No. 126606

IN THE SUPREME COURT OF ILLINOIS

PNC BANK, NATIONAL ASSOCIATION,

Plaintiff-Appellee,

v.

JERZY KUSMIERZ and HALINA KUSMIERZ,

Defendants-Appellants,

and

THE TOWNSHIP OF YORK and PNC BANK, NATIONAL ASSOCIATION,

Defendants,

JERZY KUSMIERZ and HALINA KUSMIERZ,

Section 2-1401 Petitioners-Appellants,

v.

PNC BANK, NATIONAL ASSOCIATION, NELLISA S. RAGLAND, BRIAN T. HEATH, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, as Nominee for STC Capital Bank, and STC CAPITAL BANK,

Section 2-1401 Respondents-Appellees,

and

THE TOWNSHIP OF YORK,

Section 2-1401 Respondent,

Appeal from the Appellate Court of the Illinois Second Judicial District
Case No. 2-19-0521
On Appeal from the Circuit Court of DuPage County, Illinois
Trial Court Case No. 2011 CH 1585
The Honorable James D. Orel, Judge Presiding

BRIEF OF SECTION 2-1401 RESPONDENTS-APPELLEES NELLISA S. RAGLAND, BRIAN T. HEATH AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for STC Capital Bank

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POINTS AND AUTHORITIES

NATURE OF THE ACTION AND JUDGMENT ON APPEAL 1

ISSUES PRESENTED FOR REVIEW 2

STATEMENT OF JURISDICTION 2

STATEMENT OF FACTS 3

ARGUMENT 7

I. Standard of Review 7

People v. Carter, 2015 IL 117709, 43 N.E.3d 972 7

BankUnited, Nat'l Ass'n v. Giusti, 2020 IL App (2d) 190522 7

II. Introduction 8

Hearing on S.B. 2432, Illinois House Transcript, 2018 Reg. Sess. No. 141 at 73-75, 79-80 8

III. Service Upon Petitioners was Proper 9

735 ILCS 5/2-202 9

PNC Bank, Nat'l Ass'n v. Kusmierz, 2020 IL App (2d) 190521, 161 N.E.3d 1181 ..... 9, 17

Municipal Tr. and Sav. Bank v. Moriarty, 2020 IL App (3d) 190016 10-12

C.T.A.S.S.&U. Fed. Credit Union v. Johnson, 383 Ill. App. 3d 909, 891 N.E.2d 558 (1st Dist. 2008) 10

Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc., 172 Ill. App. 3d 993, 527 N.E.2d 693 (2nd Dist. 1988) 10-11

People v. Clark, 2019 IL 122891, ¶ 47, 135 N.E.3d 21, *reh'g denied* (Oct. 2, 2019) 11

People ex rel. Illinois Dep't of Corr. v. Hawkins, 2011 IL 110792, 952 N.E.2d 624 12

IV. Respondents are Entitled to the Protections Afforded by 735 ILCS 5/1-1401(e) 12

735 ILCS 5/2-1401(e) 12-14

U.S. Bank Nat. Ass'n v. Rahman, 2016 IL App (2d) 150040, 54 N.E.3d 866, *reh'g denied* (June 2, 2016) 13, 16, 20

Mortg. Elec. Sys. v. Gipson, 379 Ill. App. 3d 622, 884 N.E.2d 796 (1st Dist. 2008) 13

PNC Bank, Nat'l Ass'n v. Kusmierz, 2020 IL App (2d) 190521, 161 N.E.3d 1181 ..... 13, 16, 17

State Bank of Lake Zurich v. Thill, 113 Ill. 2d 294, 497 N.E.2d 1156 (1986) 13-14

JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275 ..... 13, 16

Cullen v. Stevens, 389 Ill. 35, 58 N.E.2d 456 (1944) 14

Central Mortg. Co. v. Kamarauli, 2012 IL App (1st) 112353, 980 N.E.2d 745 14

Allison v. White, 285 Ill. 311, 319, 120 N.E. 809 14-15

Carnes v. Whitfield, 352 Ill. 384, 185 N.E. 819 (1933) 15

Smith v. Grubb, 402 Ill. 451, 84 N.E.2d 421 (1949) 15

Application of Cty. Collector (Miller), 397 Ill. App. 3d 535, 921 N.E.2d 462 (1st Dist. 2009) 15

Application of Cook Cty. Collector (Elsie Bee), 228 Ill. App. 3d 719, 593 N.E.2d 538 (1st Dist. 1991); 15

Application of Cty. Treasurer & Ex-Officio Cty. Collector of Cook Cty., *(Howell)*, 30 Ill. App. 3d 235, 332 N.E.2d 557 (1st Dist. 1975) 15

BankUnited, Nat'l Ass'n v. Giusti, 2020 IL App (2d) 190522 16

C.T.A.S.S.&U. Fed. Credit Union v. Johnson, 383 Ill. App. 3d 909, 891 N.E.2d 558 (1st Dist. 2008) 16-19

Bowman v. Chicago Park Dist., 2014 IL App (1st) 132122, 19 N.E.3d 75 18

735 ILCS 5/2-202 19

Concord Air, Inc. v. Malarz, 2015 IL App (2d) 140639, 49 N.E.3d 26 20

V. Petitioners are Guilty of Laches 20

A. *Laches can be Interposed as a Defense to a Jurisdictional Challenge* ... 20

James v. Frantz, 21 Ill. 2d 377, 172 N.E.2d 795 (1961) 20, 23

Koberlein v. First Nat. Bank of St. Elmo, 376 Ill. 450, 34 N.E.2d 388 (1941) 20

City of Champaign v. Torres, 214 Ill. 2d 234, 824 N.E.2d 624 (2005) 20 n.7

Ocwen Loan Servicing, LLC v. DeGomez, 2020 IL App (2d) 190774 ..... 20, 22

Fed. Nat'l Mortg. Ass'n v. Altamirano, 2020 IL App (2d) 190198 20

BankUnited, Nat'l Ass'n v. Giusti, 2020 IL App (2d) 190522 21

JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275, ... 21
156 N.E.3d 98 *reh'g denied* (June 4, 2020)

In re Jamari R., 2017 IL App (1st) 160850, 82 N.E.3d 109 21

Eckberg v. Benso, 182 Ill. App. 3d 126, 537 N.E.2d 967 (1st Dist. 1978) 21, 22

Rodriguez v. Koschny, 57 Ill. App. 3d 355 373 N.E.2d 47 (2nd Dist. 1978) 21

Miller v. Bloomberg, 60 Ill. App. 3d 362, 376 N.E.2d 748 (2nd Dist. 1978) 21, 24

Watson v. Watson, 235 Ga. 136, 218 S.E.2d 863 (1975) 21 n.8

Harrison v. G. & K. Inv. Co., 238 Miss. 760, 115 So. 2d 918 (1959) 21 n.8

Halverson v. Hageman, 249 Iowa 1381, 92 N.W.2d 569 (1958) 21 n.8

McBrayer v. Hokes Bluff Auto Parts, 685 So. 2d 763 (Ala. Civ. App. 1996) ..... 21 n 8

Pyle v. Ferrell, 12 Ill. 2d 547, 147 N.E.2d 341 (1958) 21-24

Negron v. City of Chicago, 376 Ill. App. 3d 242, 876 N.E.2d 148 22
(1st Dist. 2007)

Bill v. Bd. of Educ. of Cicero Sch. Dist. 99, 351 Ill. App. 3d 47, ... 22
812 N.E.2d 604 (1st Dist. 2004)

Ashley v. Pierson, 339 Ill. App. 3d 733, 791 N.E.2d 666 (4th Dist. 2003) 22

B. *Petitioners' Flawed Arguments Regarding Laches* 24

i. While a Void Judgment may be Challenged at any Time 24
Laches any Nonetheless be Asserted

JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275 ¶ 30 24-25
27

Blazyk v. Daman Exp., Inc., 406 Ill. App. 3d 203, 940 N.E.2d 796..... 25
(2nd Dist. 2010)

Fed. Nat'l Mortg. Ass'n v. Altamirano, 2020 IL App (2d) 190198 ..... 25, 26,

In re N.G., 2018 IL 121939, *reh'g denied,* 2018 IL 121939, 115 N.E.3d 102..... 25-27

