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IN THE SUPREME COURT OF FLORIDA

NAEGELE OUTDOOR ADVERTISING CO., INC., SAM E. NEWEY, LES LOGGINS ADVERTISING & PUBLIC RELATIONS, INC., et al.,

Petitioners,

vs.

Case No. 83,734
(DCA No. 93-381)

CITY OF JACKSONVILLE, FLORIDA and CAPSIGNS, INC.,

Respondents.

_____/

CORRECTED ANSWER BRIEF OF RESPONDENT, CITY OF JACKSONVILLE, FLORIDA

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PRELIMINARY STATEMENT

This Answer Brief is filed on behalf of Respondent, Consolidated City of Jacksonville which will be referred to as "City" (City).

Petitioners, Naegele Outdoor Advertising, Co. (Naegele), Sam E. Newey (Newey), Les Loggins Advertising & Public Relations, Inc. (Loggins), Wil Wes Rappaport, Tracy Rappaport, and Dare Hawkins d/b/a Classic Outdoor Advertising, a Pennsylvania general partnership (collectively referred to as "Classic"), and Whiteco Metrocom, a division of Whiteco Industries, Inc. (Whiteco) will be referred to by name or collectively as "Petitioners."

Respondent Capsigns, Inc., granted status as Defendant/Intervener by the trial court, will be referred to as "Capsigns."

The Charter of the Consolidated City of Jacksonville will be referred to as the "Charter."

Article 23 (formerly Article 31) of the Charter, as adopted by the voters on May 26, 1987, will be referred to as the "1987 Charter Amendment" or "Charter Amendment."

The legislative body of the Consolidated City of Jacksonville, Florida, will be referred to as the "City Council."

Ordinances of the City will be referred to by ordinance number which identifies: the year of introduction, the consecutive number assigned to the ordinance upon introduction, and the consecutive number assigned to the ordinance upon

passage. For example, the 1,523rd ordinance introduced in 1986 and which was the 871st ordinance passed in 1987 is assigned ordinance number 86-1523-871.

References to the record, transcripts of testimony and evidentiary exhibits, pleadings and orders will be accomplished through the references to the appendix by appendix:section number:page number. For example, a reference to appendix section 2 at page 46 would be referenced as "[A:2:46]."

References to Petitioners' appendix to their Second Amended Initial Brief will be by appendix:section number:page number. For example, a reference to Petitioners' appendix section number 32 at page 7 would be referred to as "[IB:32:7]."

STATEMENT OF THE CASE

This appeal involves the issue of whether Petitioners have been denied due process by the accrual of fines for failure to remove certain billboards in violation of the City's sign regulations (located in various chapters of the City's Ordinance Code and as provided in the 1987 Charter Amendment) where Petitioners delayed over 5 years in challenging the validity of these sign regulations.

On May 24, 1991, Petitioners Naegele, Newey and Loggins filed an 89 paragraph 14-count complaint (Case No. 91-07793-CA) challenging the validity of the 1987 Charter Amendment and various sections of the Jacksonville Ordinance Code. [IB:1:1-23]. On December 16, 1991, Petitioners Naegele, Newey and Loggins filed an Amended Complaint adding 14 additional counts. [A:2:1-41]. On March 30, 1992, Plaintiffs Lois I. Gefen and National Advertising Company filed a 286-paragraph, 20-count complaint. On May 26, 1992, Plaintiff Junior Posters of North Florida, Inc., filed its 261-paragraph, 20-count complaint. Also filing a 314-paragraph, 20-count complaint on the same day were Plaintiffs Universal Outdoor, Inc., L. I. Gefen, Anastasia Advertising Art, Inc., Walter Brazil, Ed Yates, First Coast Outdoor Advertising, Inc., James M. Wynn, and Tri-State Systems, Inc., as well as Petitioners Classic and Whiteco. [IB:3:1-71]. Motions to dismiss raising specific defenses on the face of the complaints were filed as to each complaint.

On or about October 28, 1992, each Plaintiff, including Petitioners Naegele, Whiteco and Classic,[1] moved for the entry of a temporary injunction, and the trial court consolidated the cases. [A:3-6]. On November 6, 1992, Respondent Capsigns filed its motion to intervene in the consolidated cases, and the trial court entered an order permitting Capsigns to intervene on November 23, 1992. A full day evidentiary hearing was conducted on November 23, 1992 [A:17:2], and the parties orally argued their positions to the trial court on December 11, 1992. [A:17:253].

On December 29, 1992, the trial court entered an order granting temporary injunctive relief to all Plaintiffs[2] (including Petitioners Naegele, Whiteco, and Classic who sought temporary injunctive relief and also extending to Petitioners Newey and Loggins who had not sought temporary injunctive

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[1] Petitioners Newey and Loggins did not seek temporary injunctive relief. None of the Petitioners sought temporary injunctive relief prior to June 1, 1992, the date by which certain of Petitioners' signs were required to be removed, pursuant to the 1987 Charter Amendment.

[2] Plaintiff's at the trial court level included: Naegele Outdoor Advertising, Co., a corporation; Sam E. Newey; John E. Mullis; Les Loggins Advertising & Public Relations, Inc., a corporation; Junior Posters of North Florida, Inc., a Florida corporation; Universal Outdoor, Inc. d/b/a Atlantic Outdoor Advertising, Inc., a Florida corporation; L. I. Gefen, d/b/a SLG Investments; Anastasia Advertising Art, Inc.; Walter Brazil d/b/a B&B Outdoor Advertising; Ed Yates d/b/a Billboard Consultants; Wil Wes Rappaport, Tracy Rappaport, and Dare Hawkins d/b/a Classic Outdoor Advertising, a Pennsylvania general partnership; First Coast Outdoor Advertising, Inc., a Florida corporation; Whiteco Metrocom, a Division of Whiteco Industries, Inc., a foreign corporation; James M. Wynn; Tri-State Systems, Inc., a foreign corporation; Louis I. Gefen and National Advertising Company, a Delaware corporation.

relief). [A:7:0-5(sic)]. In addition, the trial court effectively enjoined the enforcement of Ordinance 86-1523-871, which ordinance Petitioners had conceded was validly enacted. [A:17:294-95]. Furthermore, as to whether Petitioners' demonstrated a substantial likelihood of success on the merits (one of the four prerequisites to granting a temporary injunction), the trial court simply stated:

> Whether the remaining requirement that Plaintiffs demonstrate a substantial likelihood of success on the merits has been met will not be decided at this time. . . . The merits of these [the parties'] positions should be decided after trial.

