**IN THE SUPREME COURT OF OHIO**

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| CHRISTEEN TUTTLE, *et al.*,<br><br>Plaintiffs/Appellants,<br><br>vs.<br><br>TIM COLLINS, *et al.*,<br><br>Defendants/Appellees. | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District<br><br>Court of Appeals Case No. CA-19-108909<br><br>**Appellants' Memorandum in Support of Jurisdiction** |

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**Table of Contents**

**Table of Authorities**

Cases



Rules

## I. This case presents an issue of great public and general interest for which leave to appeal should be granted.

This case pertains to a highly publicized[1] dispute involving the Dunham Tavern Museum ("DTM"), the oldest building standing in the City of Cleveland, once a stagecoach stop on the historic "Buffalo Stage Road" connecting Buffalo, Cleveland, and Detroit, a locally and nationally registered landmark (R. 1, Complaint, ¶ 1–¶ 2), and a non-profit organization with the express mission, enshrined in its bylaws, to preserve the building and its history, and to restore historic public greenspace to its surrounding urban campus. *Id.*, ¶ 16–¶ 17, ¶ 20.

The dispute is over the DTM's controversial plan to sell a 2.28 acre parcel of its campus for a privately owned real-estate development in a transaction that was secretly engineered almost immediately after the DTM had raised $700,000 in charitable donations for the purpose of reclaiming and restoring that very

[1] *See, e.g.*, Thomas Bier, "Cleveland Foundation errs in thwarting Dunham Tavern Museum's green space rebuilding efforts," *Cleveland.com* (Jan. 12, 2020), https://www.cleveland.com/opinion/2020/01/cleveland-foundation-errs-in-thwarting-dunham-tavern-museums-green-space-rebuilding-efforts-thomas-bier.html ("Members, feeling grievously violated, were furious. 'We believe these tactics to be reprehensible' and 'we will initiate removal of Dunham Tavern Museum from our estate planning,' read a letter to the Dunham Board of Trustees signed by 26 members. The essence of the organization, its supporting membership, was shattered. But champions of the deal did not hesitate and eventually achieved the board majority needed for approval."); Jordyn Grzelewski, "Dunham Tavern Museum, board members sued over proposed real-estate deal with Cleveland Foundation," *Cleveland.com* (May 30, 2019), https://www.cleveland.com/business/2019/05/dunham-tavern-museum-board-members-sued-over-proposed-real-estate-deal-with-cleveland-foundation.html ("The proposal to sell off the land drew backlash from some museum members and donors, who said the development of the land would be at odds with a long-held vision of converting the property into community greenspace."); "Tell Cleveland Foundation 'NO!' Please don't buy Dunham Tavern Museum land," *Change.org*, https://www.change.org/p/cleveland-foundation-don-t-hurt-dunham-tavern-museum-cleveland-s-oldest-remaining-building ("CLEVELAND FOUNDATION BOARD MEMBERS, PLEASE DO THE RIGHT THING! Please leave Dunham Tavern Museum property alone.").

parcel as historic public greenspace, consistent with the organization's mission to do just that. *Id.*, ¶ 2–¶ 4, ¶ 18–¶ 27.

The transaction was driven primarily by the Cleveland Foundation ("CF"), an enormously influential "non-profit" corporation that touts its status as "the world's first community trust" (founded in 1914), its $2.5 billion endowment, and its "charitable" grantmaking of more than $100,000,000, annually. *Id.*, ¶ 3, ¶ 38. Almost immediately after the DTM had reclaimed the greenspace at issue, the CF began secret discussions about buying it with two DTM trustees—individual Defendants Tim Collins and David Wagner—who are prominent real-estate professionals in Cleveland. *Id.*, ¶ 3–¶ 4, ¶ 22–¶ 25, ¶ 33–¶ 35, ¶ 40–¶ 41.