People v. Castleberry, 2015 IL 116916, 43 N.E.3d 932 ..... 25, 26

BAC Home Loans Servicing, LP v. Mitchell, 2014 IL 116311, 6 N.E.3d 162..... 25

Ford Motor Credit Co. v. Sperry, 214 Ill. 2d 371, 827 N.E.2d 422 (2005)..... 25, 26

LVNV Funding, LLC v. Trice, 2015 IL 116129, 32 N.E.3d 553..... 25 n. 9

W. Suburban Bank v. Advantage Fin. Partners, LLC, ... 25 n.10
2014 IL App (2d) 131146, 23 N.E.3d 370

PNC Bank, Nat'l Ass'n v. Kusmierz, 2020 IL App (2d) 190521, ... 25, 27
161 N.E.3d 1181

In re Jamari R., 2017 IL App (1st) 160850, 82 N.E.3d 109..... 26

In re Adoption of Miller, 106 Ill. App. 3d 1025, 436 N.E.2d 611..... 26
(1st Dist. 1982)

Miller v. Bloomberg, 60 Ill. App. 3d 362, 376 N.E.2d 748 (2nd Dist. 1978)..... 26

People v. Thompson, 2015 IL 118151, 43 N.E.3d 984..... 26

Warren Cty. Soil & Water Conservation Dist. v. Walters, 2015 IL 117783 26
32 N.E.3d 1099

LVNV Funding, LLC v. Trice, 2015 IL 116129, 32 N.E.3d 553..... 26

In re Haley D., 2011 IL 110886, 959 N.E.2d 1108..... 26

In re Dar. C., 2011 IL 111083, 957 N.E.2d 898..... 26

People v. Laugharn, 233 Ill. 2d 318, 909 N.E.2d 802 (2009) 26

People v. Vincent, 226 Ill. 2d 1, 871 N.E.2d 17 (2007)..... 26

Sarkissian v. Chicago Bd. of Educ., 201 Ill. 2d 95, 776 N.E.2d 195 (2002) 26

Pyle v. Ferrell, 12 Ill. 2d 547, 147 N.E.2d 341 (1958) 27

Merit Mgmt. Grp. v. Ponca Tribe of Indians Okla.,..... 27
778 F. Supp. 2d 916 (N.D. Ill. 2011)

Allen v. U.S., 102 F. Supp. 866 (N.D. Ill. 1952) 27

Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1091..... 27
(7th Cir. 1992)

People v. Gutman, 2011 IL 110338, 959 N.E.2d 621 27

People v. Matthews, 2016 IL 118114, 76 N.E.3d 1233..... 28

735 ILCS 5/2-301..... 28

735 ILCS 5/15-1505.6..... 28

ii. Courts do not have an Inherent Duty to Vacate Orders..... 28
for Want of Personal Jurisdiction

People v. Thompson, 209 Ill. 2d 19, 805 N.E.2d 1200 (2004)..... 28-29

People v. Vara, 2018 IL 121823, 115 N.E.3d 53 *reh'g denied* (Sept. 24, 2018)..... 28

People v. Matthews, 2016 IL 118114, 76 N.E.3d 1233 28

Nye v. Parkway Bank & Tr. Co., 114 Ill. App. 3d 272, 448 N.E.2d 918 29
(1st Dist. 1983)

iii. *Laches* may be Asserted as a Defense to the Petition 29

Valdovinos v. Tomita, 394 Ill. App. 3d 14, 914 N.E.2d 221 (1st Dist. 2009)..... 29

Coleman v. O'Grady, 207 Ill. App. 3d 43, 565 N.E.2d 253 (1st Dist. 1990) 29

Villiger v. City of Henry, 47 Ill. App. 3d 565, 362 N.E.2d 120, (3rd Dist. 1977) 29

JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275 29

Warren Cty. Soil & Water Conservation Dist. v. Walters, ... 29
2015 IL 117783, 32 N.E.3d 1099

Studentowicz v. Queen's Park Oval Asset Holding Tr.,..... 30
2019 IL App (1st) 181182

Fed. Nat'l Mortg. Ass'n v. Altamirano, 2020 IL App (2d) 190198 30-31

iv. Petitioners Fail to Distinguish Cited Appellate Court Authority..... 31

James v. Frantz, 21 Ill. 2d 377, 172 N.E.2d 795 (1961) 31, 32
34

In re Adoption of Miller, 106 Ill. App. 3d 1025, 436 N.E.2d 611 (1st Dist. 1982)... 31, 33

Rodriguez v. Koschny, 57 Ill. App. 3d 355, 373 N.E.2d 47 (2nd Dist. 1978) 31, 33
34

In re Jamari R., 2017 IL App (1st) 160850, 82 N.E.3d 109..... 31, 33

Eckberg v. Benso, 182 Ill. App. 3d 126, 537 N.E.2d 967 (1st Dist. 1989)..... 31, 33

Miller v. Bloomberg, 60 Ill. App. 3d 362, 376 N.E.2d 748 (2nd Dist. 1978)..... 31, 34,
35

Slatin's Properties, Inc. v. Hassler, 53 Ill. 2d 325, 291 N.E.2d 641 (1972)..... 31, 34

LaSalle Nat. Bank v. Dubin Residential Communities Corp., ... 32, 34
337 Ill. App. 3d 345, 785 N.E.2d 997 (1st Dist. 2003)

Ocwen Loan Servicing, LLC v. DeGomez, 2020 IL App (2d) 190774..... 31

Koberlein v. First Nat. Bank of St. Elmo, 376 Ill. 450, 34 N.E.2d 388 (1941)..... 31

Fed. Nat'l Mortg. Ass'n v. Altamirano, 2020 IL App (2d) 190198 ..... 32, 33

Fox v. Dep't of Revenue, 34 Ill. 2d 358, 215 N.E.2d 271 (1966)..... 33-34

Hustana v. Hustana, 22 Ill. App. 2d 59, 159 N.E.2d 265 (1st Dist. 1959)..... 33-34

Thayer v. Vill. of Downers Grove, 369 Ill. 334, 16 N.E.2d 717 (1938) 34

Bowman v. Chicago Park Dist., 2014 IL App (1st) 132122, 19 N.E.3d 75 34

735 ILCS 5/12-108..... 35 n.12

Cates v. Cates, 156 Ill. 2d 76, 619 N.E.2d 715 (1993)..... 35

v. No Evidentiary Hearing was Required..... 35

Evergreen Oak Elec. Supply & Sales Co. v. First Chicago Bank of Ravenswood,... 35
276 Ill. App. 3d 317, 657 N.E.2d 1149 (1st Dist. 1995)

In re Adoption of Miller, 106 Ill. App. 3d 1025, 436 N.E.2d 611 (1st Dist. 1982)... 36

Ocwen Loan Servicing, LLC v. DeGomez, 2020 IL App (2d) 190774..... 36

Fed. Nat'l Mortg. Ass'n v. Altamirano, 2020 IL App (2d) 190198 36

BankUnited, Nat'l Ass'n v. Giusti, 2020 IL App (2d) 190522 ..... 36, 37

JPMorgan Chase Bank, N.A. v. Robinson, 2020 IL App (2d) 190275,..... 36, 37
156 N.E.3d 98 *reh'g denied* (June 4, 2020)

vi. The Doctrine of Unclean Hands is Inapplicable 37

Bowman v. Chicago Park Dist., 2014 IL App (1st) 132122,..... 37
19 N.E.3d 75

Jaffe Commercial Fin. Co. v. Harris, 119 Ill. App. 3d 136,..... 37
456 N.E.2d 224 (1st Dist. 1983)

Ocwen Loan Servicing, LLC v. DeGomez, 2020 IL App (2d) 190774..... 37

VI. Petitioners' Claims for Other Relief were Properly Dismissed..... 38

A. *The Request for Extraneous Relief was not a Proper Subject for Inclusion in the Petition* 38

Burchett v. Goncher, 235 Ill. App. 3d 1091, 603 N.E.2d 1 (1st Dist. 1991) 38

In re Marriage of Oldham, 222 Ill. App. 3d 744, 584 N.E.2d 385 38
(1st Dist. 1991)

