12-16

IN THE SUPREME COURT OF FLORIDA

REBERT JONES, et al.,

Petitioners,

vs.

ARTHUR E. THOMAS, et al.,

Respondents.

----------/

CASE NO. 72,563

AMENDED
RESPONDENTS' INITIAL BRIEF

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STATEMENT OF THE CASE

Defendants/Respondents (Defendants) restate the case to supply relevant facts excluded from Plaintiffs/Petitioners' (Plaintiffs) Brief.

Plaintiffs' initial class action complaint filed March 21, 1984 (Vol. III, 1278-1288) contains three counts based on various and sundry violations of Chapter 83, Part III, Florida Statutes (1983), known as the Florida Mobile Home Landlord and Tenant Act. Among the alleged violations Plaintiffs complain of a proposed rent increase scheduled to become effective on April 1, 1984, after the tenants' leases had expired. Attached to the Complaint are various exhibits pertinent to Defendants' said proposal. Exhibit "B" is a letter dated January 30, 1984, notifying tenants of the proposed rental increase effective April 1, 1984, and as to where the rental agreements and Rules and Regulations can be picked up; Exhibit "A" is a copy of the proposed lease agreement and a copy of the Rules and Regulations made a part thereof; Exhibit "D: is a notification dated March, 1984, by tenants to Defendants that they do not intend to pay rent beginning April 1, 1984, for the reasons stated. Tenants have continued to reside on their respective lots and have paid no rent direct to Defendants since March 1, 1984.

On August 8 and 9, 1984, the Honorable Cecil H. Brown, Circuit Judge, entered an Order allowing the class action on the

authority of Florida Rules of Civil Procedure 1.220(b)(1) and 1.220(b)(2) (Vol. III, p. 1470-1474). The said Order was admittedly defective as it did not provide for notice to the class as required by Rule 1.220(d).

On June 4, 1984, Chapter 83, Part III, was repealed by the Legislature and Chapter 723, Florida Statutes, known as the "Florida Mobile Home Act", was enacted in its stead. Pursuant thereto and on July 25, 1985, Plaintiffs filed an Amended Complaint (Vol XI, p. 1956-2009).

The said Amended Complaint adds a fourth cause of action and alleges among other things that the proposed rental increase that was to become effective April 1, 1984, was unconscionable because Defendants failed to comply with Chapter 723.022, 723.022(4), and was unconscionable in accordance with 83.754, Florida Statutes and prays for injunctive relief for further violations.

After numerous motions and hearings the trial court dismissed three of the four counts alleged in the Amended Complaint leaving but one issue for decision, namely whether the proposed rental increase was unconscionable under Section 723.033 of the Florida Statutes. As to whether leases between the parties were unconscionable was not an issue at the trial level. On May 5, 1986, the trial court entered an Amended Final Judgment in favor of the Plaintiffs holding that the proposed rental increase was unconscionable and awarded attorneys fees of $35,000 and costs of $1,102.

On Defendants' appeal to the Fifth District Court of Appeal the Court reversed the Amended Final Judgment of the trial court

finding that procedural unconscionability cannot be asserted in a class action and reversed the finding of attorneys' fees. The said court did not pass on the additional issues raised by Defendants as to whether the trial court erred when it ordered the proposed lot rental increase to be unconscionable in the absence of a Mobile Home Lot Rental Agreement between the respective parties and others.

SUMMARY OF ARGUMENT

1. Meaningful choice to purchase a mobile home is an individual decision and where it is to be located is an individual decision. In this case most mobile homes were purchased by tenants at the location.

2. The parties had no agreement on March 21, 1984, except to pay $102.50 per month which they paid on or about March 1, 1984. There was no agreement to pay any monies above that amount. The suit was filed before the proposed increase was to be effective. The tenants did not contest the agreement to pay $102.50 per month. F.S. Ch. 83.754 is a defensive pleading to be pled if the landlord started an action to evict because the rent increase was not paid.

3. The Plaintiffs should not receive any attorney fees, even if they prevail, as there was no agreement providing for attorney fees nor did F.S. Chapter 83 provide for attorney fees on a suit as brought by Plaintiffs.