For no apparent good reason, the CF has insisted on building a new headquarters on the recently restored historic greenspace at issue, instead of on any of a number of underdeveloped parcels in the surrounding neighborhood that the CF and its cheerleaders claim to want to "revitalize."[2] *Id.*, ¶ 3, ¶ 24, ¶ 36–¶ 37. What is unfortunately apparent, however, is that Collins and Wagner have a client who owns a parcel adjacent to the greenspace at issue, which is expected

[2] Steven Litt, "Cleveland Foundation plans to relocate from Playhouse Square to Midtown, despite legal tussle over site," *Cleveland.com* (June 28, 2019), https://www.cleveland.com/news/2019/06/cleveland-foundation-plans-to-relocate-from-playhouse-square-to-midtown-despite-legal-tussle-over-site.html ("The move highlights the foundation's desire to direct new civic energy to low-income minority neighborhoods harmed by decades of disinvestment caused by structural racism."); ("This is a clear, emphatic statement that we want to work on bringing these neighborhoods back,' said Ronn Richard, president and CEO of the foundation since 2003."); ("Jeff Epstein, director of nonprofit Midtown Inc., which leads development efforts in the corridor, said the foundation's move would be 'huge, not just for Midtown, but for the entire city.'").

to substantially increase in value as a result of the CF's planned development project. *Id.*, ¶ 39–¶ 41, ¶ 48.

This case presents an issue of great public and general interest not just due to the prominence of the players involved or the historic character of the parcel of land at issue (*Id.*, ¶ 16–¶ 21, ¶ 23–¶ 27, ¶ 33–¶ 48); Rather, this Supreme Court's attention is required here because these players, and the Trial Court and Court of Appeals below,[3] have run roughshod over (1) the DTM bylaws and the mission of historic preservation enshrined therein, as well as (2) bedrock provisions of Ohio law on corporate governance, and (3) contract interpretation, and (4) fundamental notice-pleading and (5) evidentiary standards, in what is impossible to see as anything other than an effort to accommodate the enormously wealthy and influential Cleveland Foundation as above the law. And all to allow the CF to encroach on a parcel of land that was expressly reclaimed by charitable donations intended precisely to preserve this historic land for the public's enjoyment. R. 1, ¶ 2, ¶ 18–¶ 21.

As explained further in the following sections, allowing the below result to stand would not only make a mess of sound, long-established, and fundamental provisions of Ohio law discussed above, undermining the pursuit of historic preservation, as well as corporate governance, *inter alia*, statewide, it would substantially undermine public confidence in the judiciary in the process.

[3] Pursuant to S.Ct. Prac. R. 7.02(D)(1) and (3), Appellants have attached the opinion from the Eighth District Court of Appeals, issued on 8/13/2020 (**Appendix 1**) and the trial court's opinion, issued on 7/24/2019 (**Appendix 2**).

## II. Statement of the Case and Statement of Facts

### A. The rulings below run roughshod over the DTM bylaws and the organization's mission of historic preservation, as well as bedrock principles of corporate governance and contract interpretation.

Most pertinently, the Trial Court and Court of Appeals engaged in absurd gymnastics to avoid a provision in the DTM bylaws barring trustees from voting on any matter involving the DTM if they have either a "conflict of interest" or a "conflict of responsibility" with respect to the matter and "any other business entity or person." **Appendix 1**, 8/13/2020 JE and Opinion, 9, fn 3.

While the term "conflict of responsibility" has never been addressed by a court in Ohio, nor, apparently, in any other state, Plaintiffs—DTM trustees and members who filed the below derivative suit under Civ.R. 23.1 to rescind the transaction as void under both the bylaws and Ohio common law barring breaches of fiduciary duty—plausibly alleged that the provision provided broader protection than a prohibition against "conflicts of interest." R. 1, ¶ 4, ¶ 28–¶ 32, ¶ 58–¶ 62, ¶ 72–¶ 78. Specifically, Plaintiffs quoted a "conflicts of responsibility" policy published by a national association of nephrologists that cogently defined the term as "extend[ing] beyond the personal," to "situations when [interests] will conflict, regardless of personal gain," so as to avoid even "questions or concerns related to the leader's motives with regard to executing [the organization's] business," that might arise from "involvement with outside relationships or interests." *Id.*, ¶ 30.