Ocwen Loan Servicing, LLC v. DeGomez, 2020 IL App (2d) 190774..... 38

i Petitioners Failed to Allege a Basis for the Extraneous Relief 38

735 ILCS 5/9-102..... 38

City of Champaign v. Torres, 214 Ill. 2d 234, 824 N.E.2d 624 (2005)..... 38 n.13

Wieboldt v. Best Brewing Co., 163 Ill. App. 246 (1st Dist. 1911) 39

735 ILCS 5/9-201 39

Cauley v. N. Tr. Co., 315 Ill. App. 307, 43 N.E.2d 147 (1st Dist. 1942) 39

ii. Section 2-1401(e) of the Code Bars the Extraneous Relief 39

735 ILCS 5/2-1401(e) 39-40

Hearing on S.B. 2432, Illinois House Transcript, ... 39 n.14
2018 Reg. Sess. No. 141 at 73-75, 79-80

iii. Restitution is not a Panacea 40

In re Marriage of Lehr, 317 Ill. App. 3d 853, 740 N.E.2d 417 (1st Dist. 2000) 40

Thompson v. Davis, 297 Ill. 11, 130 N.E. 455 (1921) 40

Cent. Mortg. Co. v. Kamarauli, 2012 IL App (1st) 112353, 980 N.E.2d 745 ..... 40 n.15

McJilton v. Love, 13 Ill. 486 (1851) 40-41

Yugolsav-Am. Cultural Ctr., Inc. v. Parkway Bank & Tr. Co., ... 41
327 Ill. App. 3d 143 (1st Dist. 2001)

iv. Orders Entered Against Properly Joined Defendants Must Stand 42

People v. Matthews, 2016 IL 118114, 76 N.E.3d 1233 42

In re J. W., 87 Ill. 2d 56, 429 N.E. 2d 501 (1981) 42

In re Estate of Thorp, 282 Ill. App. 3d 612, 669 N.E.2d 359 (4th Dist. 1996) 42

Just Pants v. Bank of Ravenswood, 136 Ill. App. 3d 543, ... 42
483 N.E.2d 331 (1st Dist. 1985)

CONCLUSION 43

NATURE OF THE ACTION AND JUDGMENT ON APPEAL

Over six years following the conclusion of the underlying foreclosure, defendants/section 2-1401 petitioners Jerzy Kusmeirz ("Jerzy") and Halina Kusmeirz ("Halina," and collectively with Jerzy, the "Petitioners") filed a Petition for Relief from Void Judgments pursuant to 735 ILCS 5/2-1401 (the "Petition") seeking to unwind the proceeding as well as a subsequent conveyance of the subject property. The basis for Petitioners' challenge was an alleged defect in the manner in which they were served, namely, the failure of the foreclosing lender, plaintiff/section 2-1401 respondent-appellee PNC Bank, National Association ("PNC"), to secure appointment of a special process server prior to effectuating service in Cook County. While not brought to the attention of the courts below, Petitioners now also take issue with the *in personam* judgment entered against them in the proceeding.

The Petition joined, among others, section 2-1401 respondents-appellees Nellisa S. Ragland ("Nellisa"), Brian T. Heath ("Brian," and collectively with Nellisa, the "Current Owners"), and Mortgage Electronic Registration Systems, Inc., as nominee for STC Capital Bank ("MERS", and collectively with the Current Owners, the "Respondents") - the current owners of the subject property and their mortgage lender. On December 4, 2018, Respondents filed a motion to dismiss arguing that: (1) they were entitled to the protections afforded by 735 ILCS 5/2-1401(e); (2) Petitioners were guilty of *laches*; and (3) the Petition requested improper relief. PNC also moved to dismiss the Petition, asserting, *inter alia*, the doctrines of *laches* and mootness. On May 21, 2019, the trial court granted both motions. Petitioners subsequently appealed the ruling.

On August 28, 2020 the Second District Appellate Court affirmed the judgment of the trial court, holding that: (1) because the alleged jurisdictional defect did not affirmatively appear on the face of the record, section 2-1401(e) applied in favor of Respondents; and (2) *laches* barred Petitioners' restitution claims against PNC due to their unreasonable delay in bringing the claims and the resulting prejudice to PNC.

ISSUES PRESENTED FOR REVIEW

I. Whether a duly licensed or registered private detective may serve process, without special appointment, anywhere in this State so long as the summons was issued from a county with a population less than 2,000,000.

II. Whether a violation of 735 ILCS 5/2-202(a) affirmatively appeared from the record proper for purposes of negating the protections afforded by 735 ILCS 5/2-1401(e) where the record did not disclose the county of service or the population thereof.

III. Whether *laches* precludes the relief sought in the Petition.

IV. Whether Petitioners were entitled to relief beyond vacatur of the allegedly void orders entered against them.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Illinois Supreme Court Rule 315. More specifically, the Appellate Court issued its opinion affirming the trial court judgment on August 28, 2020, and this Court subsequently allowed Petitioners' Petition for Leave to Appeal on January 27, 2021.

STATEMENT OF FACTS

The Underlying Foreclosure

On March 30, 2011, PNC commenced the underlying proceeding (the "Foreclosure") seeking to foreclose a consensual mortgage lien interest in a vacant residential lot commonly known as 1405 Wisconsin Avenue, Lombard, Illinois (the "Premises"). C 20-34, 57, 61, 176, 178. Petitioners, as mortgagors and owners of the Premises, along with PNC Bank and the Township of York (each allegedly holding a subordinate lien interest in the Premises) were joined as defendants in the proceeding. C 20-22.

PNC Bank was served with process on March 31, 2011. C 76. Thereafter, on April 1, 2011, Halina was personally served by an employee of Metro Detective Agency, LLC (the "Detective") at 1107 West Eaton Court, Palatine, Illinois 60067 (the "Service Address"). C 69. Nothing in the record identifies the county in which the Service Address is located. C 20-132.

On April 4, 2011, the Foreclosure court entered an order appointing the Detective as special process server in the proceeding (the "SPS Order"). C 53. On this same date, the Detective completed abode service on Jerzy at the Service Address. C 65. The Detective subsequently served the Township of York on April 5, 2011. C 80.

No party filed an appearance or responsive pleading in the Foreclosure. C 86, 97. As a result, on February 28, 2012, the trial court entered a default order and Judgment of Foreclosure and Sale (the "Judgment"). C 108-113. In relevant part, the Judgment authorized the Sheriff of DuPage County (the "Sheriff") to sell the Premises in satisfaction of the debt due PNC. C 109-113. Pursuant to this authorization, on May 31,

2012, the Sheriff conducted a judicial sale of the Premises (the "Sale"). C 120, 122-125. PNC submitted the successful bid of $40,000.00 - a sum $54,229.26 less than the amount due under the Judgment. C 122-125. On June 12, 2012, the trial court confirmed the Sale and entered an *in personam* judgment against Petitioners in the amount of the Sale deficiency (the "Confirmation Order").[1] C 127-128. On this same date, the Sheriff issued a deed vesting PNC with title to the Premises. C 303-305.

Respondents' Purchase of the Premises and Construction of a Residence[2]

On or about April 9, 2013, the Current Owners, unaware of any jurisdictional defect in the Foreclosure, purchased the Premises from PNC for $24,000.00. C 176-179. Subsequent to acquiring title, the Current Owners took and continuously maintained exclusive possession of the property. C 177, 179.

In August 2013, the Current Owners began constructing a new five-bedroom, single-family home on the Premises. C 176-179. The project was financed with two mortgage loans from STC Capital Bank ("STC"), *to wit*: (1) a $220,400.00 first; and (2) a $72,250.00 second. *Id.* Both debts were secured by mortgage lien interests in the Premises. *Id.* In addition to this financing, the Current Owners advanced approximately

[1] As noted, Petitioners failed to mention, much less contest, entry of the deficiency judgment in either the trial or appellate proceedings. C 20-352; R 4-16; Petitioners' Brief in the Second District at 1-21; Petitioners' Reply Brief in the Second District 1-20. Pursuant to section 12-108 of the Illinois Code of Civil Procedure, the *in personam* judgment against Petitioners lapsed and the record is devoid of any suggestion that PNC ever sought revival under section 2-1602. *See* 735 ILCS 5/12-108 (West 2010) ("no judgment shall be enforced after the expiration of 7 years from the time the same is rendered, except upon the revival of the same by a proceeding provided by Section 2-1601 of this Act…") and 735 ILCS 5/2-1602 (West 2010).