4. There were no pleadings seeking to declare the Defendant corporation an alter ego of other Defendants and no evidence or testimony presented to have the Defendant corporation declared the alter ego of the other Defendants.

5. The Plaintiffs failed to establish by pleadings, or testimony that a class action was proper in either the Complaint or Amended Complaint pursuant to F.R.C.P. 1.220.

ARGUMENT

I.

LANCA HOMEOWNERS, INC. ET AL., V. LANTANA CASCADE OF PALM BEACH, LTD., ET AL., 13 FL W 568, (FLA. SEPTEMBER 22, 1988) THE "LANCA CASE").

This key decision resolves the right of a home owners association to represent the interests of tenants, mobile home owners, in a class action against the park owner. To strengthen this ruling the Court adopted a new Rule of Civil Procedure titled "Mobile Home Owners Association", Rule 1.222, "to be effective immediately". The case sub judice does not involve a mobile home owners association as a party but the record does indicate one existed and Trial Judge Powell agreed for the association to be made a party. Further, it would seem most unjust to apply the new Rule retroactively after the case sub judice has been in litigation from March 21, 1984, to May 5, 1986, when the litigation under the then existing Rules was concluded at the trial level.

Inasmuch as the "absence of meaningful choice" has been an important factor in the Lanca decision we would like, with all due respect, to comment on this concept which has worked its way into mobile home law since Williams (1965), Stewart (1974) and Palm Beach Mobile Homes, Inc. (1974).[1]

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1. Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445 (DC App. 1965); Steward v. Green, 300 So. 2d 888 (Fla. 1974); Palm Beach Mobile Homes, Inc. v. Strong, 300 So. 2d 881 (Fla. 1974).

It is indeed regretable that the legal rights of mobile home owners, as a class, have developed on the conclusory assumption that they lack a meaningful choice because they are poor, aged, weak or ill and consequently become locked into their rented lots. Judicial notice should refute this erroneous conclusion because mobile home owners are not a identical twin group. Their homes are tied to the ground for safety sake and regulatory zoning rules require tying for the owner's protection. The success of the manufactured home industry (mobile homes) is attributable to the astuteness of the market. The product appeals to the young, middle aged, and retired, a whole cross section of our society, who prefer a community life in a home, or a second home, of their choice at a reasonable price. The mobile home is purchased with care and study. Certainly, a blind purchase should not be presumed in law. We propose another procedural rule which the Court may wish to consider that may help the courts in mobile home class action litigation. The new rule may provide in effect as follows:

> Upon the filing of a mobile home class action complaint counsel for the plaintiff class should file with the complaint an affidavit to the effect that he has conferred with the members of the class and to his satisfaction each member suffers an absence of meaningful choice with respect to the allegations contained in the complaint for the reasons as follows:

See: Mathieson v.General Motors Corp., 529 So. 2d 761 (Fla. 3rd DCA 1988).

II.

THE PROPOSED LOT RENTAL INCREASE DID NOT COME WITHIN THE TERMS AND PROVISIONS OF SECTION 83.754 OF CHAPTER 83, PART III, FLORIDA STATUTES (1983), TITLED THE "FLORIDA MOBILE HOME LANDLORD AND TENANT ACT".

A central issue that survived the various and sundry allegations contained in Plaintiffs' Complaints is whether, what Plaintiffs call the "proposed lease" or the "proposed leases" or the "offered" agreements or the "proposed lot rental increase" come, as a matter of law, within the terms and provisions of Section 83.754 of Chapter 83, Part III, Florida Statutes (1983), titled the "Florida Mobile Home Landlord and Tenant Act".[1] This issue was raised but not decided by the District Court--instead, said Court addressed the class action issue holding that the requirements for procedural unconscionability are too individualized to be asserted in a class action as "meaningful choice" is, in effect, a two way street. Thus, the decision of the Trial Court in favor of Plaintiffs was reversed.