[A:7:3].

The City filed a notice of appeal on January 27, 1993, with the District Court of Appeal, First District.

On March 30, 1994, following oral arguments, the First District reversed the trial court's order. [A:1:750-55]. Petitioners have sought this Court's review of the First District's decision as to whether or not, in light of Florida East Coast Railway v. State, 79 Fla. 66, 83 So. 708 (1920), the First District was required to affirm the trial court's order enjoining the accrual of fines during the pendency of litigation to challenge the validity of the sign regulations under which the fines were imposed (referred to by some courts as the "constitutional tolling" of fines). See Second Amended Initial Brief of Petitioner at 1. On September 6, 1994, this Honorable Court accepted jurisdiction and scheduled oral argument for December 8, 1994.

STATEMENT OF THE FACTS

1. Sign Regulations

Charter Amendment

In early 1987, the citizens of Jacksonville, by special county-wide referendum, enacted the 1987 Charter Amendment encompassing a new Article 31 (now Article 23) of the Charter of the City of Jacksonville. [A:9:1]. This Charter Amendment expressed the citizens' concerns for community aesthetics and traffic safety. See § 23.01, Charter of the City of Jacksonville (1991). Pursuant to these concerns, the 1987 Charter Amendment immediately prohibited construction of any new offsite commercial billboards and required that certain offsite commercial billboards[3] be removed by June 1, 1992. [A:9:1]. In addition, the Charter Amendment established a penalty of $500 per day per sign for each offsite commercial billboard which remained after June 1, 1992, in violation of the Charter Amendment. Id. The 1987 Charter Amendment provided in pertinent part:

> Section 31.04. Removal of Certain Offsite Commercial Billboards on or before June 1, 1992.-Except for offsite commercial billboards located along any portion of the "interstate highway system" or the "federal-aid primary highway system" as defined in Chapter 479,

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[3] The affected offsite commercial billboards were those located along roads other than the interstate highway system and the federal aid-primary system whose regulation is addressed by statewide legislation. See, e.g., Chapter 479, Florida Statutes (1993).

> Florida Statutes (1985), all offsite commercial billboards shall be removed on or before June 1, 1992 by the owner of the billboard and the owner of the property on which the billboard is affixed or attached.
>
> Section 31.05. Prohibition on Future Commercial Use of Offsite Non-Commercial Billboards.-Any offsite non-commercial billboard constructed or erected within the city subsequent to June 1, 1987 shall not thereafter be converted into, or used as, an offsite commercial billboard.
>
> Section 31.06 Enforcement and Penalties.-
>
> . . . .
>
> (c) In connection with any offsite commercial billboard which is not removed as required by section 31.04, each person responsible for said removal shall pay the city a penalty of $500.00 per day until the offsite commercial billboard is removed.

[A:9:1]. Under the 1987 Charter Amendment, Naegele was required to remove 45% of its structures [A:17:71], Classic was required to remove 6 of its 18 structure [A:17:117], and Whiteco was required to remove 4 of its 37 structures [A:17:142-43].

Referendum

Beginning April 8, 1987, Respondent Capsigns, a Florida not-for-profit corporation, sponsored a petition drive to place on the general election ballot a proposed amendment to the Charter for the regulation of offsite commercial billboards. [A:11:4]. On April 16, 1987, Capsigns submitted to the Supervisor of Elections over 17,000 signed petitions from registered voters in accordance with the procedures prescribed in

the Charter for a referendum in order to amend the City's Charter in connection with the commercial billboard regulations. [A:12:2]. On April 22, 1987, the Supervisor of Elections certified the validity of the signatures and acknowledged that the referendum would be placed on the May 26, 1987, ballot. Id. at 1-2. Under the Charter, notice of the referendum had to be published twice in a newspaper having a general circulation in Duval County, and had to set forth the date of the election and the "exact language of the proposed amendment" as it would appear on the ballot. Ch. 67-1320, § 23.05, at 1397, Laws of Fla. On April 24 and May 8, 1987, the proposed amendment was duly advertised in a newspaper of general circulation in Duval County, Florida, bearing the title "Special Referendum," containing a summary, and setting forth the exact language of the proposed amendment. [A:14:1].

Billboard Industry Involvement

Following the publication on April 24, 1987, considerable campaigning took place by the billboard industry in opposition to the Charter Amendment. Members of the billboard industry formed two political action committees known as Citizens Against Charter Amendment (CACA) and the Junior Poster Group Committee (Junior Poster Committee). [A:17:189-90]. The purpose of these two committees was to try to prevent adoption of the amendment to the Charter. Id. One of the two committees, CACA, was actually

formed by Petitioners' own counsel. [A:17:208-09]. Petitioner Naegele's predecessor in interest contributed $160,807 to CACA, as reflected by CACA's financial report. [A:13:4]. Naegele Advertising, Inc.'s, address (1120 Crestwood Street) was the same address as CACA's president, James R. Shine, Jr., and CACA's treasurer, Rita B. Donaldson. Id. at 1-2. The express purpose of the Naegele-funded committee, CACA, was "[t]o oppose the Jacksonville City Charter Amendment, which bans billboards." Id. at 1. The CACA's campaign financial report also reflected the payment of $2,515.36 to Naegele for attorney fees and expenses on June 5, 1987, and an additional $4,713.51 in attorney fees paid directly to Petitioners' counsel on June 9, 1987. Id. at 10.

