

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS
United States District Court for the District of South Carolina

Patrick Michael Duffy, Senior U.S. District Judge

Appellate Case No. 2016-001766

Paul Chenard and Rebecca Chenard, Plaintiffs,

v.

Hilton Head Island Development Company, LLC d/b/a
Coral Resorts and Sunrise Vacation Properties, Ltd., d/b/a
Coral Resorts, Defendants.

James Nichols and Irene Nichols, Plaintiffs,

v.

Hilton Head Island Development Company, LLC,
Sunrise Vacation Properties, Ltd., Sherri J. Smith,
Patrick Budnick, and Robert Lauderman, Defendants.

Linda Renchkovsky, Plaintiff,

v.

Coral Resorts, LLC, and Sunrise Vacation Properties
Ltd. d/b/a Coral Resorts, Defendants.

Robert Curry, Jr. and Monica R. Curry, Plaintiffs,

v.

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JUN 01 2017

S.C. SUPREME COURT

Hilton Head Island Development Company, LLC d/b/a
Coral Resorts and Sunrise Vacation Properties, Ltd. d/b/a
Coral Resorts, Defendants.

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JUN 01 2017

Charles Olenick and Karen Maniscalco, Plaintiffs,

S.C. SUPREME COURT

v.

Coral Resorts, LLC and Sunrise Vacation Properties, Ltd.
d/b/a Coral Resorts, Defendants.

Phillip Ross and Kimberly Ross, Plaintiffs,

v.

Hilton Head Island Development Company, LLC,
Sunrise Vacation Properties, Ltd., Sherri J. Smith, David
Watson, and Sheldon Stanhope, Defendants.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Hilton Head Island Development Company, LLC, Coral Resorts, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, David Watson, and Sheldon Stanhope petition the Court for rehearing and reconsideration of Opinion No. 27720, filed May 17, 2017. This matter came before this Court on three certified questions from the United States District Court for the District of South Carolina. This Court answered the first two questions in the negative.

The Court framed the third certified question as "Are the South Carolina Real Estate Commission's determinations as to whether the Timeshare Act was violated binding on courts of the judicial branch?" Op. 27720 *4. The Court answered the third

certified question in the following qualified manner: "if a court, either in a proceeding brought pursuant to the APA or in the underlying litigation, declares the REC acted within its lawful authority in issuing a decision, the REC's decision is then binding on the court." Op. 27720 *15. It is in answering the third certified question in a qualified manner that the Court erred, and Defendants ask the Court to reconsider the below-detailed points that the Court overlooked and misapprehended.

1. The Court overlooks and misapprehends the distinction between decisions of the Real Estate Commission regarding registration of timeshare plans and decisions of the Real Estate Commission regarding violations of the Timeshare Act in the process of selling a timeshare.

As Defendants explained in their brief and at oral argument, the Real Estate Commission (the REC) regulates two broad categories of activity in the life of a timeshare plan: (1) the registration of timeshare plans and (2) the subsequent sale of timeshare interests. Under the statutory framework established by the Timeshare Act, the REC is the only entity with the authority to register a timeshare plan, and such registration must be done prior to advertising or selling timeshare interests. S.C. Code Ann. § 27-32-190(A). The registration process includes the REC's review and approval of documents that sellers must use in the timeshare purchase transaction such as the purchase contract, S.C. Code Ann. § 27-32-40, and the public offering statement. S.C. Code Ann. § 27-32-100.

When the REC evaluates a timeshare plan registration, it is not reviewing violations of the Timeshare Act. It is merely making a determination as to whether the timeshare plan meets the regulatory requirements of the Timeshare Act. S.C. Code Ann. § 27-32-190(A)(2)(a). It is the REC's determination on registration status that Defendants contend

should be binding on courts of the judicial branch.¹ This is in contrast to the provisions of the Timeshare Act that regulate the sale of timeshare interests and enumerate what constitutes a violation of the Timeshare Act in the context of the sale of a timeshare interest. S.C. Code Ann. §§ 27-32-20, -30, -40, -60, -70, -80, -100, and -110.

Permitting court review of a REC decision on registration status would be analogous to a plaintiff in a car wreck case arguing that the defendant was at fault because he did not have a valid driver's license at the time of the accident because the plaintiff believes that the Department of Motor Vehicles' online license renewal procedures do not comply with the motor vehicle code. The defendant driver in that example took every necessary step to ensure that his license was valid, but the plaintiff would seek to invalidate a state agency's procedures.

