ORIGINAL

NO. 29035

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; MAUI TOMORROW, INC., a Hawaii non-profit corporation; and the KAHULUI HARBOR COALITION, an unincorporated association, Plaintiffs-Appellants/ Cross-Appellees/ Appellees/Cross-Appellants, vs. THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; BRENNON MORIOKA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; MICHAEL FORMBY, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII, Defendants-Appellees/ Cross-Appellants/ Appellants/Cross-Appellees, HAWAII SUPERFERRY, INC.	Civil No. 05-1-0114 (3) (Declaratory Judgment) APPEAL **AND** CROSS APPEAL FROM A) FINAL JUDGMENT; CERTIFICATE OF SERVICE FILED JANUARY 31, 2008; B) ORDER GRANTING 1) DEFENDANT STATE OF HAWAI'I'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; AND 2) DEFENDANT HAWAII SUPERFERRY, INC.'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; CERTIFICATE OF SERVICE FILED NOVEMBER 14, 2007; C) ORDER GRANTING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF REASONABLE ATTORNEY'S FEES AND COSTS FILED ON JANUARY 15, 2008 FILED MARCH 27, 2008; **AND** CROSS APPEAL FROM A) ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION; CERTIFICATE OF SERVICE FILED

Defendant-Appellee/ Cross-Appellant/ Appellant/Cross-Appellee.	OCTOBER 9, 2007 AND B) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN SUPPORT OF ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY INJUNCTION; CERTIFICATE OF SERVICE FILED NOVEMBER 9, 2007 CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI'I The Honorable Joseph E. Cardoza, Judge

khc/SCII/replybrief

REPLY BRIEF OF PLAINTIFFS/APPELLANTS/ CROSS-APPELLEES/ APPELLEES/CROSS-APPELLANTS THE SIERRA CLUB, MAUI TOMORROW, INC. AND THE KAHULUI HARBOR COALITION TO ANSWERING BRIEF OF STATE OF HAWAII DEPARTMENT OF TRANSPORTATION ON ACT 2

AND

CERTIFICATE OF SERVICE

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REPLY BRIEF OF SIERRA CLUB TO ANSWERING BRIEF OF STATE OF HAWAII DEPARTMENT OF TRANSPORTATION ON ACT 2

Sierra Club files this Reply Brief to the Answering Brief of State of Hawaii Department of Transportation on Act 2, pursuant to Rules 27, 28 and 30 of the Hawaii Rules of Appellate Procedure ("HRAP"), as follows.[1]

I. INTRODUCTION

After securing substantive and procedural environmental decisions of statewide significance from the Hawaii Supreme Court and the Second Circuit Court, HDOT and Superferry sought relief from the Legislature instead of appealing. Act 2 was passed, in violation of Hawaii's Constitution. Superferry has deferred to HDOT's defense of Act 2. HDOT has attempted to circumvent many of Sierra Club's arguments demonstrating how Act 2 is unconstitutional and has not made any effort to rebut others. [2]

II. HDOT APPLIES THE WRONG TEST TO DETERMINING WHEN LEGISLATION IS UNCONSTITUTIONAL SPECIAL LEGISLATION

HDOT claims, first on p. 22 of its Answering Brief, that the "undisputed" test for determining whether legislation is "prohibited special legislation" is whether the legislation is rationally related to a legitimate state interest and that this test is satisfied "if this court can reasonably conceive of any set of facts that justifies distinguishing the class the statute benefits from the class outside its scope, it will uphold the statute." This is the "rational basis" test.

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[1] Plaintiffs-Appellants/Cross-Appellees/Appellees/Cross-Appellants the Sierra Club, Maui Tomorrow, Inc. and the Kahului Harbor Coalition will be referenced hereafter as "Sierra Club." Defendant-Appellee/Cross-Appellant/ Appellant/Cross-Appellee Hawaii Superferry, Inc. will be referenced hereafter as "Superferry. "Defendants/Appellees/ Cross-Appellants/Appellants/Cross-Appellees the Department of Transportation of the State of Hawaii; Brennon Morioka, in his capacity as Director of the Department of Transportation of the State of Hawaii; Michael Formby, in his capacity as Director of Harbors of the Department of Transportation of the State of Hawaii will be referenced hereafter as "HDOT."

[2] HDOT has not (1) challenged Sierra Club's distinction between the Chapter 343 EA/EIS and the Act 2 EIS or (2) attempted to distinguish the cases relied upon by Sierra Club on "Closed Classes" or "Short Duration" legislation. Whether Superferry is complying with Act 2 is irrelevant.