Defendants contend that "proposed leases" or "offered" agreements are not covered or contemplated by Section 83.754 and Plaintiffs, therefore, have no cause of action as a matter of law under said Section.

The admitted facts relevant thereto are as follows:

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1. Chapter 83, Part III was repealed June 4, 1984, and Chapter 723, Florida Statutes, 1985, the "Florida Mobile Home Act" was adopted in its stead. Section 83.754 is substantially the same as Section 723.033, Florida Statutes, 1985.

On January 30, 1984, by letter of even date, the park owner notified the mobile home owners that effective April 1, 1984, lot rent would be increased $27.50 per month to $130.00 and new lot rental leases were available on the park premises for signature and return by April 1, 1984. On March 31, 1984, existing leases would expire. Upon receipt of such notices the Plaintiffs, in March, advised the park owner in writing that they had no intention to pay the proposed rent increase. Pursuant to their stated intention they refused to enter into a lease agreement with the park owner and on March 21, 1984, the Plaintiffs filed their Complaint. Subsequently after April 1, 1984, the park owner was enjoined from instituting an eviction action at the instance of the Plaintiffs and the Section 83.754 action proceeded over the park owners' timely objection.

Section 83.754 provides as follows:

> (1) If the court as a matter of law finds a mobile home lot rental agreement, or any provision of the rental agreement, to have been unconscionable at the time it was made, the court may:
>
> (a) Refuse to enforce the rental agreement.
>
> (b) Enforce the remainder of the rental agreement without the unconscionable provision.
>
> (c) So limit the application of any unconscionable provision as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the rental agreement, or any provision thereof, may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to meaning, relationship of the parties, purpose, and other relevant factors to aid the court in making the determination.

Section 83.752(4) "Definitions" provides as follows:

> (4) "Mobile home lot rental agreement" or "rental agreement" means any mutual understanding, lease, or tenancy between a mobile home owner and a mobile home park owner in which the mobile home owner is entitled to place his mobile home on a mobile home lot for the payment of consideration to the mobile home park owner.

Under the foregoing admitted facts and under the express and unambiguous provisions of Sections 83.754 and 83.752(4) Plaintiffs have no claim of unconscionability against the park owners absent a mobile home lot rental agreement and the Trial Court erred to declare one.

In State of Florida v. De Anza Corporation, 416 So. 2d 1173, (Fla. 5th DCA 1982) the State sought in its Count II to have the Trial Court declare the landlord's prospective rental increase declared unconscionable within the meaning of Section 83.754 of Chapter 83, Part III. The State appealed from the trial Court's order dismissing Count II. The Fifth District Court of Appeals affirmed. In its opinion the Court stated:

> "Section 83.754, upon which Count II is based, allows the court to declare 'a mobile home lot rental agreement, or any provision of the rental agreement, to have been unconscionable at the time it was made.' Section 83.752(4) defines 'mobile home lot rental agreement' as 'any mutual understanding, lease or tenancy between a mobile home owner and a mobile home park owner' and contemplates that a contract must exist between the parties before it, or any term of it, may be declared to be unconscionable. While Count II generally alleges that defendant's rent structure was unconscionable because rental was increased at a rate in excess of the cost of living, it does not allege that the lessees were bound by any agreement to pay the increased rental."

In this case the Plaintiffs have not alleged they were bound by any agreement to pay the increased rental.

In Kohl v. Bay Colony Condominium, Inc., 398 So. 2d 865 (Fla. 4th DCA 1981) relief was sought based on the terms of a lease of recreational facilities on grounds of unconscionability as was in Garrett v. Janiewski, 480 So. 2d 1324 (Fla. 4th DCA 1986) where unconscionability under Section 83.754 was based on a rental provision in a lease. Absent a mutual understanding lease

or tenancy for the payment of consideration to the park owner unconscionability cannot be declared under 83.754 or 723.033.