Applying the bar on "conflicts of responsibility" in this way is consistent both with the plain language of the term, as well as DTM's express mission of

preserving history and historic property against development and the demands of the market. R. 1, ¶ 16–¶ 27, ¶ 30.

Accordingly, Plaintiffs plausibly alleged that this provision alone renders the CF deal void pursuant to the DTM bylaws, because not only Wagner but five other DTM trustees have "involvement with outside relationships or interests" raising, at very least, "questions or concerns related to [their] motives" for having voted to approve the sale. *Id.*, ¶ 30, ¶ 33–¶ 35, ¶ 39–¶ 41.

Rather than simply remand this matter for enforcement of this plainly worded term, or for discovery and adjudication as to its meaning and application to the contested transaction, the Court of Appeals instead tried to flush it down the memory hole. Relegating its analysis of Plaintiffs' strongest claim to a footnote, the Court held that,

> "[because] conflict of responsibility' is not a term of art adopted" "within the legal context," "[and because] there is no recognized cause of action in Ohio against a trustee for a conflict of responsibility, ... nor is there any case law in Ohio or any jurisdiction on this issue, ... the trial court correctly dismissed [Plaintiffs' claim] alleging a conflict of responsibility [on Defendants' Civ.R. 12(C) motion] ... [and] the remainder of this opinion will address only [Plaintiffs'] alleged conflict of interest."

**Appendix. 1**, 08/13/2020 JE and Opinion, 9, fn 3.

This holding by the Court of Appeals—that a corporate bylaw somehow can't be enforced unless it involves some kind of "term of art" that's gone through some kind of "adoption" process within some larger "legal context," or has otherwise been "recognized" as a specific "cause of action" in the courts—egregiously disregards the fundamental and binding principles that, (1) bylaws are enforceable "as contracts as between the corporation and its members,"

(*Knight v. Shutz*, 141 Ohio St. 267, 278, 47 N.E.2d 886 (1943)), and (2) courts must "give meaning to every paragraph, clause, phrase and word" in a contract, and "avoid that construction which renders a provision meaningless or inoperative." *Heifner v. Swaney*, 3d Dist. Allen No. 1-91-82, 1992 Ohio App. LEXIS 4177, *6 (Aug. 17, 1992); *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21.

In other words, Ohio law was properly clear that corporations are free to govern themselves by whatever bylaws they choose—if not contrary to the general laws—including bylaws to prohibit conflicts of any kind as broadly or narrowly as the corporation may prefer. Appellants' Reply Br., 2, citing *Shutz*, 141 Ohio St. 267, 278 ("[T]he rules and regulations of an Ohio corporation, not in contravention of any statutory provision, have the force of 'contracts' as between the corporation and its members and as between the members themselves."). And the holding below substantially undermines this fundamental principle, subjecting countless corporate bylaws to be read as meaningless if there were not some previously recognized legal application of their terms, or if they haven't been adopted as a "cause of action" in Ohio courts. **Appendix 1**, 8/13/2020 JE and Opinion, 9, fn 3. Essentially, the opinion below purports to freeze in time the further creation or development of corporate bylaws in Ohio, and, if not corrected, will make a mess of corporate governance and related litigation statewide.

### B. The rulings below run roughshod over fundamental pleading and evidentiary standards.

Making matters worse, the Court of Appeals also erected an impossible standard for pleading a conflict of interest, particularly in cases involving real-

estate transactions. **Appendix 1**, 08/13/2020 JE and Opinion, ¶ 25 ("It is these speculative property value increases that serve as the basis for the trustees' alleged financial gain or conflict of interest."), ¶ 35 (Collins's and Wagner's tenuous connections to the proposed sale fall short of providing a conflict of interest.").

Plaintiffs' allegations of conflict are based on the basic inference that if the Cleveland Foundation, a multi-billion-dollar corporation, built its new headquarters on the DTM greenspace, real estate in the largely underdeveloped surrounding neighborhood would reasonably be expected to increase in value. R. 1, ¶ 33–¶ 35, ¶ 39–¶ 48. This inference is further strengthened by Plaintiffs' undeniable allegations that the project is situated in a federally designated and tax-abated "opportunity zone," about which the enormously influential local chamber of commerce, the Greater Cleveland Partnership, issued a press release touting "the potential to raise hundreds of millions of dollars in catalytic urban development opportunities, stimulating growth and job creation." *Id.*, ¶ 36–¶ 38.