Sierra Club disagrees that this is the proper test to be applied to determine whether a statute is unconstitutional special legislation.

HDOT has confused three distinct tests applicable to a challenge to the unconstitutionality of legislation. The first two tests are based upon the Equal Protection Clause. First, the "rational basis" test is applicable to Equal Protection challenges generally (not at issue here). Second, a less rigorous test is applicable when suspect classes or fundamental rights are involved in the Equal Protection challenge (not at issue here). A third test is applied to challenges based upon Constitutional Clauses prohibiting Special Legislation (this test is applicable to this case).

The Attorney General Opinion issued on September 11, 2007 relies heavily upon a case, *Hamen v. Marsh*, 237 Neb. 699, 467 N.W. 2d 836 (1991) which makes it clear that separate tests are to be applied in Special Legislation challenges and Equal Protection challenges to legislation. In *Hamen, supra,* the Defendants urged the Nebraska Supreme Court to apply the exact Equal Protection test quoted by HDOT. The Court held at pp. 846-847 that

> .... the plaintiff has not attacked [the legislation] on equal protection grounds, but rather attacks it as special legislation. The narrower special legislation prohibition supplements the equal protection theory. [Citations omitted] The test of validity under the special legislation prohibition is more stringent than the traditional rational basis test.

Hawaii's Constitution includes a provision guaranteeing the Equal Protection of the Law (Article I, Section 5) and other provisions prohibiting Special Legislation (Article I, Section 21 and Article XI, Section 5). While the Equal Protection Clause and the Clauses Prohibiting Special Legislation are both concerned with distinctions between classes, as the Colorado Supreme Court held in *In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005*, 814 P.2d 875, 886 (Colo. 1991), the concern with class composition in the Clause prohibiting Special Legislation is "**more than a redundant equal protection clause**." (Emphasis added). The same court held in *People v. Canister*, 110 P.3d 380, 382-383 (Colo. 2005) that:

> The ban on special legislation was also intended to curb favoritism on the part of the General Assembly, prevent the state government from interfering with local affairs, and preclude the legislature from passing unnecessary laws to fit limited circumstances. [Citation omitted]. The provision creates a strong preference for the enactment of general legislation. Most importantly, the provision acts as a limitation on the power of the legislature.

Because HDOT has applied the wrong "governing principles" **throughout** its Answering Brief, its opposition to Sierra Club's Opening Brief is seriously flawed. As importantly, HDOT has failed to recognize that legislation is unconstitutional special legislation, **irrespective of any broader test**, if the special legislation creates a "closed class," as addressed below.

III. ACT 2 IS UNCONSTITUTIONAL SPECIAL LEGISLATION CREATING A CLASS OF ONE LIMITED TO SUPERFERRY

HDOT has ignored all of the cases cited and analyzed by Sierra Club in Section IV.C, on pages 12 through 24, of its Opening Brief, demonstrating how Act 2 has created an unconstitutional closed class. HDOT has made no effort to distinguish these cases or to take issue with their rationales. Instead, HDOT relies upon several other cases to attempt to show that the classifications created by Act 2 are constitutional. This effort fails for the reasons that follow.

CLEAN v. Washington, 928 P.2d 1054 (Wash. 1997) is easily distinguishable. The Washington State Legislature adopted the Stadium Act authorizing the construction of a baseball stadium for the Mariners in "a county with a population of one million or more." The statute was alleged to be unconstitutional special legislation because King County was the only county in Washington with a population of one million or more. The Court held that the legislation did not create a closed class and could have future applicability, at p. 1064 finding that:

> Although CLEAN correctly points out that only one county currently has a population exceeding one million people, **it is certainly possible that in the not too distant future another county or counties may grow that large**. (Emphasis added)

This is precisely what the Hawaii Supreme Court also held in *Bulgo v. County of Maui*, 50 Haw. 51, 450 P.2d 321 (1967). Act 47 was passed by the Hawaii Legislature to provide for an orderly succession to the office of county chairperson under the contingency that the person elected to that office died before taking office on January 2. As the Court held:

> The power given by Act 47 is the power to hold special elections for successor county chairman where the chairman-elect dies before January 2 following his election. **The Act confers this power upon every county in which the contingency occurs**, so long as the county is within the class of political subdivisions encompassed by it.
>
> **The challenged provision does not give the county of Maui any power which is different from that which the Act gives to the counties of Hawaii and Kauai**. (Emphasis added)

In short, Act 47 did not create a "closed class." The class created was not "conceived, cut and tailored" for Maui County alone. The class had general applicability among all of the counties within the State of Hawaii.[3]