The severity of unconscionability is tested with respect to a contractual relationship between the parties starting mainly in Florida with the widely accepted case of Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445 (DC App. 1965) and carried into Section 83.754, as defined by 83.752(4), adopted into the Statute law of this state. To change the impact of unconscionability to other party relationships or where there is no party relationship requires an act of the Legislature and this has been done by Chapter 723, Florida Statutes (1985). Section 723.037 thereof relates to lot rental increases and provides for arbitration where the increase is unreasonable. If the Plaintiffs have misplaced their rights the responsibility therefore should not be that of the park owner and "meaningful choice" has no relevance where the tenants have deliberately stated in writing their intention not to pay the proposed rent increase.

In mobile home cases it has been the practice to advise tenants to sign the lease then proceed under Section 83.754 (or 723.033) on the concept of "the absence of meaningful choice."

The case sub judice circumvents the practice and seeks relief when admittedly no agreement exists.

III.

ATTORNEY'S FEES TO COUNSEL FOR PLAINTIFFS SHOULD BE DENIED.

Section 83.756 of the Florida Mobile Home Landlord and Tenant Act provides:

> If a mobile home lot rental agreement contains a provision allowing attorney's fees to the mobile home park owner, the court may also allow reasonable attorney's fees to the mobile home owner whenever the mobile home owner prevails in any action by or against him.

There being no mobile home lot rental agreement in the case sub judice, no attorney's fees are allowable under this Section, and furthermore, in the circumstances stated in this Brief, Plaintiffs should not prevail in their action under Section 83.754 and all other of Plaintiffs' claims alleged in their Complaint and Amended Complaint have either been denied by the Trial Court or abandoned by the Plaintiffs. Likewise, attorney's fees are not recoverable under Section 83.76(2) for the same reasons.

In counsel's affidavit re Services rendered (Vol. XV, p. 2688-2689) and Motion to Award Attorney's Fees (Vol. XV, p. 2695-2752) he states that the named Plaintiffs retained him pursuant to an agreement to pay him at the rate of $100.00 per hour for services rendered in the prosecution of the action and $750.00 per day for services rendered during the trial.

At the fee hearing held April 21, 1986 (Transcript, Vol. XVI, R. 302) counsel testified that his firm has been paid $22,000.00 to the date of hearing (p. 24).

The following questions were asked of counsel (hearing, April 21, 1986 (Transcript, Vol. XVI, R. 302, p. 28, 29)):

> Q. Now, do you have an agreement with the client that they were to pay your fee and these costs no matter what the result of the lawsuit was?
>
> A. Yes.
>
> Q. Did you have that in writing?
>
> A. x x x It is my recollection that we did have a written agreement, but I could not locate it x x x.
>
> Q. You have nothing in writing at this moment?
>
> A. I could not find it.
>
> Mr. McLeod: I ask the court for him to produce that if he has something. I think it is very important for the Court to see if there was something in writing x x .
>
> The Court: Mr. McLeod, I don't know whether I'm going to grant that or not x x.

The Court did not grant Mr. McLeod's request. The written fee agreement between counsel and his clients would be the best evidence from which a determination could be made as to the amount of compensation counsel would be entitled to receive for his agreed services. The fact that he could not find this important and relevant written agreement which admittedly was some place in his files is a careless disregard of the merit of his request for the services purported to have been rendered on his clients' behalf.

Erickson Enterprises, Inc. v. Louis Wohl & Sons, 422 So. 2d 1085 (Fla. 3rd DCA 1985).

In Re Lonstein, 433 So. 2d 672 (Fla. 4th DCA 1983).

4 Fla. Jr. 2d, Attorneys at Law, 137.

In the absence of counsel's admitted written agreement relative to the payment of fees there is no basis in the record upon which the fairness thereof can be determined.

Attorney's fees should be denied.

IV.

THE TRIAL COURT ERRED IN FINDING THAT FRIENDLY ESTATES MOBILE HOME PARK, INC. WAS AN ALTER EGO OF THE INDIVIDUAL DEFENDANTS, ARTHUR E. THOMAS AND SHIRLEY THOMAS, HIS WIFE.