Yet despite that Plaintiffs are entitled to have all reasonable inferences construed in their favor on the pleadings and on summary judgment, and as the jury would otherwise construe them at trial, the Court of Appeals held that this particular reasonable inference was somehow out of bounds. Specifically, the Court held that this inference constituted a "legal conclusion, deduction, or opinion couched as [a] factual allegation[]," an "unreasonable assum[ption]," "mere[] conjecture and supposition ... lack[ing] any factual basis," and thus "not considered in a Civ.R. 12(C) motion to dismiss." **Appendix 1**, 08/13/2020 JE and Opinion, 9, fn3.

Thus, in so dismissing Plaintiffs' conflict-of-interest-based claims, the Court of Appeals—like the trial court before it—denied the very concept of an inference, let alone that all reasonable inferences were to be construed in Plaintiffs' favor. *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187, 1192 (1980) ("[A] trial court may not weigh the proof or choose among reasonable inferences ... the court ... [must] tak[e] all permissible inferences and resolv[e] questions of credibility in plaintiff's favor..."). And it did so in a manner that—if followed—would negate any claim whatsoever that was not based on direct evidence, and particularly those relating to corrupt real estate deals. *See State v. Sherrils*, 8th Dist. Cuyahoga No. 41302, 1980 Ohio App. LEXIS 11433, at *8 (Apr. 17, 1980), fn. 2 ("Inference has been defined as 'a mere permissible deduction which the trier of the facts may make without express direction of the law to that effect, signifying those deductions and rational conclusions which are the result of the application of the ordinary principles of logic.'"), citing *State v. Myers*, 26 Ohio St.2d 190, 197, 271 N.E.2d 245 (1971); *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 17 ("The fact that [plaintiff] may employ[] circumstantial evidence and inference ... does not equate to mere speculation. Circumstantial evidence has the same probative value as direct evidence. [And] rational inferences can be drawn based upon facts in the record and even based upon a combination of a fact in the record and another rational inference."). On the standard applied by the Court of Appeals here, no inference could ever withstand the accusation that it is "too speculative," and all circumstantial evidence would be rendered void.

### C. The rulings below—by which an enormously wealthy and influential corporation and its accomplices have effectively been conferred immunity for an unlawful transaction by which they seek to usurp historic greenspace that was reclaimed by charitable donations intended precisely to preserve the land for the public's enjoyment—will undermine the public's confidence in the judiciary if allowed to stand.

It is hopefully needless to say that if the below rulings are permitted to stand, the public's confidence in the judiciary would be substantially undermined as a result. Regardless of the below courts' respective intentions (one should certainly not be unmindful of the enormous political pressure brought to bear by the Cleveland Foundation here[4]), the unmistakable message conveyed by these erroneous decisions is that laws don't matter in Ohio for those who are wealthy or powerful enough. There is surely never a good time for the public to receive such a message. But with the release of recent census data giving rise to widespread reports that Cleveland is now the poorest large city in the U.S.[5]—on top of what was already known about the City's staggering

[4] June 28, 2019 Litt report ("[The Cleveland Foundation] said they hoped to complete construction of the new headquarters within three years. But they said the timing of the move would be contingent on the resolution of a lawsuit filed in May in which former Dunham board member Christeen Tuttle and museum members Richard Parke and Ted Peterson are seeking to invalidate the sale of 1.2 acres to the foundation.").