[2] The Petitioners' Brief ("Petitioner Br.") neglects to mention that the Current Owners purchased the Premises and thereafter constructed a residence on the property financed, in part, with $292,650.00 in mortgage loans.

$42,000.00 in personal funds to complete construction of the dwelling. C 177, 179. In June of 2014, the Current Owners moved into their new home. *Id.*

From 2013 until commencement of the underlying section 2-1401 proceeding, the Current Owners advanced approximately $36,000.00 in order to satisfy real estate tax liability and maintain insurance coverage for the Premises. C 177, 179.

The Petition

On September 12, 2018, over six years after the conclusion of the Foreclosure and five years after the Current Owners purchased the Premises, Petitioners filed their Petition. C 136-139, 176, 178. In pertinent part, the pleading contends that service on Petitioners did not comply with section 2-202(a) of the Illinois Code of Civil procedure (the "Code") because the Detective effectuated service "in Cook County, Illinois and the Circuit Court did not appoint a special process server to serve process" in that jurisdiction. (735 ILCS 5/2-202(a) (West 20101)). C 136-138. As a result of this alleged jurisdictional defect, Petitioners submitted that all orders entered in the Foreclosure were void *ab initio*. C 138. Petitioners also requested, *inter alia*, that the trial court: (1) find that the lack of jurisdiction over them was "apparent on the face of the record;" (2) decree Petitioners the owners of the Premises and award them possession of the property; (3) direct PNC and the Current Owners "to pay [Petitioners], as restitution, reasonable use and occupancy of the [Premises] from June 12, 2012, through and including, the date [Petitioners] are restored to possession," or, in the alternative, "in the event that possession is not restored to [Petitioners]," direct PNC and the Current Owners "to pay to [Petitioners], as restitution, the value of the [Premises] on the date that [the Petition] is granted plus reasonable use and occupancy of the [Premises] from July 12, 2012, through

and including, the date restitution is paid in full;" and (4) order PNC and Respondents to pay to Petitioners "as restitution, all profits that they derived from the [Premises]" (collectively, the "Extraneous Relief"). C 138-139. Ironically, despite predicating their claim for relief upon defective service, Petitioners did not conventionally serve the Respondents despite the fact the Petition included claims against them for monetary and injunctive relief. C 134, 289-292.

In response to the Petition, on December 4, 2018, the Current Owners filed a Combined 2-619.1 Motion to Dismiss (the "Respondent MTD"). C 157-179. MERS, the holder of the Current Owners' first mortgage, subsequently adopted the pleading. C 200. The Respondent MTD argued that the Petition was fatally defective because: (1) section 2-1401(e) of the Code of Civil Procedure protected Respondents' rights in the Premises, (2) the doctrine of *laches* barred Petitioners' claims, and (3) Petitioners were not entitled to their requested relief. C 157-166. In support of Respondents' arguments premised upon section 2-1401(e) and *laches*, the Current Owners submitted affidavits demonstrating, *inter alia*, their continuous possession of the Premises, the nature of their improvements to the property, and the payment of real estate taxes and insurance premiums (the "Affidavits"). C 176-179.

For its part, on December 7, 2018, PNC filed a Combined 735 ILCS 5/2-619.1 Motion to Dismiss the Petition (the "PNC MTD") raising the defenses of *laches* and mootness in addition to an attack on the scope of requested relief. C 189-195.

In lieu of responding to the Respondent MTD, Petitioners filed a motion to pursue discovery from the Current Owners pursuant to Illinois Supreme Court Rule 191(b) (the "Rule 191(b) Motion"). C 206-210. On January 23, 2019, the trial court sustained the

Respondents' objection to the request. C 213-260. The trial court later reversed this ruling so as to authorize the Petitioners to pursue discovery.[3] C 288. In lieu of doing so, however, the Petitioners responded to the merits of the Respondent MTD. C 306-329. Significantly, the Petitioners' response brief failed to include counter-affidavits or other evidence to rebut the Affidavits or otherwise refute Respondents' *laches* defense. *Id.*

On May 21, 2019, following briefing and oral argument, the trial court granted both the Respondent MTD and the PNC MTD. C 349; R 4-16; SUP C 7-25. Thereafter, on June 18, 2019, the Petitioners filed a timely Notice of Appeal. C 350-352.

Appellate Proceedings

Briefing before the Appellate Court was completed on February 28, 2020. Thereafter, on August 28, 2020, the Second District Appellate Court entered its opinion affirming the trial court judgment (the "Opinion"). On November 3, 2020, Petitioners filed their Petition for Leave to Appeal to this Court. That request was granted on January 27, 2021.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* the dismissal of a section 2–1401 petition attacking an allegedly void judgment. *People v. Carter*, 2015 IL 117709, ¶ 13, 43 N.E.3d 972, 976; *see also BankUnited, Nat.l Ass'n v. Giusti*, 2020 IL App (2d) 190522, ¶ 14 ("[an appellate court] review[s] *de novo* a judgment on a section 2-1401 petition claiming voidness due to a lack of personal jurisdiction").

[3] The Petitioner Br. neglects to note that the trial court ultimately allowed the Petitioners to pursue discovery.

II. Introduction

For over seven years, Petitioners were unconcerned with the manner in which service of process was effectuated upon them. In the interim, the Premises were sold to the Current Owners and a home openly constructed on what was once a vacant lot. Now, in a transparent attempt to create chaos in the chain of title to the Premises, Petitioners seek to unwind the Foreclosure and the subsequent conveyance to the Current Owners. Given the various damages sought in the Petition, it is not difficult to discern Petitioners' motivation in challenging the Foreclosure at this late date.

Perhaps not surprisingly, the matters alleged in the Petition are far from unique. As noted by the trial judge in a hearing conducted on a related matter, the circuit court has been "inundated" with "over 100" section 2-1401 petitions seeking to set aside foreclosure judgments entered many years earlier, all prosecuted by the same cadre of firms (including Petitioners' counsel). C 279-280, SUP C 18:19-19:10, 21:4-10; 24:16-19. The havoc created by this "cottage legal industry" prompted the Illinois Legislature to pass Public Act 100-1048, aimed at curtailing a deluge of post-foreclosure jurisdictional challenges and the resultant angst of a multitude of third-party purchasers who acquired title to distressed property in reliance upon the finality of the underlying proceedings. *Hearing on S.B. 2432*, Illinois House Transcript, 2018 Reg. Sess. No. 141 at 73-75, 79-80 (statements of Representative Martwick and Representative Thapedi); *see also* C 280, SUP C at 21:4-10.

While couched as an effort to vindicate due process rights, it should be apparent the present appeal is really nothing more than a transparent attempt to exploit these protections. As set forth more fully below, this Court should reject Petitioners' effort.

First, recent authority undermines the basis for Petitioners' jurisdictional challenge. Moreover, the Appellate Court correctly concluded that the statutory protections afforded Respondents, combined with Petitioners' *laches*, warranted dismissal of the Petition. Further, while not squarely addressed in the Opinion, dismissal of the Extraneous Relief sought by Petitioners was entirely appropriate.

III. Service Upon Petitioners was Proper

In relevant part, section 2-202 of the Code provides:

> (a) Process shall be served by a sheriff, or if the sheriff is disqualified, by a coroner of some county of the State…In counties with a population of less than 2,000,000, process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 or by a registered employee of a private detective agency certified under that Act as defined in Section (a-5)…The court may, in its discretion upon motion, order service to be made by a private person over 18 years of age and not a party to the action…
>
> (a-5) Upon motion and in its discretion, the court may appoint as a special process server a private detective agency certified under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004. Under the appointment, any employee of the private detective agency who is registered under that Act may serve the process…
>
> (b) Summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve process…

735 ILCS 5/2-202 (West 2010).

Petitioners contend that it is "undisputed" that service upon them did not comply with section 2-202 of the Code. *See* Petitioner Br. at 8-9. Following the completion of briefing in the underlying appeal, however, and as noted in the Opinion, *PNC Bank, Nat'l Ass'n v. Kusmierz*, 2020 IL App (2d) 190521, ¶ 21, 161 N.E.3d 1181, a district split arose on the issue of when court appointment of a special process server is required under

section 2-202. In particular, on May 4, 2020, the Third District Appellate Court rendered an opinion in *Municipal Tr. and Sav. Bank v. Moriarty*, 2020 IL App (3d) 190016,[4] finding that "a duly licensed or registered private detective may serve process, 'without special appointment,' anywhere in the state *so long as the summons was issued from a county 'with a population less than 2,000,000*.'" *Id.* ¶ 22 (emphasis added). *Moriarty* thus deviated from First and Second District precedent holding that the county where service is effectuated controls the issue of whether court appointment of a special process server is required. *C.T.A.S.S.&U. Fed. Credit Union v. Johnson*, 383 Ill. App. 3d 909, 912, 891 N.E.2d 558, 561 (1st Dist. 2008); *Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 172 Ill. App. 3d 993, 998, 527 N.E.2d 693, 697 (2nd Dist. 1988). This split relative to the interpretation of section 2-202 should be resolved in favor of the Third District view as *Moriarty* provides a better-reasoned, more common-sense interpretation of the provision.