The Trial Court's Amended Final Judgment of May 5, 1986 (R. Vol. XVI, 310) finds, among other things as follows:

> Turning now to the evidence offered to prove substantive unconscionability, the facts are that this mobile home park was built in the early 1970s. The Thomas's began to operate the park under a purchase contract in 1978 and closed the transaction in February, 1979. Subsequently, the Thomas's formed a closely held Florida corporation, Friendly Estates Mobile Home Park, Inc., to which they leased the park under a verbal agreement whereby the corporation would operate the park and make monthly payments to the Thomas's from which the latter would pay the mortgage and taxes. This corporation was made a party defendant. I find from the evidence that it was merely an alter ego of the Thomas's.

The Amended Complaint (R. Vol. XI, 137, p. 1956-2009) provides, in part, at page 4 thereof:

> The Defendants, Arthur E. Thomas and Shirley Thomas, his wife, are residents of Osceola County, Florida, and are land contract vendees of the real property upon which the Friendly Adult Estate Mobile Home Park is located and represent themselves as owners of said mobile home park. The advertising literature, brochures and the proposed lease represent the lessor of the mobile home park to be "Friendly Adult Estates". The Defendant, Friendly Adult Estates, Inc., is a Florida corporation owned by Arthur E. Thomas and

> Shirley Thomas, his wife, who are respectively, President and Secretary/Treasurer of said corporation; that Arthur E. Thomas is the Registered Agent of said corporation; that the occupational license for said mobile home park indicates said corporation as owner of the park and it has been represented in prior leases that the corporation is the lessor of mobile home sites in said park. The term "Defendants" as used herein refers to the Defendants, jointly and severally.

The Amended Complaint further charges that the "offered" lot rental agreements are "unreasonable, unfair and unconscionable for the following reasons": Following thereafter are the allegations which purport to show that the "offered" lot rental agreements were unconscionable.

There is no allegation in the Complaint or the Amended Complaint that Mr. and Mrs. Thomas used the corporation to evade their obligations, to defraud creditors, to evade the law or that they were guilty of a breach of trust. Nor is their proof of any such activity on their part.

To the contrary, the Trial Court found that the Thomas's were guilty of "inadequate management" of the corporate entity or they relied on "self help", the park was "poorly managed", etc. Assuming this is true, the corporate park, the owner of the park, had as its principal officers the Thomas's.

There is no evidence in this case that the corporation was formed or used for fraudulent purposes nor were there allegations in the complaints to that extent. Nor does the complaint allege that the corporation was formed or used for fraudulent purposes or that it was the alter ego of the Thomas's. Nor is it alleged or proven that the corporate entity was used by the Thomas's as a cloak or cover for fraud or illegality.

See Charter Air Center, Inc., v. Miller, 348 So. 2d 614 (Fla. DCA 2d 1977); Hester v. Tucker, 465 So. 2d 1261 (Fla. DCA 2d 1985); 8 Fla. Jur 2d, Business Relationship, § 18.

The issue of alter ego was not raised in the complaints and as such was not an issue at any time during the hearings with respect to unconscionability of the proposed lot rental increase. The only issue was whether the proposed increase was unconscionable under Section 83.754 as proposed by the Friendly estates Mobile Home Park, Inc.

The trial court was in error finding that the corporation was the alter ego of the Thomas's in the circumstances of this case.

V.

THE ORDER OF THE TRIAL COURT ALLOWING CLASS REPRESENTATION FAILED TO COMPLY WITH RULE 1.220 OF THE FLORIDA RULES OF CIVIL PROCEDURE AND AS A RESULT, THE CLASS ACTION MAINTAINABLE.

The Complaint was filed alleging the action was brought pursuant to F.R.C.P. 1.220(b)(1)(B) and Rule 1.220(b)(2) on March 21, 1984 (Vol. III, p. 1278-1288):

> (b) Claims and Defenses Maintainable. A claim or defense may be maintained on behalf of a class if the court concludes that the prerequisites of subdivision (a) are satisfied, and, in addition that:
> (1) the prosecution of separate claims or defenses by or against individual members of the class would create a risk of either:
>
> . . . . . .
>
> (B) adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests; or
>
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate; or
>
> . . . . . .