In *Crusius v. Illinois Gaming Board*, 837 N.E. 88 (Ill. 2005) the Illinois legislature enacted the Riverboat Gambling Act of 1990 which, in § 11.2(a), required the Illinois Gaming Board to grant a renewed application and to relocate activities to any licensees "not conducting riverboat gambling on January 1, 1998" when there was only one such licensee, namely, Emerald Casinos, Inc. The Court found open-endedness because the Act:

> .... did not diminish the regulatory authority of the Board in any way .... **The Act's license revocation provision still applies to Emerald with full force** .... [citations omitted] **and revocation proceedings have, in fact, been initiated against it.** Thus, regardless of Emerald's eligibility for license renewal and relocation under section 11.2(a), **if Emerald has failed to comply with the Act, it could lose its riverboat gambling license in accordance with the Act's provisions, as is the case with any other licensee**. (Emphasis added)

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[3] HDOT argues on pp. 27-28 of its Answering Brief that the *Bulgo* decision rebuts plaintiffs' "short duration" argument because of the short duration of the Proclamation in the *Bulgo* case; however a review of that case reveals that the "short duration" argument was never presented by the parties or addressed by the Court and was **not** the subject of any decision by the Court. *Bulgo, supra,* is not precedent in HDOT's favor on this issue.

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The Illinois situation is not at all comparable to the case at bar. Emerald Casino was in the process of losing any benefit that may have been conferred by the legislation. Emerald Casino was required to comply with the Act along with all other licensees. Here, Superferry is not treated in the same manner as all others with respect to Chapter 343 compliance. There is no longer any aspect of Chapter 343 that is applicable to Superferry.

In *Paul Kimball Hosp Inc., v. Brick Twp. Hosp. Inc.,* 432 A.2d 36 (N.J. 1981) the Health Care Facilities Planning Act imposed, as of 1971, a new requirement on hospitals that certificates of need must be applied for and received. An amendment to the Act added to those "grandfathered" a class alleged to have only one member. The trial court agreed and struck down the amendment. The Supreme Court of New Jersey reversed based upon a three (3) to (2) vote of its Justices, with a Dissent filed by Justices Pashman and Clifford demonstrating that a closed class had been created. The majority recognized that there were two tests, one applicable to challenges on Equal Protection grounds and one applicable to challenges on Special Legislation grounds. Most importantly, the majority also suggested that the class was **not** a closed class. In Footnote 2 the majority states:

> **At oral argument another comparable institution was said possibly to exist**. (Emphasis added)

HDOT, in Footnote 13 of its Answering Brief, on p. 27, suggests that this Court may take notice of the existence of non-Superferry large capacity ferry vessels meeting the Act 2 definition, namely ferries that "run between Maine and Nova Scotia" and that "run in British Columbia," referred to by websites.

Sierra Club strongly denies that there has been any sufficient showing that any of these other ferries have been designed or constructed to dock or to allow disembarkation and embarkation using the "barges" at state harbors. [4]

[4] This Court may also take notice that the pseudo, non-Chapter 343 EIS now being prepared by HDOT has only one subject matter – Superferry. HDOT is not studying any other "non-Superferry large capacity ferry vessels." HDOT is not studying ferry

These "barges" were specially constructed with $40,000,000 of state funds to be of the right dimensions, sizes and shapes to "fit" Superferry and allow it to dock and to disembark and embark vehicles and passengers. ROA 1179. [5]

Act 2 was "conceived, cut and tailored" in an unconstitutional fashion to apply to a class of one, Superferry alone. Superferry is the only entity for which the major terms contained within Act 2 were and are applicable. [6] HDOT has made no effort to demonstrate how these terms would be applicable to ferries that "run between Maine and Nova Scotia" or "in British Columbia." That would have been meritless. Where the prospects of entries into the classification or exits from the classification "is only theoretical, and not probable, we will find the act special and local in nature." *Republic Investment Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251, 1258 (1990); *Sutherland* § 40.09, 432-33. It is not probable, or even possible, that ferries that "run between Maine and Nova Scotia" or "in British Columbia" will enter this class and therefore Act 2 is special legislation.