To the extent section 27-32-130 permits a purchaser to bring a private right of action in the courts of the judicial branch, any decision of the REC regarding registration status of a timeshare plan would not fall within the ambit of section 27-32-130 because registration determinations are for the approval or disapproval of registration applications as distinguished from determinations of a violation of the Timeshare Act. In the sale of a timeshare interest. Accordingly, this Court should reconsider its decision and find that the REC's timeshare plan registration determinations are binding on the courts of the judicial branch.

¹ As with Spinnaker, the existence of orders from the REC finding the timeshare plans to be properly registered is not hypothetical. As the transcript put into the record by Plaintiffs demonstrates, Coral Resorts, LLC and Hilton Head Island Development Company, LLC have appeared before the REC. Coral Resorts, LLC and Hilton Head Island Development, LLC were permitted to pay the annual renewal fees due with no effect on the prior status of the subject timeshare plans as registered with the REC.

2. The Court misapprehends Defendants' position as premised solely on public policy rather than the plain language of the Timeshare Act.

The Court casts its opinion as an evaluation of the plain language of the Timeshare Act and contrasts that approach with its assessment that Defendants' arguments are based solely on public policy. What the Court misapprehends is that the public policy focused on by Defendants is incorporated expressly by the General Assembly into the stated purpose of the Timeshare Act.

Defendants agree with the Court that the "cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) (citing *Bankers Trust of South Carolina v. Bruce*, 275 S.C. 35, 267 S.E.2d 424 (1980)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

In the Timeshare Act, the General Assembly stated several legislative purposes. It is not often that the General Assembly codifies the express reason that it enacted particular legislation, but in this case it did, and one of the express purposes is stated as:

(M) the economic health and continued stability of the vacation time sharing industry should be subject to the clear identification of various procedures involved in the purchase and sale of an interest in a vacation time sharing plan and the timeshare closing itself.

S.C. Code Ann. § 27-32-405. Thus, one of the purposes of the Timeshare Act is to protect the “economic health and continued stability of the vacation time sharing industry.” *Id.*

The Court misapprehends Defendants’ position as a desire for the Court to resort to interpretation of public policy as a means of statutory construction; in fact, the reverse is the case. No interpretation of public policy is necessary because the purpose of the Timeshare Act—to protect the stability of the timeshare industry—is expressly stated within the Timeshare Act itself.

Construction of a statute should be consistent with its express legislative purpose. See *City of Columbia v. Glens Falls Ins. Co.*, 245 S.C. 119, 125, 139 S.E.2d 529, 531 (1964). “[L]egislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *Broadhurst v. City of Myrtle Beach Election Comm’n*, 342 S.C. 373, 379 537 S.E.2d 543, 549 (2000).

In this case, at least one purpose of the Timeshare Act can be discovered in the statutory language—i.e., to protect the stability of the timeshare industry. Thus, the Timeshare Act must be construed in light of that intended purpose. Permitting plaintiffs to challenge the validity of the REC’s registration determinations in the courts of the judicial branch would undermine the stability of the timeshare industry, in direct conflict with the plain language of one of the statutory purposes of the Timeshare Act.

On page 10 of the Opinion, the Court states that it “readily acknowledge[s] there is considerable merit to Defendants’ concerns, and we do not reject them lightly. However valid Defendants’ concerns might be, they must yield to the plain language of the statute

that commands a different result.” Op. 27720 * 10. This statement of the Court fails to acknowledge that the “plain language of the statute” actually addresses Defendants’ concerns about stability of the timeshare industry. When one express purpose of the Timeshare Act is acknowledged to be maintaining the stability of the timeshare industry, then the plain language of the statute commands that the REC determinations regarding registration must be binding on courts of the judicial branch.

Timeshare sellers² must be able to rely on the REC’s determinations in order to conduct the most basic aspect of their business—selling timeshare interests. Permitting courts to review the REC’s determinations regarding registration would call into question the REC’s determinations on registration of timeshare plans and approval of statutorily-required documents. In that case, timeshare sellers would have no ability to predict how, when, or why their registrations and might be called into question. The timeshare industry would be crippled in South Carolina. This is in direct contradiction of the express purpose of the Timeshare Act, and accordingly, this Court should reconsider its decision and find that the REC’s timeshare plan registration determinations are binding on the courts of the judicial branch.