As the *Moriarty* court observed:

> [S]ubsection 2-202(a), read out of its context, appears ambiguous in cases where the summons was issued in a county with a population less than 2,000,000 but the defendant was personally served in Cook County…The term "in counties" can refer to either the location at which the defendant is served or the venue where the case is pending. Both interpretations are reasonable—when subsection 2-202(a) is read in isolation.
>
> Subsection 2-202(b), however, is clear and unambiguous, with only one reasonable interpretation: it empowers "any person authorized to serve process" to do so on "defendants wherever they may be found in the State."

Moriarty, 2020 IL App (3d) 190016, ¶¶ 19-20 (citations omitted). The *Moriarity* court went on to reject the contention that subsection 2-202(a) serves as a limitation as to subsection 2-202(b), as "'[n]o rule of construction authorizes this court to declare that the

[4] Respondents note that *Moriarity* is presently on appeal before this Court. *Municipal Tr. & Sav. Bank v. Moriarty*, 159 N.E.3d 951 (Ill. 2020).

legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions or limitations the legislature did not include.'" *Id.* ¶ 20 (quoting *People v. Clark,* 2019 IL 122891, ¶ 47, 135 N.E.3d 21, 33, *reh'g denied* (Oct. 2, 2019)).

Moreover, the position of the *Schorsch* court creates an impermissible inconvenience and impediment to judicial economy. *See Clark,* 2019 IL 122891, ¶ 20 ("a court presumes that the General Assembly did not intend absurdity, inconvenience, or injustice in enacting legislation"). Where, as here, *see* C 57, 61, 65, 69, multiple attempts to effectuate service at various addresses was required to serve a defendant, it makes little sense for a process server to suspend efforts when a defendant crosses into Cook County. The situation becomes even more untenable where service is attempted in a town that borders or straddles Cook and another county. Under such circumstances, a special process server would be required to consult a county map or GPS device before completing service. At the same time, a savvy defendant could attempt to avoid service by simply stepping across the county line. Clearly, the legislature did not intend to create such obstacles to ensuring a defendant's timely receipt of notice of an action's commencement..

The *Moriarty* court also properly observed that making court appointment dependent upon the location of service "defies logic":

> Why would the legislature provide broad authority to "serve defendants wherever they may be found in this state" if it intended to limit this authority based on the population of the county where defendant is located at the time of service? Clearly, it did not do that….[S]ubsection 2-202(a)…informs subsection 2-202(b) in terms of identifying who is a "person authorized to serve process." It places no limitation on where authorized persons may serve defendants. If the legislature intended to limit a process server's authority based on county population it would not

> have added the broad authority to serve the process wherever a defendant may be found in this state.

Moriarty, 2020 IL App (3d) 190016, ¶ 21.

Finally, as noted by the *Moriarty* court, the reasoning of *Schorsch* is flawed. In particular, the Second District relied upon legislative history "to limit the clear and unambiguous language of subsection 2-202(b)." *Id.* at ¶ 22. "[W]hen the language of the statute is clear and unambiguous, it must be applied as written without resort to extrinsic aids or tools of interpretation." *People ex rel. Ill. Dep't of Corr. v. Hawkins,* 2011 IL 110792, ¶23, 952 N.E.2d 624 In this regard, "[a]lthough subsection 2-202(a) is ambiguous when read in isolation, the plain language of subsection 2-202(b) is not, and it eliminates the seeming ambiguity of subsection 2-202(a)" as well as any basis to resort to legislative history. *Moriarty,* 2020 IL App (3d) 190016 ¶ 22.

In sum, Respondents submit this Court should adopt the *Moriarty* court's interpretation of section 2-202 such that where, as here, summons is issued out of a county with a population of less than 2,000,000, a duly licensed or registered private detective may serve process without special appointment anywhere in the state.

IV. Respondents are Entitled to the Protections Afforded by section 2-1401(e) of the Illinois Code of Civil Procedure

Even if service was improper, Respondents should nonetheless be afforded the protections of section 2-1401(e). In this regard the section provides:

> (e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition…

735 ILCS 5/2-1401(e) (West 2018).

The section "has been interpreted by Illinois courts as intending to protect *bona fide* purchasers for value." *U.S. Bank Nat. Ass'n v. Rahman*, 2016 IL App (2d) 150040, ¶ 41, 54 N.E.3d 866 *reh'g denied* (June 2, 2016). In affording these protections, the legislature aimed "to promote the merchantability of property affected by court judgments and decrees." *Mortg. Elec. Sys. v. Gipson*, 379 Ill. App. 3d 622, 634, 884 N.E.2d 796, 806 (1st Dist. 2008) (quoting Ill. Ann. Stat., ch. 110, par. 2–1401, Joint Committee Comments, at 603–04 (Smith–Hurd 1983)).

Here, Respondents[5] established all elements of section 2-1401(e). Specifically, as reflected by the Foreclosure record, Respondents were not parties to the proceeding, C 20-132, 177, 179, and acquired their respective interests in the Premises for value following entry of the Confirmation Order and prior to the filing of the Petition. C 127-128, 136-139, 176-179. Moreover, as correctly observed by the Appellate Court, the defect of which the Petitioners complain - a purported failure to comply with section 2-202(a) of the Code - was not apparent from the record. *PNC Bank, Nat'l Ass'n v. Kusmierz*, 2020 IL App (2d) 190521, ¶¶ 25-27, 161 N.E.3d 1181.

In the context of section 2-1401(e), a lack of jurisdiction is apparent from the record if it does not require inquiry beyond the "face" of the "record proper." 735 ILCS 5/2-1401(e) (West 2018); *see also State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 313–14, 497 N.E.2d 1156, 1164 (1986) (holding that a lack of jurisdiction is apparent if it "does not require inquiry beyond the face of the record"). The "record proper" is a legal

[5] Respondents note that a mortgagee such as MERS may avail itself of the protections afforded *bona fide* purchasers under section 2-1401(e) of the Code. *See JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275, ¶ 28 ("A mortgagee of realty is afforded the same protections as a bona fide purchaser if the mortgage is supported by consideration and secured in good faith, without knowledge or notice of adverse claims").

term of art, and this Court has held that it must be limited to the "pleadings, process, verdict of the jury and judgment or decree of the court." *Cullen v. Stevens*, 389 Ill. 35, 42, 58 N.E.2d 456, 459 (1944); *see also Thill*, 113 Ill. 2d at 313 ("In determining whether a lack of jurisdiction is apparent from the record, we must look to the whole record, which includes the pleadings, the return on the process, the verdict of the jury, and the judgment or decree of the court"). This limitation is necessary in order to provide "stability in decrees…of the court" and to avoid "disturbing…titles long considered settled." *Cullen*, 389 Ill. at 42.

In this regard, Petitioners' effort to apply the broader common law *bona fide* purchaser analysis to section 2-1401(e) of the Code is inapposite. *See* Petitioner Br. at 11-13. First, an interpretation of section 2-1401(e) as a mere reiteration of the common law *bona fide* purchaser doctrine violates the principle that courts must construe legislation so as to "avoid rendering any part of it meaningless or superfluous." *Central Mortg. Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 16, 980 N.E.2d 745, 750. Moreover, a plain reading of section 2-1401(e) reveals that it is more circumscribed than the common law doctrine. Specifically, under section 2-1401(e) a subsequent purchaser's rights are only affected if the jurisdictional defect "affirmatively appears" on the face of the "record proper," 735 ILCS 5/2-1401(e), which consists solely of the pleadings, returns of process, and judgment of the trial court. *Thill*, 113 Ill. 2d at 313.