[5] "Cleveland overtakes Detroit as poorest big city in U.S., census finds," *The Detroit News* (Sept. 17, 2020), https://www.detroitnews.com/story/news/local/detroit-city/2020/09/17/cleveland-overtakes-detroit-poorest-big-city-u-s-census/3476269001/ ("Cleveland, at 30.8% of its residents living below the poverty line, was the poorest large U.S. city in 2019, according to the U.S. Census Bureau's American Community Survey results"); Joe Pagonakis, "Cleveland poorest big city in U.S., according to Census data," *News 5 Cleveland* (Sept. 17, 2020), https://www.news5cleveland.com/news/local-news/cleveland-poorest-big-city-in-u-s-according-to-census-data ("Cleveland is now the poorest large city in the U.S., according to the latest U.S. Census report data").

inequality,[6] poverty,[7] and infant mortality rates[8]—it would be hard to think of a worse time for Ohio courts to send the message that such an enormously influential and wealthy community foundation, the oldest in the nation, is above the law; Particularly in a case where the foundation seeks to usurp historic greenspace that was reclaimed by charitable donations intended precisely to preserve the land for the public's enjoyment.[9]

## III. Propositions of law for review

For the reasons set forth above, Plaintiffs/Appellants request that this Supreme Court accept this matter for appellate review regarding the following and any related propositions of law as it deems necessary and proper:

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[6] "Cleveland moves to the No. 5 spot in Bloomberg's city inequality ranking," *Crain's Cleveland Business* (Nov. 21, 2019), https://www.crainscleveland.com/economic-outlook/cleveland-moves-no-5-spot-bloombergs-city-inequality-ranking ("Cleveland moved to the No. 5 spot in the inequality rankings, from 22nd on the list the previous year. Half of the city's households made just below $30,000, according ... whereas those among the top 5% of earners made an average of $262,924").

[7] Danielle Serino, "Cleveland leads the nation in child poverty," *WKYC Channel 3* (Oct. 18, 2019), https://www.wkyc.com/article/news/local/cleveland/cleveland-leads-the-nation-in-child-poverty/95-da6e7f5a-d3a5-4152-b0ae-6742c38334ba ("A new study shows more than 50% of children in the city are economically distressed, versus the national average of 16%").

[8] First Year Cleveland, https://www.firstyearcleveland.org/the-issue ("For more than five decades, Cuyahoga County has had one of the highest infant death rates in the country.").

[9] Indeed, it seems clear that Cleveland, especially, is long overdue for increased scrutiny of the non-profit organizations that dominate its politics and culture. *See* Peter Buffett, "The Charitable-Industrial Complex," *The New York Times* (July 26, 2013), https://www.nytimes.com/2013/07/27/opinion/the-charitable-industrial-complex.html ("[A]ccording to the Urban Institute, the nonprofit sector has been steadily growing ... It's a massive business, with approximately $316 billion given away in 2012 in the United States alone and more than 9.4 million employed ... As more lives and communities are destroyed by the system that creates vast amounts of wealth for the few, the more heroic it sounds to 'give back.'").

### A. Proposition of Law No. 1: Where a provision in corporate bylaws expressly prohibits both "conflicts of interest" and "conflicts of responsibility" by corporate trustees, the corporation is entitled to enforce the prohibition against "conflicts of responsibility" as prohibiting something distinct from "conflicts of interest."

As set forth fully in Section II.A. above, the below courts' baseless refusal to even consider the provision in the DTM bylaws barring "conflicts of responsibility" disrupts fundamental standards of corporate governance and contractual interpretation in a manner that requires this Court's correction. The DTM was entitled to write its own bylaws in a manner not inconsistent with the general laws, and the trustees and members of the organization are entitled—and here, indeed, obliged—to ensure that those bylaws are enforced. *See* Section II.A. above, citing *Knight v. Shutz*, 141 Ohio St. 267, 278, 47 N.E.2d 886 (1943) (bylaws are enforceable "as contracts as between the corporation and its members"); *Ahmed v. Univ. Hosps. Health Care Sys.*, 8th Dist. Cuyahoga No. 79016, 2002-Ohio-1823, ¶ 37, ¶ 39 ("[A]s a matter of law, ... the bylaws constituted a contract ... . The parties are bound by the terms of [the bylaws], and the existence of material breach is considered in relation to those terms."); *Heifner v. Swaney*, 3d Dist. Allen No. 1-91-82, 1992 Ohio App. LEXIS 4177, at *6 (Aug. 17, 1992) (courts must "give meaning to every paragraph, clause, phrase and word" in a contract); *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21 (courts must "avoid that construction which renders a provision meaningless or inoperative").