IV. HDOT CONSTRUES TOO NARROWLY HAWAII'S TWO CONSTITUTIONAL PROHIBITIONS AGAINST SPECIAL LEGISLATION

A. Act 2 Violates Article I, Section 21 of the Hawaii Constitution

HDOT argues that Article I, Section 21 of the Hawaii Constitution does not apply because there "is nothing irrevocable about Act 2." This statement is not true. Act 2 deprives Sierra Club and other members of the public irrevocably (without reversal by this Court) of the EA and EIS to which they are

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operators that "run between Maine and Nova Scotia" or that "run in British Columbia." See the Hawaii Department of Transportation website: "Statewide Large-Capacity Ferry Environmental Impact Statement; Rapid Risk Assessment of Operational Compliance and Environmental Risks of the **Hawaii Superferry** (PDF)" (Emphasis added); http://hawaii.gov/dot/harbors/file-links/other-pdf files/ Rapid% 20Risk% 20 Assessment%20of%20Operational%20Compliance %20an.pdf.

[5] Record on Appeal will be referenced hereafter as "ROA."

[6] The multiple manners in which Act 2 is "cut and tailored" for Superferry alone is detailed in Sierra Club's Opening Brief on pp. 17-24. HDOT has made no effort to rebut this demonstration by Sierra Club.

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entitled by Chapter 343. [7]

B. Act 2 Violates Article XI, Section 5 of the Hawaii Constitution

1. HDOT Ignores the Reasons Why the Attorney General Opinion is Important

HDOT attempts to minimize the significance of its own Attorney General Opinion defining what constitutes unconstitutional special legislation. This Opinion relies upon cases that HDOT wholly ignores in this case. *Hamen, supra; Republic Investment Fund I, supra.* If HDOT applied these cases here, it is clear that Act 2 is unconstitutional special legislation.

2. The Legislature Exercised Power Over State Lands

HDOT employs fallback argument after fallback argument in its Answering Brief on pp. 17 - 21 until it has all but admitted the true facts that compel the conclusion that the Legislature did, in Act 2, unconstitutionally exercise control over state lands in violation of Article XI, Section 5 of the Hawaii Constitution. First, HDOT argues that this is a Chapter 343 case, having very little to do with state lands. This argument ignores that in Chapter 343 the use of state lands is a primary trigger for environmental review and that the use of state lands is prohibited while environmental review is being undertaken. HRS § 343-5(a)(1); HAR § 11-200-23(c). Second, HDOT inaccurately recites the history of the exercises of power over state lands in this case. HDOT **granted** 5.1 acres of state lands to Superferry at Kahului Harbor. [8] The Trial Court entered the Findings of Fact that:

> 18. HDOT and HSF entered into a Harbors Operating Agreement on the 7th day of September, 2005. The Operating Agreement grants to HSF the use of certain "premises" or state lands at the Kahului Harbor for the Hawaii Superferry Project. ROA 2954.

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[7] Act 2, in environmental terms, represents an "irrevocable commitment of resources" during the period of time Superferry places them at risk while it operates without any EA or EIS. *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i,* 91 Haw. 94, 105, 979 P2d 1120 (1999).

[8] The language of Article XI, Section 5 is unambiguous. Nevertheless, a "grant" is sufficiently close to any definition of an "alienation" of lands. It is irrelevant that this "grant" was characterized by HDOT as "non-exclusive."

> 20. Through the Operating Agreement, HSF was able to use approximately 5.1 acres of state land at Kahului Harbor and to construct certain facilities thereupon, with the approval of HDOT. ROA 2955.

These Findings of Fact have not been challenged by HDOT or Superferry in this appeal. The Trial Court, after **weighing the equities** (ROA 1573), found:

> **HDOT and HSF are risking actual harm to the environment that may best be explored through the preparation of an EA prior to the implementation of the action**.

and prohibited HDOT and Superferry from using the 5.1 acres at Kahului Harbor granted by HDOT to Superferry by prohibiting them:

> from using the barge attached to Pier 2 at the Kahului Harbor or any of the "premises" or state lands granted by HDOT to HSF at the Kahului Harbor for the passenger terminal, for inspection or ticketing and for roadways to and from Pier 2 and the non-harbor Kahului roadway system. ROA 1574.

The Trial Court also voided the Operating Agreement, effectively *ab intitio*, as it applied to Kahululi Harbor based upon *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005). ROA 2279-2280. [9]

Finally, HDOT's gravest error is in its mischaracterization of the facts at the time Act 2 was passed. The Legislature set out to undo all that the Courts had done. The Legislature **exercised control** over the specific 5.1 acres of state land at Kahului Harbor in Act 2: (1) by exempting Superferry from Chapter 343 and its non-implementation requirements, which prevented the use of state lands and (2) by reweighing the equities, weighed properly by the Trial Court, to attempt to justify operation of Superferry without an EA and (3) by reversing the Order of the Trial Court voiding the Operating Agreement, by specifically authorizing the re-execution of the Operating Agreement and the use of these