By contrast, under the common law doctrine, subsequent purchasers are chargeable with, among other things, "notice of what appeared in [their chain of title], and if unusual facts appeared, such as would cause a reasonably prudent man to suspect the title, they are chargeable with knowledge of whatever would have been discovered by

diligent inquiry." *Allison v. White*, 285 Ill. 311, 319, 120 N.E. 809, 811 (1918). In light of the difference between Section 2-1401(e) and the common law doctrine, Petitioners' contention that this Court should apply the standard described in *Allison*; *Carnes v. Whitfield*, 352 Ill. 384, 390, 185 N.E. 819, 821 (1933); and *Smith v. Grubb*, 402 Ill. 451, 464, 84 N.E.2d 421, 428 (1949), all of which concern the latter rule, is misguided.

As for the balance of the cases cited by Petitioners, *i.e. Application of Cty. Collector (Miller)*, 397 Ill. App. 3d 535, 921 N.E.2d 462 (1st Dist. 2009); *Application of Cook Cty. Collector (Elsie Bee)*, 228 Ill. App. 3d 719, 593 N.E.2d 538 (1st Dist. 1991); and *Application of Cty. Treasurer & Ex-Officio Cty. Collector of Cook Cty. (Howell)*, 30 Ill. App. 3d 235, 332 N.E.2d 557 (1st Dist. 1975), none stand for the proposition that common law *bona fide* purchaser standards are analogous to those applied under Section 2-1401(e) of the Code. Rather, the cases involve circumstances in which the party asserting *bona fide* purchaser status was charged with or failed to demonstrate the absence of notice of issues other than in an underlying tax deed proceeding. Accordingly, a common law analysis was appropriate. *Miller*, 397 Ill. App. 3d at 548–51; *Elsie Bee*, 228 Ill. App. 3d at 734–36; *Howell*, 30 Ill. App. 3d at 240–41.

By applying the appropriate standard to the facts of this case, it is clear that the Appellate Court correctly determined that section 2-1401(e) of the Code applied in favor of Respondents. Assuming, *arguendo*, this Court declines to adopt *Moriarty*'s interpretation of section 2-202, the Detective was nevertheless authorized to effectuate service of process, without prior appointment, in any county in Illinois with a population of less than 2,000,000 people. 735 ILCS 5/2-202(a) (West 2010). In this regard, neither the Detective's service returns (the "Service Returns") nor the balance of the record

proper reflect the county in which service was effectuated much less specify the number of people residing therein. C 20-132. Further, the Service Returns reflect that the Detective was "authorized to serve process within the State of Illinois pursuant to 735 ILCS 5/2-202(a)." C 65, 69. As set forth in the Opinion, the Appellate Court has consistently and correctly held that where a service affidavit contains such a statement and does not specify the county of service, "a third-party purchaser would not, on the record alone, have any reason to suspect that service was not in compliance with section 2-202(a) and, further, that [the] purchaser should be able to rely on the affidavit's statement that service complied with the service requirements." *Kusmierz*, 2020 IL App (2d) 190521, ¶ 27 (citing *BankUnited, Nat'l Ass'n v. Giusti*, 2020 IL App (2d) 190522, ¶¶ 32-36); *JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275, ¶¶ 24-27, 156 N.E.3d 98, *reh'g denied* (June 4, 2020); *Rahman*, 2016 IL App (2d) 150040, ¶¶ 37-42.

In the proceedings below, Petitioners urged the trial and appellate courts to take judicial notice of matters outside the record, such as county and zip code boundaries. C 308-309; Petitioners' Brief in the Second District at 10; Petitioners' Reply Brief in the Second District at 4. In apparent recognition of the impropriety of this demand, the Petitioners now abandon the suggestion to instead contend that the Appellate Court erred in its application of Section 2-1401(e) by: (1) finding that notice is only imputed to third-party purchasers when the county of service and its population affirmatively appear in a service return; (2) focusing "on the [Service Returns] without any consideration of the record as a whole, including the…SPS Order entered three days after the purported service;" (3) disregarding the First District Appellate Court's decision in *C.T.A.S.S.&U.*

Fed. Credit Union v. Johnson, 383 Ill. App. 3d 909, 891 N.E.2d 558 (1st Dist. 2008); and (4) overlooking the alleged "inconsistency" between the Service Returns and the SPS Order, which the Petitioners contend "was sufficient…to place any subsequent purchaser…on notice of the jurisdictional defect." *See* Petitioner Br. at 11-15.

With respect to Petitioners' initial argument, the Appellate Court correctly determined that a service defect must affirmatively appear from the record proper to avoid application of section 2-1401(e) of the Code. In this regard, notwithstanding the Petitioners' prior arguments to the contrary, such a requirement does not "eviscerate any ability to vindicate a due process violation following a judicial sale." *See* Petitioners' Reply Brief in the Second District at 2, 4. Rather, the Petitioners only needed to assert their rights at some point in the two year period that elapsed between the date they were served and the time the Current Owners acquired title and possession of the Premises. Despite actually receiving PNC's summons and complaint, the Petitioners elected to ignore the Foreclosure and took no action to assert their jurisdictional challenge until after the Premises were twice sold and then developed by the Current Owners.

Further, Petitioners' contention that the Appellate Court focused on the Service Returns to the exclusion of other matters in the record—in particular, the SPS Order—is simply incorrect. The court specifically noted the existence of the SPS Order, observing that "there is nothing on the face of the affidavit to suggest that the [Detective] was unauthorized to serve process, or that service was in Cook County and that, therefore, the [SPS Order] entered three days later was a reason to suspect defective service." *Kusmierz*, 2020 IL App (2d) 190521. Put another way, the record is devoid of any indication that an order appointing the Detective was required to effectuate service on

Petitioners. As such, the fact the SPS Order was entered after the Petitioners were served is irrelevant for purposes of a section 2-1401(e) analysis.

Likewise, Petitioners' contention that *Johnson* is dispositive of the Respondents' section 2-1401(e) protections is misplaced. In *Johnson*, the court held that a third-party purchaser was on notice of a jurisdictional defect where a process server effectuated service upon a lone defendant prior to the date of the server's appointment. *Johnson*, 383 Ill. App. 3d at 910, 912-13, 891 N.E.2d at 560-62. As a preliminary matter, Petitioners have never argued that *Johnson* was dispositive of Respondents' section 2-1401(e) protections and, therefore, have forfeited the issue. *See Bowman v. Chicago Park Dist.*, 2014 IL App (1st) 132122, ¶ 59, 19 N.E.3d 75 ("issues not raised in the trial court are waived and may not be considered for the first time on appeal"). In particular, while Petitioners cited *Johnson* in the trial court for the proposition that an order appointing a special process server does not have retroactive effect, C 313, they failed to argue that *Johnson* had any bearing on Respondents' section 2-1401(e) defense. What's more, *Johnson* was not even mentioned in Petitioners' briefs before the Appellate Court. *See* Petitioners' Brief in the Second District at 1-21; Petitioners' Reply Brief in the Second District at 1-20. That being the case, Petitioners' contention that *Johnson*, decided over 11 years before the filing of their opening brief in the Appellate Court, controls the applicability of section 2-1401(e) represents nothing more than a transparent attempt to correct a prior omission that may be properly rejected by this Court.

Even if considered, Petitioners' arguments premised upon *Johnson* are meritless. As noted, nothing in the Foreclosure record suggested that an appointment order was necessary or that the SPS Order was in any way connected with service on Petitioners. In

this regard, *Johnson* concerned a lawsuit against a single defendant. *Johnson*, 383 Ill. App. 3d at 910. In contrast, the Foreclosure involved multiple defendants, including the Township of York, which was served by the Detective *after* the SPS Order was entered. C 53, 80. Accordingly, unlike *Johnson*, the timing of the appointment order would not disclose a jurisdictional defect. Rather, a subsequent purchaser could reasonably conclude that the SPS Order was required for service on another party.[6]

Viewed in light of the foregoing, it becomes apparent that the Petitioners seek to impose a standard for third-party review of a trial court record that far exceeds the realm of reasonableness. This is exemplified by Petitioners' contention that a detailed comparison of the Service Returns and SPS Order would have disclosed a jurisdictional defect. In substance, Petitioners argue that the Detective's attestation that she was "a registered employee of a Private Detective Agency licensed by the Illinois Department of Financial and Professional Regulation and thereby authorized to serve process…pursuant to 735 ILCS 5/2-202(a)" conflicts with the preamble of the SPS Order which reflects that PNC requested that the Foreclosure court "exercise its discretion under" section 2-202 of the Code. C 53, 65, 69. As noted, however, the Township of York was served with the Petition after the SPS Order was entered. C 53, 80. That being the case, there is no "inconsistency" between the Service Returns and SPS Order; it would have been entirely reasonable for a subsequent purchaser to conclude that appointment was required for some but not all defendants.