**B. Proposition of Law No. 2: Allegations that a real-estate development project that includes the construction of a new headquarters for a multibillion dollar corporation, in a federally designated tax-abated "opportunity zone," where the local chamber of commerce has issued a press release touting "the potential to raise hundreds of millions of dollars in catalytic urban development opportunities, stimulating growth and job creation," are sufficient to support an inference that property values in the surrounding neighborhood were reasonably expected to increase as a result of the project.**

As explained fully in Section II.B. above, the courts below erroneously dismissed Plaintiffs' claims for rescission based on the alleged breach of the DTM bylaws' prohibition against conflicts of interest, as well as Plaintiffs' claim against the individual Defendants for breach of their fiduciary duty of loyalty that were based on the same alleged conflicts. The lower courts' dismissal of these claims depended on the notion that it was somehow too "speculative" for Plaintiffs to rely, at the pleadings stage, on the inference that property values in the neighborhood surrounding the DTM were reasonably expected to increase as a result of the construction of the new Cleveland Foundation headquarters. **Appendix 2**, 8.[10] This, despite Plaintiffs' allegations that this project was located in a federally designated tax-abated "opportunity zone," and that the local chamber of commerce issued press release touting "the potential to raise

[10] While secondary to its opinion upholding dismissal of the conflict-of-interest based claims, the Court of Appeals, like the Trial Court before it, also included an inapposite discussion of the "business judgment rule." Appendix 1, 14-16, ¶ 30–¶ 35. As Plaintiffs pointed out below, the business judgment rule only applies in analyzing alleged breaches of the fiduciary's duty of care, and has nothing to do with the analysis of alleged breaches of loyalty, the latter being the only alleged breaches at issue here. Reply Br., 7, citing *Stepak v. Schey*, 51 Ohio St.3d 8,14, 553 N.E.2d 1072 (1990) (The "protections of the business judgment rule" are not available where it is shown that "the director was not acting in good faith or with disinterest... It matters not that the director acted absent actual fraudulent intent; as long as the director places himself in a position of conflicting loyalties and subsequently violates his primary obligation to the corporation, liability attaches.").

hundreds of millions of dollars in catalytic urban development opportunities, stimulating growth and job creation." R. 1, ¶ 36–¶ 37.

This error similarly requires this Supreme Court's attention, as it effectively writes the very concept of an "inference" out of existence, not to mention its disregard for the requirement that all reasonable inferences available from Plaintiffs' allegations were to be construed in Plaintiffs' favor. On the standard erroneously applied below, no inference could ever withstand the accusation that it is "too speculative," and any circumstantial evidence whatsoever could be rendered void. *See* Section II.B. above, citing *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187, 1192 (1980). *State v. Sherrils*, 8th Dist. Cuyahoga No. 41302, 1980 Ohio App. LEXIS 11433, at *8 (Apr. 17, 1980), fn. 2 ("Inference has been defined as 'a mere permissible deduction which the trier of the facts may make without express direction of the law to that effect, signifying those deductions and rational conclusions which are the result of the application of the ordinary principles of logic.'"), *State v. Myers*, 26 Ohio St.2d 190, 197, 271 N.E.2d 245 (1971). *See* *State ex rel. Cordray v. Evergreen Land Dev., Ltd.*, 7th Dist. Mahoning Nos. 15-MA-0115, 15-MA-0116, 2016-Ohio-7038, ¶ 17 ("The fact that [plaintiff] may employ[] circumstantial evidence and inference ... does not equate to mere speculation. Circumstantial evidence has the same probative value as direct evidence. [And] rational inferences can be drawn based upon facts in the record and even based upon a combination of a fact in the record and another rational inference.").

## IV. Conclusion

For the reasons stated above, this Supreme Court cannot allow the below errors to stand without undermining sound, long-established, and fundamental

provisions of Ohio law; the pursuit of historic preservation, as well as corporate governance, generally, statewide; and public confidence in the judiciary. If it is really so important for the Cleveland Foundation and the DTM to encroach on this recently restored public greenspace, they should at least be required to do so in a lawful manner.

Respectfully submitted,

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**Certificate of Service**

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