During the campaign waged by the billboard industry, the Naegele-funded CACA utilized direct mailings to households, took out full-page and other newspaper advertisements, paid management and phone bank fees, and paid radio advertising. Id. at 5-7. CACA also paid attorney fees in excess of $7,000. Id. Petitioners' counsel even participated as spokesperson for the billboard industry in two television debates. [A:17:209].

Adoption of Charter Amendment

On May 26, 1987, despite the billboard industry's efforts, the voters adopted the proposed charter amendment by majority vote during the general election. In 1991, the City Council reenacted the charter amendment by ordinance. See

Ordinance 91-756-352; [IB:15:1-4]. In 1992, the state legislature, by special act, re-adopted the entire Charter, including the 1987 Charter Amendment. Ch. 92-341, at 130-214, Laws of Fla.

Ordinance Code

In 1986, the City introduced Ordinance 86-1523-871 which provided for amendments to Chapters 320, 326, and 656, Jacksonville Ordinance Code, pertaining to both onsite and offsite signs, and which prohibited certain offsite signs. [A:8:32-40]. Ordinance 86-1523-871 became effective on March 11, 1987. [A:8:42]. Petitioners themselves presented evidence at the November 23, 1992, evidentiary hearing as to the publication and notice requirements prior to adoption of Ordinance 86-1523-871. [A:15:1-15 and A:17:39]. Ordinance 86-1523-871 required the removal, change or alteration of all lawful nonconforming signs by March 11, 1992. [A:11:20-24]. The term "lawful nonconforming sign" was clearly defined to include any sign that was at one time lawfully erected but which subsequently did not conform to the standards of the ordinance code. Id.

In 1989, the City Council amended the Jacksonville Ordinance Code to make it consistent with the Charter, prohibiting new offsite commercial billboards and requiring certain others to be removed by March 11, 1992. See Ordinance 89-459-244; [A:10:1-5]. Petitioners' counsel was actively

involved in this Ordinance 89-459-244 prior to its adoption. Petitioners' counsel, by letter dated June 27, 1989, to the President of the City Council went so far as to suggest an amendment to the proposed ordinance so that regulations of signs under Ordinance 89-459, "like the Charter Amendment 31, would exempt off-site signs on the interstate and federal aid primary systems." [A:16:1]. The signs to be removed under the Charter and the Jacksonville Ordinance Code are the same.

Petitioners challenged the validity of a variety of City ordinances pertaining to sign regulations.[4] Petitioners argued that the City failed to comply with the notice requirements of Section 166.041, Florida Statues, when adopting sign regulations in the ordinance code. [A:2:14-15]; [IB:3:39-40].

2. Challenges by Petitioners

Delayed Challenge

Petitioner's counsel testified at the November 23, 1992, evidentiary hearing that in May of 1987, he felt that the 1987

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[4] In their amended complaint, filed on December 16, 1991, Petitioners Naegele, Newey and Loggins challenged Ordinances numbered 91-59-148, 91-305-142, 91-756-352 and 91-761-410. In their initial complaint filed May 26, 1992, Petitioners Whiteco and Classic challenged the same ordinances as Naegele, Newey and Loggins. In addition, they challenged Ordinances numbered 86-1523-871, 88-254-107, 89-459-244 and 91-462-235. [IB:3:1-15, 39-52]. These ordinances challenged by Petitioners are codified in Chapters 320, 326 and 656 of the Jacksonville Ordinance Code.

Charter Amendment "violated the constitutional rights" by taking private property without compensation. [A:17:211]. Petitioner's counsel also testified that he "did not feel it was particularly appropriate to have a group of citizens being able to institute suit against people and attempt to collect fines of $500 a day per sign." Id. Nonetheless, no billboard company elected to challenge the referendum prior to the election.

In fact, despite their knowledge and active involvement during 1987, 1988, 1989, and 1990, Petitioners did not challenge the validity of the Charter Amendment or the Jacksonville Ordinance Code until 1991. Petitioners did not institute a suit to contest the Supervisor of Elections certification of the petitions on April 22, 1987, to challenge the ballot summary, or to keep the proposed charter amendment off the ballot. Just two days before the four-year anniversary of the 1987 Charter Amendment and over four years after the Supervisor of Elections certification of the petition, Petitioners Naegele, Newey and Loggins filed their initial complaint. [A:2:41]. Petitioners Whiteco and Classic did not file their initial complaint until May 26, 1992, exactly five years after voters adopted the Charter Amendment. [IB:3:71].

Furthermore, Petitioners waited until after the five-year grace period was over and penalties had begun accruing and after the City had notified them of certain billboards existing in violation of the Charter Amendment before filing motions for temporary injunctive relief on October 28, 1992. [A:3-6].

Petitioners' excuses for the delay in seeking temporary injunctive relief included lack of funds to fight the regulations in court and a purported lack of knowledge that there could be a legal challenge to the form of the petitions. [A:17:150-53, 257-58, 273-74].

In the amended complaint, filed on December 16, 1991, Petitioners Naegele, Newey and Loggins challenged Ordinance number 91-305-142, which had become effective before the filing of the original complaint. [IB:14:3]. All of the ordinances challenged by Petitioner Whiteco and Classic in their initial complaint, not filed until May 26, 1992, had already been enacted. [A:8,9]; [IB:10,13-15].

No Challenge

Initially, Petitioners Whiteco and Classic challenged the enactment of Ordinance 86-1523-871. However, at oral argument, all Petitioners[5] conceded that this ordinance was properly enacted. [A:17:294].

Petitioners in their Second Amended Initial Brief of Petitioners at page 7, footnote 6, asserted jointly as having alleged certain claims under the Florida Constitution. Several of those challenges included: Article I, Section 9 (due process), Article I, Section 17 (prohibition against excessive

[5] As previously noted, Petitioners Loggins and Newey did not join in Naegele's motion for temporary injunctive relief.

fines), Article I, Section 18 (prohibition of unauthorized administrative agency penalties), and Article III, Section 11(a)(4),(7),(8), & (12) (prohibited special laws), as a part of their challenge to the sign ban regulations. However, Petitioners Naegele, Loggins and Newey did not allege any such claims in either the Initial Complaint or the Amended Complaint. [A:2:1-41].