[6] It is also worth noting that the subsequent purchaser in *Johnson* conceded during oral argument that section 2-1401(e) of the Code did not apply to the facts of that case. *Johnson*, 383 Ill. App. 3d at 912.

In this respect, Petitioners' reliance upon *Concord Air, Inc. v. Malarz*, 2015 IL App (2d) 140639, 49 N.E.3d 26 is misplaced. In *Malarz,* there were inconsistencies in service documents *concerning the same defendant. Id.* ¶¶ 12, 37-38, 40. What's more, section 2-1401(e) does not require the type of convoluted analysis of service documents advanced by Petitioners. Rather, the jurisdictional defect must "affirmatively appear[]" from a "simple review of the record." 735 ILCS 5/2-1401(e) (West 2018); *Rahman,* 2016 IL App (2d) 150040, ¶ 42; *see also Malarz,* 2015 IL App (2d) 140639, ¶ 40 (denying section 2-1401(e) protections where the subsequent purchaser could have identified the potential jurisdictional error without "comb[ing] the record").

V. Petitioners are Guilty of Laches[7]

A. *Laches can be Interposed as a Defense to a Jurisdictional Challenge*

Notwithstanding Petitioners' contention to the contrary, Illinois courts have long recognized *laches* as a viable defense to an attack upon an alleged void order. *See, e.g.*, *James v. Frantz*, 21 Ill. 2d 377, 383, 172 N.E.2d 795, 798 (1961) ("laches is a familiar defense when the validity of an earlier judgment or decree has been attacked"); *Koberlein v. First Nat. Bank of St. Elmo*, 376 Ill. 450, 455–57, 34 N.E.2d 388, 390–91 (1941) (sustaining the defense of *laches* in a proceeding to set aside a purportedly void foreclosure decree); *Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774, ¶ 27 ("*laches* may be applied even where the issue concerns defective service and allegedly void orders"); *Fed. Nat'l Mortg. Ass'n v. Altamirano*, 2020 IL App (2d) 190198,

[7] Respondents note that the Appellate Court found that they were entitled to the protections afforded by section 2-1401(e) of the Code and thus did not address their *laches* defense. However, Respondents raised the defense in the proceedings below, and this Court may affirm on any basis supported by the record. *City of Champaign v. Torres*, 214 Ill. 2d 234, 241, 824 N.E.2d 624, 629 (2005).

¶ 19 ("The principle that *laches* may bar a collateral attack on a void judgment is far from novel"); *BankUnited, Nat'l Ass'n v. Giusti*, 2020 IL App (2d) 190522, ¶ 39 (holding that "laches can preclude relief [from a void judgment] in an appropriate case where prejudice is demonstrated"); *JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275, ¶ 30, 156 N.E.3d 98, 106, *reh'g denied* (June 4, 2020) (same); *In re Jamari R.*, 2017 IL App (1st) 160850, ¶ 55, 82 N.E.3d 109, 124 ("even if service of process is defective an attack on a decree may be barred by laches"); *Eckberg v. Benso*, 182 Ill. App. 3d 126, 131, 537 N.E.2d 967, 971 (1st Dist. 1989) ("Illinois courts have applied [*laches*] to bar claims that a decree is void for defective service of process despite contrary arguments that such a jurisdictional claim may be brought at any time"); *Rodriguez v. Koschny*, 57 Ill. App. 3d 355, 361, 373 N.E.2d 47, 52 (2nd Dist. 1978) (holding that a jurisdictional attack on a decree may be barred by *laches*); *Miller v. Bloomberg*, 60 Ill. App. 3d 362, 365, 376 N.E.2d 748, 750 (2nd Dist. 1978) ("a void decree may be attacked at any time…although the equitable defense of laches may be interposed").[8]

Implicit in these decisions is a recognition that *laches* relates to more than the mere passage of time. As this Court explained in *Pyle v. Ferrell*, 12 Ill. 2d 547, 552, 147 N.E.2d 341, 344 (1958), *laches* is "principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation

[8] Illinois is not alone in this respect. *See, e.g., Watson v. Watson*, 235 Ga. 136, 138, 218 S.E.2d 863, 864–65 (1975) ("an equitable attack upon the void decree may be defended against with equitable defenses…[such as] [*l*]*aches*"); *Harrison v. G. & K. Inv. Co.*, 238 Miss. 760, 774, 115 So. 2d 918, 923 (1959) ("It is true that our cases hold that an absolute void decree, order or judgment may be assailed anywhere on collateral attack, but the right to do so is limited to those who are not estopped by affirmative conduct, laches or some other equitable doctrine"); *Halverson v. Hageman*, 249 Iowa 1381, 1390, 92 N.W.2d 569, 575 (1958) ("laches and estoppel sometimes preclude setting aside a void judgment"); *McBrayer v. Hokes Bluff Auto Parts*, 685 So. 2d 763, 766 (Ala. Civ. App. 1996) (holding that *laches* applies to motions to set aside void judgments).

of the property and parties, and where there is such a change as to make it inequitable to grant relief, it will be refused."

Consistent with this interpretation, courts in Illinois recognize that *laches* represents "'the neglect or omission to assert a right which, taken in conjunction with a lapse of time and circumstances causing prejudice to the opposite party will operate as a bar to a suit.'" *Negron v. City of Chicago*, 376 Ill. App. 3d 242, 246–47, 876 N.E.2d 148, 153 (1st Dist. 2007) (quoting *Bill v. Bd. of Educ. of Cicero Sch. Dist. 99*, 351 Ill. App. 3d 47, 54, 812 N.E.2d 604, 610 (1st Dist. 2004)). It follows that "[a] party asserting laches…must prove two fundamental elements: (1) lack of due diligence by the party asserting a claim; and (2) prejudice to the party asserting laches." *Negron*, 376 Ill. App. 3d at 247, 876 N.E.2d at 153 (quoting *Ashley v. Pierson*, 339 Ill. App. 3d 733, 739, 791 N.E.2d 666, 671 (4th Dist. 2003)). In this instance, both elements were clearly established.

Initially, the evidence demonstrates that Petitioners neglected to exercise diligence in asserting their jurisdictional challenge despite possessing an opportunity to do so. Alleged service defects aside, Petitioners became aware of the Foreclosure on April 1, 2011 – the date each received PNC's summons and complaint. C 62-69. At that point, both possessed sufficient knowledge of their jurisdictional claim for purpose of the *laches* doctrine. *See Pyle*, 12 Ill. 2d at 554 ("The test [for the application of *laches*] is…what [the claimant] might have known by the use of the means of information within his reach with the vigilance the law requires of him"); *DeGomez*, 2020 IL App (2d) 190774, ¶¶ 30-31 (finding that the section 2-1401 petitioners had notice of proceedings despite defective service); *Eckberg*, 182 Ill. App. 3d at 132 (holding that the claimant

"need not have actual knowledge of the specific facts upon which his claim is based if he fails to ascertain the truth through readily available channels and the circumstances are such that a reasonable person would make inquiry concerning these facts").

Subsequent to receipt of PNC's summons and complaint, the Petitioners acquired constructive knowledge of: (1) the Current Owners' recorded deed and the MERS' mortgage; (2) the Current Owners' possession of the Premises and the construction of a five bedroom home on the property; and (3) Respondents' payment of real estate taxes. C 137-138, 176-179. In this regard, this Court has held that a claimant will be charged with notice of adverse interests reflected in public records, including recorded documents and real estate tax payments, so as to subject the claimant's cause of action to a *laches* defense where the claimants fails to exercise diligence in seeking redress. *Pyle*, 12 Ill. 2d at 554; *see also James*, 21 Ill. 2d at 381–82 (finding that an attack on a void decree was barred by *laches* where the parties bringing the challenge had, *inter alia*, record notice of the transfer of title pursuant to the invalid judgment).