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[9] In *Kepoo, supra,* the Hawaii Supreme Court held that the Lease, in that case, providing the authorization to use state lands, was **void *ab initio***, since an EA was required and had not been prepared on the date of the execution of the Lease. The Operating Agreement as it applied to Kahului Harbor was likewise void *ab initio*, as a matter of law, based upon *Kepoo, supra,* because it had been executed before the EA required in this case had been prepared.

specific 5.1 acres of state lands at the Kahului Harbor. Once the Trial Court had entered its prohibitory orders, only the Legislature could attempt to summon the power to supplant these orders, since HDOT and Superferry had not appealed them. The Legislature lacked the power or authority, however, to exercise power or control, through special legislation, over these 5.1 acres at Kahului Harbor for the benefit of Superferry alone.

V. ACT 2 VIOLATES ARTICLE III AND THE DUE PROCESS CLAUSE OF THE HAWAII CONSTITUTION

Unconstitutional interference in violation of the separation of powers doctrine can occur in at least four distinct fashions according to the United States Supreme Court in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), not all dependant upon the entry of a final judgment, as alleged by HDOT. [10]

A. Act 2 Has Significant Retroactive Components

HDOT falsely claims, on p. 30 of it Answering Brief, that Act 2 and the Trial Court's Order based upon Act 2, simply "altered the prospective effect of injunctions issued by Article III Courts." Instead, Act 2 undisputedly had retroactive effect. The Operating Agreement was *void ab initio*, as a matter of law, as of February 23, 2005, based upon *Kepoo, supra.* Section 1.(e) of Act 2 reaches back retroactively two (2) years to authorize the use the 5.1 acres.

As importantly, Act 2 is a clear deprivation of Sierra Club's rights to the environmental review process vested by the Hawaii Supreme Court. The Hawaii Supreme Court's decision invalidating the exemption and declaring the EA requirement of Chapter 343 applicable was a **final disposition** of the primary claim in the case and vested in Sierra Club and the public, by the end of August 2007, at the latest, a panoply of environmental rights and protections. Act 2 cannot retroactively create a pseudo-process, stripping Sierra Club of rights that had already vested in them, without violating Article III and the Due Process Clause of the Hawaii Constitution.

B. The Legislative and Executive Branches Reweighed the Equities and Directed a Different Outcome Through Act 2 Thus Violating Article III of the Constitution

[10] See Sierra Club Opening Brief, p. 26 and pp. 25-34 generally.

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HDOT's attempt to distinguish the reasoning in *NRDC v. Winter*, 527 F. Supp 2d 1216 (C.D. Cal. 2008) and *NRDC v. Winter*, 518 F.3d 658 (9th Cir. 2008) fails. [11] What is significant is the analysis by both Courts that when the facts show that the Legislature has simply reweighed the equities and directed a different result, Article III is violated. [12]

C. The Governor's Proclamation Convening the Special Session is Illegal and Void

HDOT has relegated any rebuttal of Sierra Club's challenge to the Governor's Proclamation to a footnote. Sierra Club agrees that the Governor has the power to convene special sessions; however the Governor violates HRS § 601-5 if she does so, as here, to "interfere with, alter, or overrule any order, writ, judgment, or decision of any court, judge, or other judicial officer." Based upon the language in the Proclamation itself (ROA 3054) and for the other reasons given above, it is clear that the Governor convened the special session to interfere with or to alter or to overrule the decisions of the Hawaii Supreme Court and Judge Cardoza in violation of HRS § 601-5. Article III does not "trump" these requirements of the law, as argued by HDOT.

VI. CONCLUSION/ RELIEF REQUESTED

Based upon the foregoing, Sierra Club respectfully requests that this Court grant the relief requested by Sierra Club on pp. 34-35 of its Opening Brief filed *ex officio* on June 6, 2008.

DATED: Wailuku, Maui, Hawai'i 9.2.08

Isaac Hall, Attorney for Plaintiffs/Appellants/Cross-Appellees/Appellees/Cross-Appellants The Sierra Club, Maui Tomorrow, Inc. and the Kahului Harbor Coalition

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[11] Sierra Club recognizes that certiorari has been granted for this case; however the rationale, no matter what, still applies with force to this case.

[12] HDOT does not address this argument. For all the reasons already given in Sierra Club's Opening Brief, Act 2 has simply reweighed the equities already weighed by the Trial Court and directed a different result. Act 2 is therefore unconstitutional.

CERTIFICATE OF SERVICE

I certify that two (2) copies of the foregoing document were duly served upon each of the following parties by the method and on the date described below:

Method

[x] Mailing through the United States Postal Service, postage prepaid

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