Finally, Petitioners limited their request for temporary injunctive relief to the issue of alleged procedural defects in the enactment of the 1987 Charter Amendment and certain City ordinances. [A:17:10-15, 19-24].

SUMMARY OF ARGUMENT

The "constitutional tolling" principle established by this Honorable Court in Florida East Coast Railway v. State, 79 Fla. 66, 83 So. 708 (1920), protects the right of an individual to challenge the validity of rules or regulations without having to face the "Hobson's choice" of either complying with a rule or regulation believed to be invalid and suffering the possible severe economic consequences of compliance or, instead, refusing to comply and challenging the rule or regulation at the risk of accumulating crippling penalties against the individual. In such a situation, this Court assures adequate due process by preventing the imposition of heavy fines pending a good faith test of the rule or regulation.

Assuming there is no legitimate opportunity to test the validity of the rule before fines begin accruing, the individual challenging the validity of the rule may shield himself from heavy fines only after meeting three prerequisites. First, the party must reasonably and in good faith believe that the legislation is an unconstitutional violation of the party's property rights. Second, the party must proceed with good faith and due diligence. Third, heavy fines must be so onerous as to intimidate the party. Petitioners have not met these prerequisites. The record reveals that Petitioners waited almost four years after the Charter Amendment was adopted to challenge the validity of the Charter Amendment, and Petitioners waited

until after a five year grace period was over before filing motions for temporary injunctive relief. Also, based upon case law and the facts of this case presented at the evidentiary hearing, a fine of $500 per day per sign is not excessive.

The factual distinctions between this case and Florida East Coast Railway prevent there being an "express and direct" conflict between Florida East Coast Railway and the decision of the First District Court of Appeal. The First District's decision should be affirmed.

ARGUMENT

THE DECISION OF THIS COURT IN FLORIDA EAST COAST RAILWAY V. STATE IS FACTUALLY DISTINGUISHABLE FROM AND DOES NOT CONTROL THE DECISION OF THE DISTRICT COURT OF APPEAL.

The case before this Court involves City sign regulations established through a 1987 Charter Amendment and various ordinances. These sign regulations required removal of certain billboards by June 1, 1992, which was the end of a five-year grace period (called an "amortization period"). The Charter Amendment imposed a $500 per day fine for each billboard not removed by the end of the five years. Petitioners waited until after the five-year amortization period had ended and fines were already accruing before filing motions for temporary injunctive relief to enjoin the accrual of these fines retroactively to June 1, 1992. Petitioners cited to Florida East Coast Railway v. State, 79 Fla. 66, 83 So. 708 (1920), in support of their request for injunctive relief, and Petitioners now claim that the District Court of Appeal's reversal of this temporary injunction ignored this controlling precedent.[6]

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[6] Although irrelevant to the "constitutional tolling" issue before this Court, Petitioners nevertheless in their Second Amended Initial Brief cited this Court to Holzendorf v. Bell, 606 So. 2d 645 (Fla. 1st DCA 1992). Petitioners argued that, based upon Holzendorf, the City is judicially estopped from maintaining a position in this litigation that is inconsistent with a position it had argued successfully in Holzendorf. See Second Amended Initial

This Court in Florida East Coast Railway v. State addressed the issue of whether "a party affected by a statute passed without his having an opportunity to be heard," was denied due process of law where the party's judicial challenge of the statute could be made only at the risk of having to pay substantial penalties. Id. at 715 (emphasis added). This Court relied upon seminal cases of the United States Supreme Court dealing with the issue of whether the imposition of excessive fines was a denial of due process.

One such case, Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), involved the Minnesota state legislature's creation of a railroad and warehouse commission. This commission established an order fixing the rates for various railroad companies for carrying merchandise between stations within the state. Id. at 127. The rates established by this commission were materially lower than those in existence at that time, and such rates were to go into effect almost immediately

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Brief of Petitioners at 17. However, Holzendorf is neither on point nor applicable to the case before this Court, and the City adopts, in support thereof, the arguments made by Respondent Capsigns as to why Holzendorf is distinguishable. See Answer Brief of Respondent Capsigns, Inc. at 27-31.

Furthermore, even if applicable, Holzendorf goes to the merits of Petitioners' claims and Respondent's defenses in this lawsuit and is only relevant to the issue of substantial likelihood of success on the merits. Again, in its order granting Plaintiffs' Motions for Temporary Injunctive Relief, the trial court specifically held "[w]hether the remaining requirement that Plaintiffs demonstrate a substantial likelihood of success on the merits has been met will not be decided at this time." [A:7:3] (emphasis added). The trial court chose not to address the substantial likelihood of success on the merits; therefore, any issue concerning Holzendorf is improperly before this Court.

after establishing the order. Id. The penalty for violating the order was a fine of not less than $2,500 nor more than $5,000 for the first offense and not less than $5,000 nor more than $10,000 for each subsequent offense. Id. In addition to these fines, the violator was subject to imprisonment in state prison for a period not exceeding five years for each separate offense. Id. at 145. Further, the sale of each ticket above the price permitted by the act could be considered a separate offense. Id. The United States Supreme Court held that in this situation, where the impact of the act was immediate and where those who were affected by the act could challenge it only at the risk of enormous fines and possible imprisonment, the act had the effect of foreclosing any judicial review to determine its validity. Id. at 147-48.

The United States Supreme Court in Wadley Southern Railway v. Georgia, 235 U.S. 651, 35 S. Ct. 214, 59 L. Ed. 405 (1915), limited, to some extent, this "constitutional tolling" of fines where the party failed to exercise due diligence in challenging such a rule or regulation. In Wadley, the railroad commission had ordered the railroad to cease certain discriminatory practices in freight routing. Id. at 653. Noncompliance with the order resulted in a fine of not more than $5,000 for each and every offense. Id. at 654. Every violation was a separate and distinct offense, and in the case of a continuing violation, every day the violation took place would be considered a separate and distinct offense. Id. Instead of

immediately initiating a lawsuit to challenge the validity of this order, the railroad simply declined to comply with the order on the grounds that the order was void. Id. at 653. The railroad delayed challenging the validity of the order until the Railroad Commission brought suit to enforce a penalty ten weeks after the order's passage. Id.