On August 9, 1984, Trial Judge Brown entered an order on pending motions (Vol. III, page 1470-1472) which stated in paragraph 10 as follows:

> 10. That the Court shall take under advisement the Plaintiffs' Motion for Determination of Class Action, the Defendants' Motion for Determination of Class Action and the Defendants' Motion to Deny Motion to Determine Class Action and the attorneys for the Defendants shall prepare a proposed Order and no later than July 20, 1984, file said proposed Order and serve it on Plaintiffs' attorney and further, that Plaintiffs attorney is to prepare a proposed order and no later

than July 27, 1984 file said proposed Order and serve it on Defendants' attorneys.

On August 9, 1984, Judge Brown entered an Order determining and approving class action (Vol. III, p. 1473-1474). No testimony or evidence was presented to the Court as to whether the Complaint was a class action pursuant to F.R.C.P. 1.220.

> F.R.C.P. 1.220(a) Prerequisites to Class Representation. Before any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

F.R.C.P. 1.220(c) and (d) require a hearing on the issue if the complaint can be maintained as a class action.

Port Royal, Inc. et al v. Vincent H. Conboy, 154 So. 2d 734 (2 DCA 1963).

Frankel v. City of Miami Beach, 340 So. 2d 463 (Sup. Ct. 1976).

National Lake Development v. Lake Tippecanoe, 417 So. 2d 655 (Sup. Ct. 1982).

Dade County Police Benevolent Association, Inc. v. Metropolitan Dade Co., 452 So. 2d 6 (3rd DCA, 1984).

The allegations of the Complaint did not use the word "fraud" but to prove an unconscionable agreement, fraud must be proved.

Rosenwasser v. Frager, 307 So. 2d 865 (3rd DCA 1975).

Davidson, et al v. Lely Estates, Inc., 330 So. 2d 528 (2nd DCA 1976).

By letter dated March 13, 1985, filed April 2, 1985, (Vol. X, p. 1728-1731) the attorney for Plaintiffs requested the court to reconsider the issue of class action, pursuant to F.R.C.P. 1.220. Trial Judge Powell by Order, April 2, 1985 (Vol. X, p. 1732-1736) required notice of class action. On April 25, 1985, a certificate was filed (Vol. X, p. 1766-1781).

Said notice and certificate did not comply with F.R.C.P. 1.220(d) as order setting jury trial and pretrial was filed March 15, 1985 (Vol. X, p. 1709-1710).

The notice should have been directed to tenants in the park on March 21, 1984.

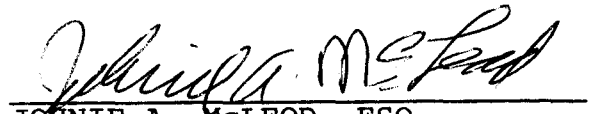
On July 11, 1985 (Vol. X, p. 1924-1927) Trial Judge Powell entered an order stating 1.(b) page 2 "The court finds that this claim is a proper subject of a class action." No testimony was taken before this order was entered. F.R.C.P. (d)(1)(2)(3)

An Amended Complaint was filed July 25, 1985 (Vol XI, p. 1956-2009). The Plaintiffs did not comply with F.R.C.P. 1.220(a)(b)(c)(d). The Amended Complaint made changes as to Paragraphs 2.C.F., 4.C.(1)(2)(3), and 6 from those made in their Complaint. This was a substantive change as it alleged that Respondents violated a portion of F. S. Chapter 723 which was not effective until June 4, 1984, at the earliest.

No order was entered amending the original order determining a class action and therefore no notice to tenants (class) was made as required by F.R.C. P. 1.220(a)(1)(2)(3).

CONCLUSION

Respondents respectively recommend that the Supreme Court affirm the Order entered by the Fifth District Court of Appeals or in the alternative return it to the Fifth District Court of Appeals or to the Trial Court to make finding of fact as to whether there was an agreement between the parties, and also whether proper notice was given to the members of the proposed class pursuant to F.R.C.P. 1.200.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U. S. Mail, postage prepaid this 2nd day of November, 1988, to the following:

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