3. The Court misapprehends the gravity of the unintended results of its interpretation of the Timeshare Act. This leads to an absurd result that renders decisions by the REC meaningless.

Permitting plaintiffs to challenge the REC’s determinations regarding the registration status of timeshare plans will lead to absurd results. Courts should reject an interpretation which leads to an absurd result that could not have been intended by the

² S.C. Code Ann. Section 27-32-10(6) defines “Seller” as “a person who creates a vacation time sharing plan . . .”

General Assembly. *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008).

Under the Court's Opinion, every purchaser of a timeshare interest who wanted to undo his or her timeshare purchase for any reason or no reason could bring a lawsuit challenging the validity of the subject timeshare plan's registration. The Court's Opinion would permit such purchaser to bring his or her lawsuit in the courts of the judicial branch, the Administrative Law Court, or in arbitration. This would result in a multiplicity of litigation, wherein different judges and arbitrators could reach different decisions regarding the registration status of the same timeshare plan. Not only could this result in conflicting determinations, but such litigation has the potential to threaten the timeshare interests of purchasers who want to maintain their ownership interests. The threat of duplicative, inconsistent, and uncertain rulings is significant and would threaten the stability of the timeshare industry.

Courts should not "construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). Permitting courts or arbitrators to second guess the REC's decisions on registration status would render the REC's determinations ultimately futile and meaningless because a single decision approving the registration of a timeshare plan could be challenged multiple times with multiple possible outcomes

To allow an individual purchaser to call such a determination into question after the fact would create chaos in the industry because timeshare sellers would be unable to rely on any registration determination made by the REC. It also permits endless

piecemeal attacks on the policies and procedures of the executive branch. This cannot be permitted, and this Court should reconsider its decision and find that the REC's timeshare plan registration determinations are binding on the courts of the judicial branch.

To the extent a purchaser could ever establish that he or she had a private right of action that was affected by a registration decision or could in some way establish standing to complain about a registration determination—which Defendants believe a purchaser could not do—such matters could be brought to the attention of the REC.

4. REC determinations regarding registration do not “affect private rights” and purchasers, therefore, are not entitled to judicial review of REC registration determinations.

The Court erred in determining that the REC's determination regarding registration affects some private right of an individual purchaser entitling them to due process and judicial review. Citing the South Carolina Constitution, the Court holds that an individual cannot be bound an administrative determination affecting private rights except on due notice and an opportunity to be heard. Op. 27720 * 12.

The Court misapprehends the nature of a timeshare plan registration determination. There are no private rights of purchasers affected by such a determination; such registration determinations generally occur before the first timeshare interests are even made available for purchase.

A rough analogy can be found in the doctrine of public nuisance. A “public nuisance,” in the broadest terms, is an interference with the rights of the community. It is an “invasion[] of the rights of the general public including violations of the public order, decency, morals, and health.” *Overcash v. S. Carolina Elec. & Gas Co.*, 364 S.C. 569, 573, 614 S.E.2d 619, 621 (2005). “[T]he courts refuse to entertain private actions to

remedy purely public nuisances” *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 86 S.E. 817, 819 (1915)). Only the State may seek to abate a public nuisance. See *Brown v. Hendricks*, 211 S.C. 395, 400, 45 S.E.2d 603, 605 (1947) (“a private action does not lie to abate a public nuisance”).

Just as in the concept of private nuisance, it is the rights of the public that implicated in the registration of timeshare plans. There are no private rights of a purchaser affected in any way different than the rights of the public when a timeshare plan registration application is approved or rejected by the REC. Because there are no private rights for the timeshare registration to affect, the state constitutional provision affording even a modicum of judicial review is inapplicable. Accordingly, this Court should reconsider its decision and determine that the REC’s decisions on registration are binding on courts of the judicial branch.

5. The Court misapprehends the distinction between the language of “enforce” and “prosecute.”

This Court’s construction of section 130 of the Timeshare Act is erroneous because it interprets the last sentence of section 130 in isolation and fails to account for the preceding language of the same section and the language of the Timeshare Act which, if properly construed, would require the Court to answer all of the certified questions in the affirmative.