The Supreme Court likened such a statute to an ex post facto law since the party challenging the statute must, at his own risk, "either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order" and subject himself to substantial penalties. Id. at 662. The Supreme Court made it clear, however, that a penalty could, nevertheless, be collected for a violation of an order not known to be valid on the date it was violated.

> . . .[T]here is no room to doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do.

Id. at 667 (emphasis added).

The Supreme Court did recognize that there might be a distinction between fines imposed for acts done before and acts done after the validity of a statute had been settled; however, the Court held that lack of due diligence in challenging the statute would vitiate such a distinction.

> If the Wadley Southern Railroad Company had availed itself of that right, and -- with reasonable promptness -- had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If, in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to a lawful order -- though not so in respect of violations prior to such adjudication.
>
> But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful.

Id. at 669 (emphasis added).

It was within the parameters of these and other United States Supreme Court cases that this Court addressed a similar issue in Florida East Coast Railway. Florida East Coast Railway involved an administrative order promulgated by the Railroad Commissioners of the State of Florida which required that before any railroad operating in the state could increase certain rates, the proposed rate increases must be submitted to and approved by the Railroad Commissioners. Florida East Coast Ry. 83 So. at 710. The Railroad Commissioners imposed a penalty of $2,500 per violation of this rule. Id. at 711. Florida East Coast Railway (FEC) refused to comply and began preparing a bill in equity to challenge the rule. Id. at 712. Shortly after the rule's enactment and before FEC filed its action, the Railroad

Commission filed a mandamus action to compel FEC to comply with the rule. Id. It was in defending that action that FEC challenged the rule's validity. Id. This Court held that the substantial penalties incurred by FEC could not be imposed pending the railroad's test of the validity of the administrative order; however, this Court still recognized the power of the state to impose substantial penalties as long as there existed sufficient procedural due process to challenge the validity of the regulations.

> A state has power to impose penalties sufficiently heavy to secure obedience to orders . . . after they have been found lawful or after the parties affected have had ample opportunity to test the validity of administrative orders and failed to do so.
>
> A party affected by a statute passed without his having an opportunity to be heard is entitled to a safe and adequate judicial review of the legality thereof. It is a denial of due process of law if such review can be affected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law.

Id. at 715 (emphasis added) (citing Ex parte Young, 209 U.S. 123; Wadley Southern Ry. v. Georgia, 235 U.S. 651). Relying upon Wadley and Ex parte Young, this Court set out the conditions under which the state does not have the power to impose heavy fines pending review of the challenged law.

> . . . [I]f the defendant reasonably and in good faith regarded the rule, for the violation of which the fines here sought to be enforced were imposed, as an unconstitutional violation of its property rights, it had the privilege of testing the validity of the rule in the courts. And, if the defendant proceeded in good faith and with due diligence to make the test . . . heavy fines

> cannot lawfully be imposed for violations pending such test, where the fines are so onerous as to intimidate the defendant in exercising its right to contest the validity . . . .

Id. at 715-16 (emphasis added) (citations omitted).

The Florida Supreme Court has, therefore, outlined three prerequisites in order for a party to prevent the imposition of heavy fines. First, the party must reasonably and in good faith believe that the legislation is an unconstitutional violation of the party's property rights. Second, the party must proceed with good faith and due diligence. Third, heavy fines must be so onerous as to intimidate the party. Petitioners in this case have not met these three prerequisites. Before reaching the issues presented by these three prerequisites, however, there must first be a denial of due process that triggers the "constitutional tolling" of fines. In the case before this Court, there has been no such denial of due process.

A.

Florida East Coast Railway Does Not Apply to Petitioners' Challenges of the Charter Amendment and Ordinance Code.

The procedural requirements imposed by the due process clause of the Constitution are essentially notice and an opportunity to be heard. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). There is no precise set of steps which must be

universally taken in order to prevent the claim that due process has been denied. The ways of due process are "flexible and variable dependent upon the particular situation being examined." Hewitt v. Helms, 459 U.S. 460, 472, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). The steps to provide due process in the case before this Court included numerous public hearings, a referendum process, and a five-year grace period during which time Petitioners could have challenged the City's sign regulations free from any fines or penalties.

Florida East Coast Railway does not apply to Petitioners' challenge of the Charter Amendment and Ordinance Code. This Court in Florida East Coast Railway recognized the state's power to impose heavy penalties to enforce compliance with administrative orders so long as the parties affected by the orders had ample opportunity to test the validity without repercussions. Thus, where a rule or regulation was promulgated without any opportunity to test its validity prior to its enforcement, this Court held that due process required creating a window of opportunity for challenging the validity of the rule or regulation. In the case of Florida East Coast Railway, no such window existed because the Railroad Commission sought enforcement of its rule and the imposition of heavy fines almost immediately after the adoption of the Commission's rule.

As previously stated, Petitioners were not placed in the position of having to test the validity of a regulation in the face of onerous fines. To the contrary, the Charter Amendment

requiring removal of certain billboards provided for a five year amortization period (or grace period) beginning May 26, 1987, the date voters adopted the proposed Charter Amendment by a majority vote, and ending June 1, 1992. Petitioners had five years in which to challenge the validity of the Charter Amendment before fines started to accrue. During this five year grace period, Petitioners chose not to avail themselves of their due process opportunity to challenge the validity of the sign regulations. Such a decision by Petitioners is not the denial of due process of law as contemplated by this Court in Florida East Coast Railway. Instead, Petitioners' actions simply represent their failure to timely test the validity of the sign regulations. In the case before this Court, there is no denial of due process which could trigger the enjoining of fines imposed for violation of the sign regulations.

B.

Petitioners Failed to Exercise Due Diligence in Challenging the Sign Regulations.

