation under this section, the governing
13 body responsible for enacting the land use regulation may modify,
14 remove, or not to apply the land use regulation or land use
15 regulations to allow the owner to use the property for a use
16 permitted at the time the owner acquired the property.

17 * * * * *

18 (10) Claims made under this section shall be paid from
19 funds, if any, specifically allocated by the legislature, city, county,
20 or metropolitan service district for payment of claims under this
21 section. Notwithstanding the availability of funds under this
22 subsection, a metropolitan service district, city, county, or state
23 agency shall have discretion to use available funds to pay claims or
24 to modify, remove, or not apply a land use regulation or land use
25 regulations pursuant to subsection (6) of this section. If a claim has
26 not been paid within two years from the date on which it accrues,
the owner shall be allowed to use the property as permitted at the
time the owner acquired the property.

27 ORS 197.352.

28 Thus, section 8 generally grants the public entities to which a demand for compensation
29 is submitted the option to pay or provide alternate relief. Section 10 makes it clear that the
30

1 option is wholly within the public entities' discretion and specifically applies to claims, like
2 plaintiffs', that are brought under section 6.⁴

3 In this case, the final order reflects the State's denial of the Measure 37 claim before it.
4 (Complaint, Ex. E at 1). Plaintiffs do not dispute that if DLCD had agreed with them on the
5 issues of ownership and dates of acquisition that DLCD could have opted not to apply certain
6 land use regulations "in lieu" of paying them compensation. (*See* Complaint, ¶ 7). If plaintiffs
7 had timely challenged this denial under ORS 183.484, a reviewing court theoretically might have
8 determined that plaintiffs were correct and that they acquired the properties prior to the
9 enactment of certain land use regulations. At that point, the State once again would have had the
10 *choice* whether to pay just compensation or, instead, to not apply land use regulations back to the
11 plaintiffs' purported date of acquisition. *See* ORS 197.352(8), (10). In other words, the State
12 would not have been compelled to pay monetary compensation even if plaintiffs had successfully
13 challenged the final order in an ORS 183.484 judicial-review proceeding. Plaintiffs cannot state
14 a claim for such compensation merely by attempting to bypass the APA process.

15 **CONCLUSION**

16 The gravamen of plaintiffs' complaint is that DLCD erred in denying the claim for
17 compensation and therefore the court should order the State to pay plaintiffs monetary
18 compensation. Because the APA provides the exclusive procedure for plaintiffs to dispute
19 DLCD's waiver-date determination, this court lacks jurisdiction over the complaint.

20

21 ⁴ If the statute remained ambiguous after an examination of text and context, a court would
22 proceed to review the statute's legislative history. The history of ballot initiatives includes the
23 explanatory statement in the Voter's Pamphlet. Measure 37's explanatory statement confirms
24 the voters' intent that public entities have the choice whether to pay compensation or to waive
25 application of land use regulations: "If a property owner proves that a land use regulation
26 restricts the use of the owner's property, and reduces its value then *the government responsible
for the regulation will have a choice*: pay the owner of the property an amount equal to the
reduction in value or modify, change or not apply the regulation to the owner's property."
www.oregon.gov/LCD/MEASURE37/legal_information.shtml
#Information_About_the_Election (site last visited on October 3, 2006; emphasis added).

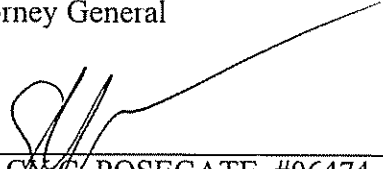
1 In addition, plaintiffs have not stated a claim upon which relief can be granted. Plaintiffs
2 seek monetary compensation but, as a matter of law, they can be entitled to only the form of
3 relief that DLCD chose under Measure 37 – here, a waiver of land use regulations. In light of
4 that election, plaintiffs have no compensation claim.

5 For both of these reasons, the complaint should be dismissed

6 DATED this 19th day of April, 2007.

7 Respectfully submitted,

8 HARDY MYERS
9 Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I certify that on April 19, 2007, I served the foregoing STATE'S MOTION TO
3 DISMISS and MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS
4 upon the parties hereto by the method indicated below, and addressed to the following:

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