Section 130 of the Timeshare Act provides:

The Real Estate Commission is responsible for the **enforcement** and **implementation** of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall **prosecute** a violation under this chapter. The commission shall promulgate regulations for the **implementation** of this chapter, subject to

the State Administrative Procedures Act. The provisions of this section do not limit the right of a purchaser or lessee to bring a private action to **enforce** the provisions of this chapter.

S.C. Code Ann. § 27-32-130 (emphasis added).

Although there are three sentences in section 27-32-130, the Court's construction of section 27-32-130 focused almost exclusively on the last sentence of section 27-32-130, which allows purchasers "to bring a private action to **enforce** the provisions of [the Timeshare Act]." The last sentence of section 27-32-130 does not allow purchasers to bring a private action to **prosecute** violations of the Timeshare Act.

In drafting section 27-32-130 of the Timeshare Act, the General Assembly used three distinct verbs, each of which has its own specific meaning: **enforce**, **implement**, and **prosecute**. The Court's construction of section 27-32-130 allows purchasers to bring private actions to prosecute violations of the Timeshare Act—something that the General Assembly did not provide and that would essentially result in the Real Estate Commission becoming largely irrelevant in the regulation of the timeshare industry. Essentially, this Court's construction of section 27-32-130 equates the verb **prosecute** with the verb **enforce**, rendering the General Assembly's use of use of the verb **prosecute** in section 27-32-130 meaningless. See *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."); *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008) (in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly); *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 608 S.E.2d 425 (2005) (it is presumed that the General

Assembly intended to accomplish something by its choice of words and would not do a futile thing); *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 574 S.E.2d 196 (2002) (this Court must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something); *Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs.*, 357 S.C. 327, 592 S.E.2d 335 (Ct.App. 2004) (the Court should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless).

As addressed by Defendants in their brief to the Court and during oral arguments, there is a distinction between bringing an action to enforce the provisions of the Timeshare Act and prosecuting alleged violations—the Timeshare Act simply does not give purchasers the right to prosecute alleged violations of the Timeshare Act. (Coral Defs' Brief at 12.) This is because the words “enforce” and “prosecute” have distinct meanings. The Court’s opinion, however, overlooks this distinction despite its efforts to construe the terms of section 27-32-130 of the Timeshare Act.

Black’s Law Dictionary defines “prosecute” as:

prosecute *vb.* (15c) **1.** To commence and carry out (a legal action) <because the plaintiff failed to prosecute its contractual claims, the court dismissed the suit>. **2.** To institute and pursue a criminal action against (a person) <the notorious felon has been prosecuted in seven states>. **3.** To engage in; carry on <the company prosecuted its business for 12 years before going bankrupt>.—**prosecutory**, *adj.*

Black’s Law Dictionary (10th ed. 2014). The first and second definitions of “prosecute” set forth in Black’s Law Dictionary are wholly consistent with the way the General Assembly used the verb “prosecute” in sections 27-32-120(A)(2), 27-32-130, and 27-32-150(D) of the Timeshare Act—all of which only contemplate civil and criminal prosecutions for alleged Timeshare Act violations being brought by the State and not a

timeshare purchaser. If the General Assembly intended to allow purchasers the ability to bring private actions to prosecute violations of the Timeshare Act, it would have provided for such—it did not.

Black's Law Dictionary defines "enforce" as:

enforce *vb.* (14c) **1.** To give force or effect to (a law, etc.); to compel obedience to. **2.** Loosely, to compel a person to pay damages for not complying with (a contract).

Black's Law Dictionary (10th ed. 2014). The General Assembly used the verb "enforce" in several sections of the Timeshare Act: § 27-32-130, § 27-32-150(C), and § 27-32-190(A)(2)(c) and (B)(1). The way the General Assembly used the verb "enforce" in these sections of the Timeshare Act is consistent with Black's Law Dictionary's definitions, and it is consistent with South Carolina's appellate courts' usage, particularly in the context of an "action to enforce." *S.C. Dep't of Social Servs v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984).

An action to enforce the provisions of the Timeshare Act is distinct from an action to prosecute alleged violations of the Timeshare Act. Because the Timeshare Act allows purchasers to enforce the provisions of the Timeshare Act, a purchaser could bring an action to enforce a final decision of the Real Estate Commission. However, the Timeshare Act does not grant a trial court the authority to stand in the place of the REC as the Court's Opinion would permit. Accordingly, this Court should reconsider its decision and find that a timeshare purchaser cannot bring an action to prosecute an alleged violation of the Timeshare Act in the trial court.