Notwithstanding the fact that Florida East Coast Railway does not apply to Petitioners' challenge to the Charter Amendment and Ordinance Code, lack of due diligence on the part of Petitioners is a total bar to the theory of relief set forth in Florida East Coast Railway. This Court in Florida East Coast Railway relied upon several United States Supreme Court decisions which also held due diligence as a prerequisite to relief. In

Wadley Southern Railway v. Georgia, the United States Supreme Court upheld the imposition of fines against Wadley Southern for violating the railroad commission's order. In Wadley, the railroad commission had ordered Wadley Southern to cease the discriminatory practice of selective train stops. Wadley, 235 U.S. at 653. Wadley Southern did not challenge the validity of the order but, instead, notified the commission of its refusal to comply. Id. Only ten weeks after the passage of the order, the commission instituted enforcement proceedings against the railroad for imposition of a penalty. Id. The United States Supreme Court addressed the issue of whether Wadley Southern was entitled to an injunction of the accrual of penalties while testing the validity of the administrative order. Id. at 667. The Supreme Court held that the state had the power to impose a penalty for violations committed after the carrier had ample opportunity to test the validity but failed to do so. Id. The United States Supreme Court found that two months was ample opportunity in which to test the validity of the order.

Other United States Supreme Court cases reached similar conclusions when addressing the issue of whether the affected party exercised due diligence in contesting the validity of a rule. See, e.g., St. Louis, Iron Mountain, and Southern Railway v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. Ed. 139 (1919) (rejected a claim of denial of due process where railroad failed to avail itself of the opportunity to test the validity of the

statute); Gulf, Colorado, & Santa Fe Railway v. Texas, 246 U.S. 58, 38 S. Ct. 236, 62 L. Ed. 574 (1918) (same).

In the case before this Court, there is no rate that was established without any hearing. To the contrary, Petitioners' own counsel admitted to actively campaigning against the Charter Amendment and admitted to involvement in opposing sign regulations possibly as early as 1985. [A:17:213]. Petitioner Naegele campaigned against the Charter Amendment, prior to its adoption, through the political organization CACA. [A:13:1-11]. Even the trial court observed, "I believe it's clear that everybody knew about this referendum back in '86 and '87." [A:17:193]. Yet, Petitioners Naegele, Newey and Loggins challenged nothing until May of 1991 - almost four years later, and Petitioners Classic and Whiteco challenged nothing until May of 1992 - five years later.

Other courts have also relied upon these same United States Supreme Court cases to reach similar conclusions. For example, the Supreme Judicial Court of Maine in Danish Health Club, Inc. v. Town of Kittery, 562 A. 2d 663 (Me. 1989), upheld the trial court's imposition of a $12,000 fine for non-compliance with an ordinance despite the affected parties' claim that it was denied due process in challenging the ordinance. In Danish Health Club, the Kittery Town Council adopted a massage ordinance which became effective on March 9, 1987. Id. at 664. The ordinance required that all massage establishments become licensed, providing for a 90-day grace period within which to do

so. Id. On July 1, 1987, nearly four months after the ordinance's effective date, the affected health club filed its complaint challenging the ordinance and seeking both a declaration that the ordinance was unconstitutional and a permanent injunction against its enforcement. Id. The city's counterclaim included imposing the $200 per day fine as provided by the ordinance. Id. The Supreme Judicial Court of Maine held that the due process right espoused by the United States Supreme Court cases did not "establish a constitutional right to risk-free litigation under all possible circumstances. . . . Due process requirements are met by a statutory scheme that provides an opportunity for testing the validity of an ordinance without incurring the prospect of debilitating penalties." Id. at 666-67.

In Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1120 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976), the United States Court of Appeals, Second Circuit, upheld the accrual of penalties against cigarette companies in the amount of $10,000 for each violation of the Federal Trade Commission's (FTC) cease and desist order relating to deceptive cigarette advertising. Although factually different from the case sub judice, the Second Circuit focused on the fact that the penalties which appellants sought to have stayed did not attach prior to the opportunity to contest the validity of the orders. Id. at 1119. The Second Circuit also recognized that the FTC's statutory scheme contemplated ample opportunity for the cigarette

companies to test the validity of the order. Id. "Appellants have pointed to no cases which support their proposition that at the compliance or enforcement stage they are still entitled to a stay." Id. at 1120 (emphasis added).[7] Certainly if courts have found two months or 90 days to be ample opportunity, then five years for Petitioners is more than ample opportunity and establishes a lack of due diligence by Petitioners to timely challenge the validity of the Charter Amendment and Jacksonville Ordinance Code.

Failure to Exercise Due Diligence in Challenging Referendum Process

The cases addressing due diligence deal generally with testing the validity of administrative rules and regulations.

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[7] Petitioners have claimed that "[i]n response to the City's enforcement efforts, [they] immediately filed a motion for temporary injunctive relief," implying that they did not know the City would enforce the size regulations until the City started tagging signs and sending notices of violations three months after the statutory deadlines for removal of sign structures. See Second Amended Initial Brief of Petitioners at 9. However, Petitioners Naegele, Newey and Loggins alleged in their initial Complaint in May of 1991, "[t]he City has announced its intention to enforce the provision of the purported Charter Amendment and the 1989 Ordinance . . . ." [IB:1:5]. Likewise, Petitioners Classic and Whiteco alleged in paragraph 119 of their Complaint filed May 26, 1992, "[t]he City of Jacksonville has advised Plaintiffs that it intends to enforce the removal of Plaintiffs' sign structures and the imposition of penalties, beginning June 1, 1992." [IB:3:28]. The City made it clear to Petitioners that these sign ordinances would be enforced, and, several months after fines started accruing, the City put Petitioners on notice that they were violating sign regulations (erroneously labeled "retroactive" enforcement by Petitioners).

Petitioners are challenging the enactment of a Charter Amendment which was adopted by referendum of the voters. Petitioners alleged procedural irregularities including lack of proper signature attestations and lack of proper ballot summary. [A:2:8-9 and A:3:30-31].

Florida Supreme Court cases addressing challenges to the election process offer additional guidance as to the issue of due diligence. The cause of action for challenging such procedural irregularities begins accruing prior to the election; in fact, it is preferred that the cause of action be brought prior to the election. State v. City of St. Augustine, 235 So. 2d 1, 3 (Fla. 1970). The courts have recognized that there is a "public interest in promptness and finality of decision" when dealing with such issues as statutory actions for election contents. Kinzel v. City of N. Miami, 212 So. 2d 327, 328 (Fla. 3d DCA 1968). This Court has held that lack of proper signature attestations on the petitions is a technical defect, and a challenge to such a defect is barred if not brought before the election. Pearson v. Taylor, 159 Fla. 775, 32 So. 2d 826 (1947).

This is not to say that all post-election challenges to the form of ballot are totally barred. This Court, in Wadhams v. Board of County Commissioners of Sarasota County, 567 So. 2d 414 (Fla. 1990), upheld a post-election challenge to a substantive defect in the ballot summary. In Wadhams, the ballot summary was so misleading that it amounted to "hoodwinking the voting public." Id. at 417. By contrast, the defect challenged in

Pearson was purely technical - that the petition submitted to the County Commissioners calling for a referendum election contained less than the statutorily mandated 25% of the qualified voters. Pearson, 32 So. 2d at 827.

Notwithstanding the limited access to post-election challenges, this Court in Wadhams recognized that there would still come a point where laches would preclude an attack. Wadhams, 567 So. 2d at 417. The ordinance in Wadhams was challenged only a few weeks after the election. Id. In the case sub judice, the Charter referendum ballot was certified by the Supervisor of Elections in April of 1987, and the election was conducted on May 26, 1987. Petitioners Naegele, Newey and Loggins did not file a lawsuit until May 24, 1991, almost four years later. Petitioners Classic and Whiteco waited five years before filing a lawsuit challenging the Charter Amendment. Furthermore, Petitioners' challenges to the referendum are purely technical like those in Pearson; Petitioners have not alleged any misrepresentation to the voters as occurred in Wadhams. Petitioners' challenge to the Charter Amendment is time barred, and this time barring further supports the conclusion that Petitioners failed to exercise due diligence in bringing this lawsuit.

Failure to Exercise Diligence in Challenging a Sign Ordinance

This Court has not addressed the specific issue of whether a party has exercised due diligence in challenging a sign ordinance where the challenge was made after the expiration of an amortization period. The United States Court of Appeals, Fourth Circuit, addressed this exact issue in National Advertising Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), cert. denied, ____ U.S. ____ 112 S. Ct. 1997, 118 L. Ed. 2d 593 (1992). In National Advertising, the City of Raleigh, North Carolina, enacted an ordinance which restricted off premise outdoor advertising signs and which provided for a 5½-year grace period for removal of nonconforming signs. Id. at 1160. The 5½-year grace period (called an amortization period), was in lieu of any form of compensation. Id. at 1161.

National Advertising, a billboard company, filed its lawsuit approximately one month after expiration of the amortization period. Id. Significantly, National Advertising contended that its cause of action did not accrue until the expiration of the amortization period. Id. at 1163. The Fourth Circuit rejected this argument, holding that National Advertising's cause of action began accruing immediately upon enactment of the ordinance. Id.[8] "Permitting National to

[8] The Fourth Circuit noted that its decision was consistent with those cases in which advertisers challenged sign ordinances on takings grounds prior to the expiration of amortization periods;

challenge the 1983 ordinance's amortization scheme more than 5½ years after its adoption will enable National to retain its signs well beyond the expiration of the amortization period and would be unfair to the City." Id. at 1168. Petitioners in the case before this Court are attempting to do exactly the same thing -- retaining their unauthorized billboards beyond the five year amortization period and then expecting a risk-free arena in which to present their belated legal challenge. Allowing Petitioner's eleventh hour challenge is unfair to both the City and to all other individuals who are complying with the City's sign regulations.

C.

The Fines Imposed by the City Were Not Excessive.

Neither the cumulative nature nor the amount of civil penalties accruing in this case could result in a finding of excessive fines.[9] This Court, in Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922), addressed the question of what constitutes an excessive fine.

> There being no definitely fixed rules or standards for determining what are and what are

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none of the lawsuits were challenged as premature. Id. at 1166 n.11.

[9] As previously noted, Petitioners Naegele, Newey and Loggins did not allege prohibition of excessive fines in their Initial or Amended Complaints filed prior to the trial court's order.

> not excessive fines, each case, whether a statute prescribing fines or a judgment imposing a fine under a statute, must be adjudged on its merits. . ., and the courts will not declare a statutory fine to be excessive in violation of the Constitution unless it is plainly and undoubtedly in excess of any reasonable requirements for redressing the wrong.

Id. at 641. The statute under consideration in Amos v. Gunn required that gasoline dealers pay a license tax and a gasoline tax. Id. at 639. The penalty imposed for noncompliance was a fine of up to $200 or imprisonment not exceeding 90 days, or both, for a first offense and a fine of $500 - $5,000 for a subsequent offense. Id. at 641. This Court held, "This is not manifestly or clearly an excessive penalty." Id. This Court held in 1922 that fines of $500 - $5,000 per offense were not excessive. Nevertheless, Petitioners would have this Court hold that a fine of $500 per offense in 1992 (70 years later) is excessive.

Petitioners argued at the trial court that the fines were excessive based upon the fact that the fines were imposed against individual signs and were cumulative. Petitioners alleged that they were collectively subject to cumulative fines of $275,000 per day. [A:17:13]. In Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976), the United States Court of Appeals, Second Circuit, entertained a similar argument. Brown & Williamson Tobacco dealt with a statute imposing fines of up to $10,000 for each violation of an order of the Federal Trade Commission (FTC) which regulated tobacco advertisements. Id. at 1118. The cigarette companies

argued that they were entitled to a stay of the accrual of civil penalties as a matter of law based upon United States Supreme Court decisions such as Ex parte Young and Wadley Southern Railway. Id. The companies argued that the penalties imposed for deceptive advertising could be computed on the basis of a separate violation for each day and for each advertisement such that the potential liability for an advertisement in one edition of the Sunday New York Daily News with a circulation of 3 million was $30 billion. Id. at 1119 & n.7. Nevertheless, the Second Circuit rejected the cigarette companies' argument that the fines were excessive.