6. **The Timeshare Act creates no new private right of action.**

In addition to erring in answering the third question, the Court also misapprehended a point of law in answering the second certified question. The Court stated the second certified question as: "Is the South Carolina Real Estate Commission's determination of a violation of the Timeshare Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Timeshare Act?" In answering that question, the Court stated:

Again, we defer to the plain language of the Timeshare Act, which expressly recognizes a person's right to bring a civil action without regard for the REC's findings. *Cf. Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 64, 744 S.E.2d 547, 551 (2013) (stating that "the Legislature would have used more exacting language had it intended . . . to forever divest the circuit court of jurisdiction"). If the courts' jurisdiction to hear claims for violations of the Timeshare Act is to be limited— whether based on Defendants' public policy concerns or for any other reason—it must be the legislature that does so.

The Court erred in answering thus because such answer assumes that Plaintiffs can maintain a private action for violation of any and all provisions of the Timeshare Act.

This requires the Court to read section 27-32-130 as **creating** a private right of action, which it does not do.

To determine if a private action is created by a statute, a court should first look to the plain language of the statute. "In determining whether a statute creates a private cause of action, the main factor is legislative intent. Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute." *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) (citing *Doe v. Marion*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007)). In evaluating the plain language of a statute, a court should follow the cardinal rule of statutory construction, stated as:

If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994). Where the terms of the statute are clear, the court must apply those terms according to their literal meaning. *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993) (emphasis supplied). This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993).

Paschal v. State Election Comm'n, 317 S.C. 434, 436–37, 454 S.E.2d 890, 892 (1995).

With those principles in mind, an evaluation of the plain language of section 27-32-130 demonstrates that no private action is created. This section is not creative; it is protective. This section states:

The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter. The commission shall promulgate regulations for the implementation of this chapter, subject to the State Administrative Procedures Act. The provisions of this section **do not limit** the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.

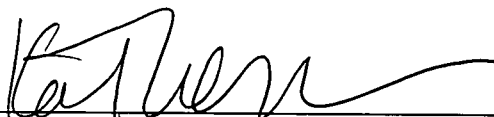
Id. (emphasis added). It is the last sentence where Plaintiffs contend there exists the creation of a private action. The **creation** of a private action is inconsistent with the plain language of the statute. The phrase “do not limit the right of a purchaser” is not the equivalent of “purchaser is granted a private right of action.” Instead, the language “do not limit” presupposes that the purchaser already had the ability to bring to a legal action for claims arising from a timeshare purchase. The use of the word “limit” indicates that there was some existing legal right of purchasers the Legislature was concerned could be affected by giving the REC the sole authority to prosecute violations of the Timeshare Act. For the phrase “do not limit” to have any meaning, there must have been some pre-

existing right in danger of being limited but for the inclusion in the statute of an express recognition of those rights not being limited and that the Legislature intended to protect those rights.

Such rights do exist in the Timeshare Act. For example, section 27-32-55 provides for a purchaser to bring an action under the Unfair Trade Practices Act, S.C. Code Ann. Sections 32-9-10 through -180. Section 27-32-90(c)(2) contemplates that a purchaser could bring an action in a court of competent jurisdiction for the recovery of disputed escrow funds. Sections §§ 27-32-200 through -230 create the Vacation Time Sharing Recovery Fund, which provides for an aggrieved person to initiate an arbitration proceeding to recover from the Fund if his or her claim is based on a specific violation of the Timeshare Act. These are just three examples of the rights of private action that exist within the Timeshare Act and that would be protected by the statement in section 27-32-130 that the authority of the REC to prosecute violations of the Timeshare Act does not limit a purchaser's right to bring a private action.

However, such protection is limited to the express rights of private action granted elsewhere within the Timeshare Act. It does not extend to creation of a new right of private action for a violation of any and all provisions of the Timeshare Act. To interpret the last sentence of section 27-32-130 to create such new rights goes beyond the letter of the statute and is an erroneous interpretation of plain language of the section. Thus, the Court erred in presupposing the creation of a new private right of action by section 27-32-130.

[Signatures on following page.]



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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the following by causing a copy to be mailed via U.S. Mail, postage pre-paid, to Counsel for the Plaintiffs on June 1, 2017, at the addresses shown below:

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