> *Young, Wadley, Love and St. Regis*, however, do not go as far as appellants suggest. Rather, they establish that one has a due process right to contest the *validity* of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost. . . .
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> . . . .
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> Appellates argue, of course, that it is the risk of huge accumulating penalties during the course of the enforcement proceedings in this case which calls into play the Supreme Court cases and requires the granting of the temporary relief sought. But while the cumulative aspect of [the] penalties is severe, . . . it very plainly was the view of Congress that such cumulative penalties might be the only way to enforce . . . orders in the face of profitable, repeated or continuing violations.

Id. at 1119-20 (emphasis added) (citations omitted).

Petitioners in the case sub judice, made an economic business decision to continue maintaining their signs throughout the five-year grace period. They continued the business of advertising, including collecting revenue for displaying advertisements, for

almost four (Naegele) to almost five (Classic and Whiteco) additional years before challenging the validity of the sign regulations. They continued the business of advertising for over five years before attempting to get a temporary injunction. Were penalties not cumulative then the parties who profit from violating the statutes or ordinances could simply consider the penalties as merely a cost of doing business.[10]

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[10] Other courts have also addressed and rejected the claim of excessive fines. See, e.g., United States v. Charles George Trucking, 823 F.2d 685, 690 (1st Cir. 1987) (court upheld EPA Resource Conservation and Recovery Act penalties of up to $25,000 for each violation); United States v. Vineland Chemical Co., 692 F. Supp. 415, 417-18 (D.N.J. 1988) (court distinguished Ex parte Young rate regulations from environmental legislation and upheld civil penalties of $25,000 for each day of violation); United States v. Louisiana-Pacific Corp., 654 F. Supp. 962, 963-64 (D. Or. 1987) (court upheld Federal Trade Commission civil penalty action for $4 million), aff'd, 967 F.2d 1372 (9th Cir. 1992). But see International Paper v. Inhabitants of the Town of Jay, 672 F. Supp. 29, 34-35 (D. Me. 1987) (court found a violation of due process where (1) a papermill's violation of town ordinance resulted in the imposition of fines of up to $2,500 per day per person housed in temporary housing totalling daily fines of $1.2 million against papermill; and (2) ordinance provided for only a 30-day grace period).

Florida Statutes provide for a multitude of fines and penalties for failure to comply with specific provisions of the statutes. See, e.g., § 585.007(1), Fla. Stat. (1993) (violation of any provision of animal industry chapter subjects person to fine of up to $10,000 for each offense; § 450.141(2), Fla. Stat. (1993) (persons or corporations employing minors in violation of the minority labor groups chapter may be subject to fines not to exceed $2,500 per offense); § 501.2075, Fla. Stat. (1993) (person who willfully violates rules of the Department of Agriculture and Consumer Services is subject to civil penalty of up to $10,000 for each violation); § 403.161(3), Fla. Stat. (1993) (person who willfully pollutes is subject to fine of up to $50,000 or imprisonment for five years, or both, for each offense; each day during any portion of which such violation occurs constitutes separate offense).

D.

Regardless of the Reasons Articulated by the District Court of Appeal, the Resulting Reversal Was Proper.

The First District did not summarily dismiss the "constitutional tolling" argument based upon Petitioners lack of due diligence, but the appellate court recognized this lack of due diligence in its review of the trial court's findings of fact. [A:1:3]. Regardless of the First District's reasons or theories for reversing the trial court's order, its decision should be affirmed by this court.

> It is elementary that the theories or reasons assigned by the lower court as its basis for the order or judgement appealed from, although sometimes helpful, are not in any way controlling on appeal and the Appellate Court will make its own determination as to the correctness of the decision of the lower court, regardless of the reasons or theories assigned therefor. Therefore, if the lower court assigns an erroneous reason for its decision, the decision will be affirmed where there is some other different reason or basis to support it.

In re Estate of Yohn, 238 So. 2d 290, 295 (Fla. 1970) (emphasis added). The enjoining of the accrual fines was properly reversed where the due process protections espoused by this Court in Florida East Coast Railway did not apply in this case. Notwithstanding the fact that there was no denial of due process, Petitioners' failure to exercise due diligence precluded the application of the "constitutional tolling" principle. Therefore, this Court should uphold the District Court of Appeal

order reversing the trial court's granting of temporary injunctive relief.

CONCLUSION

The First District correctly reversed the trial court's order granting temporary injunctive relief. Petitioners were provided ample due process in that the Charter Amendment provided for a five-year grace period during which time Petitioners could have challenged the Charter Amendment. Petitioners also could have challenged the Charter Amendment before it was adopted by the voters. Petitioners had over five years total in which to test the validity of the Charter Amendment.

Nevertheless, Petitioners failed to exercise due diligence by waiting beyond the five-year grace period and after the penalties had begun accruing before filing a motion for temporary injunctive relief. Petitioners have brought this hardship upon themselves. Their attempt to alleviate this hardship by arguing a "constitutional tolling" is as creative as their billboard advertisements. Petitioners were aware of the available avenues of redress. Their decision not to take these avenues cannot now be characterized as a lack of due process - as never having that road to relief or as having that road barricaded by the First District Court of Appeal. The decision of the First District should be upheld.

Respectfully submitted this 21 day of November, 1994.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Eric M. Rubin, Esquire, and Jeffrey Harris, Esquire, Rubin, Winston, Diercks, Harris & Cooke, at 1730 M Street, N.W., Suite 412, Washington, D.C. 20036 by U.S. Mail and to the persons listed below by HAND DELIVERY this 21 day of November, 1994.

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