Despite possessing knowledge of the Foreclosure, the subsequent conveyances of title, and the construction of a large residence on the Premises, Petitioners did nothing to seek redress from the purported service defect for *over seven years.* No justification is provided for this delay. Instead, Petitioners inexplicably seek to benefit from their neglect by pursuing purported damages for "use and occupancy" that would have been mitigated had the Petition been promptly filed. C 139. The Appellate Court recognized as much in finding that the Respondents had successfully demonstrated the absence of due diligence.

With regard to the second element of *laches*, it is undisputed that Respondents would be severely prejudiced if Petitioners are permitted to pursue the causes of action

set forth in the Petition after such an egregious delay. In this regard, the Respondents introduced un-rebutted evidence that they had: (1) no actual knowledge of any defect in their title, and (2) advanced significant funds to purchase, improve, and maintain the Premises - sums they would not have expended had they known Petitioners would one day assert their claims. C 176-179. Indeed, it is well-established that a party is guilty of *laches* where "he remains passive while an adverse claimant incurs risk, enters into obligations, or makes expenditures for improvements or taxes." *Pyle*, 12 Ill. 2d at 555; *see also Miller v. Bloomberg*, 126 Ill. App. 3d at 339 (upholding the application of *laches* where the defendants established that they had paid taxes and made improvements to the property in dispute "on the assumption that plaintiffs had abandoned" their cause of action).

B. *Petitioners' Flawed Arguments Regarding Laches*

The Petitioners' challenges to the Appellate Court's findings relative to *laches* generally fall within six categories: (1) challenges to void judgments may be brought into perpetuity, and the party asserting the claim need not establish due diligence; (2) courts have an "independent duty" to vacate void orders; (3) the Petition is a legal claim and thus the equitable doctrine of *laches* is inapplicable; (4) the authority relied upon by the Appellate Court is distinguishable; (5) a "required evidentiary hearing was never held;" and (6) the doctrine of unclean hands "bars[s] [Respondents'] invocation of *laches*." Petitioners' Br. at 9-10, 15-23

i. While a Void Judgment may be Challenged at any Time, *Laches* may Nonetheless be Asserted

While it is true that a void judgment may be challenged in perpetuity, it does not follow that *laches* cannot be interposed as a defense. *e.g., JPMorgan Chase Bank, N.A. v.*

Robinson, 2020 IL App (2d) 190275 ¶ 30; *see also Blazyk v. Daman Exp., Inc.*, 406 Ill. App. 3d 203, 207, 940 N.E.2d 796, 800 (2nd Dist. 2010) (noting that a section 2-1401 respondent may file a motion under section 2-619 of the Code raising an affirmative defense). Indeed, "the mere fact that time remains for a party to bring a cause of action is not fatal to the other party asserting a defense of laches." *Fed. Nat'l Mortg. Ass'n v. Altamirano*, 2020 IL App (2d) 190198, ¶ 24. In this regard, the decisions cited by Petitioners in support of their position - *i.e. In re N.G.*, 2018 IL 121939, 115 N.E.3d 102 *reh'g denied*, (Dec. 2018); *People v. Castleberry*, 2015 IL 116916, 43 N.E.3d 932; *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, 6 N.E.3d 162; and *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 372, 827 N.E.2d 422, 423 (2005)[9] - do not mention *laches* much less opine on the doctrine's applicability to a jurisdictional challenge.[10]

In a corollary argument, Petitioners erroneously posit that the Appellate Court "effectively plac[ed] a due diligence requirement on jurisdictional challenges to void orders." Petitioner Br. at 10, 19-21. As evidenced by its Opinion, however, the Appellate Court did no such thing.

In the Opinion, the Appellate Court specifically acknowledged that "section 2-1401 petitions alleging void judgments are not subject to that section's ordinary time restrictions." *PNC Bank, Nat'l Ass'n v. Kusmierz*, 2020 IL App (2d) 190521, ¶ 31, 161 N.E.3d 1181. Viewed in this light, it is apparent the Petitioners' argument conflates the

[9] It should be noted that this Court partially rejected the *Sperry* holding in *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 42, 32 N.E.3d 553.

[10] Petitioners also cite the Appellate Court's holding in *W. Suburban Bank v. Advantage Fin. Partners, LLC*, 2014 IL App (2d) 131146, 23 N.E.3d 370. While the *West Suburban Bank* court did opine that that *laches* is a "curious" argument to be made in response to an attack on a void judgment, the court nevertheless observed that "in some circumstances, *laches* have been held to interpose a limit on when a void judgment may be collaterally attacked." *Id.* at ¶ 26.

evidentiary burden required to sustain a jurisdictional challenge with the proofs that may be offered to substantiate a *laches* defense. While a section 2-1401 petitioner need not demonstrate due diligence in order to establish a *prima facie* challenge to a void judgment, his or her lack of due diligence may give rise to *laches. See, e.g., In re Jamari R.*, 2017 IL App (1st) 160850, ¶ 57, 82 N.E.3d 109 ("while the strictures of section 72 [(now section 2-1401)] do not apply, the equitable defense of *laches* may be interposed to an attack on a void judgment" (quoting *In re Adoption of Miller*, 106 Ill. App. 3d 1025, 436 N.E.2d 611 (1st Dist. 1982))); *Miller v. Bloomberg*, 60 Ill. App. 3d 362, 365, 376 N.E.2d 748, 750 (2nd Dist. 1978) ("a void decree may be attacked at any time…although the equitable defense of *laches* may be interposed"); *see also Altamirano*, 2020 IL App (2d) 190198, ¶ 24.

In an effort to buttress their flawed assertion, the Petitioners cite *In re N.G.*, 2018 IL 121939 at ¶ 134; *People v. Thompson*, 2015 IL 118151, ¶ 31, 43 N.E.3d 984; *Castleberry*, 2015 IL 116916 at ¶ 15; *Warren Cty. Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 48, 32 N.E.3d 1099; *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 11, 32 N.E.3d 553; *In re Haley D.*, 2011 IL 110886, ¶ 58, 959 N.E.2d 1108; *In re Dar. C.*, 2011 IL 111083, ¶ 104, 957 N.E.2d 898; *People v. Laugharn*, 233 Ill. 2d 318, 322, 909 N.E.2d 802 (2009); *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17 (2007); *Sperry*, 214 Ill. 2d at 379; and *Sarkissian v. Chicago Bd. of Educ.*, 201 Ill. 2d 95, 104, 776 N.E.2d 195 (2002). *See* Petitioner Br. at 10, 20. In each instance, however, this Court merely found that a section 2-1401 petition challenging a purportedly void judgment need not allege due diligence. In this regard, the Appellate Court did not hold that Petitioners' lack of diligence barred their Petition. Rather, the court correctly observed that "although

void judgments may be attacked at any time… *laches* 'can preclude relief in an appropriate case where prejudice is demonstrated.'" *Kusmierz,* 2020 IL App (2d) 190521, ¶ 31 (quoting *Robinson*, 2020 IL App (2d) 190275, ¶ 30.

Petitioners also cite two federal opinions for the proposition that "the passage of time cannot render a void judgment valid." Petitioners' Br. at 20 (citing *Merit Mgmt. Grp. v. Ponca Tribe of Indians Okla.,* 778 F. Supp. 2d 916 (N.D. Ill. 2011) and *Allen v. U.S.*, 102 F. Supp. 866 (N.D. Ill. 1952)). As a threshold matter, it is well established that *laches* "is…not a mere matter of time but principally a question of the inequity of permitting the claim to be enforced…" *Pyle,* 12 Ill. 2d at 552 (emphasis added). Further, it has been observed that *laches* "is a species of estoppel." *Altamirano,* 2020 IL App (2d) 190198, ¶ 25 (quoting *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1091 (7th Cir. 1992)). Viewed in this light, Petitioners are estopped from asserting the invalidity of the Foreclosure judgment and, therefore, "are not proper part[ies] to attack the…judgment." *Altamirano*, 2020 IL App (2d) 190198, ¶ 25. Moreover, inasmuch as *Allen* and *Ponca Tribes* involved attacks on void orders arising from Sixth Amendment violations and lack of subject matter jurisdiction, respectively, the holdings are readily distinguishable. *Ponca Tribe,* 778 F. Supp. 2d at 919; *Allen*, 102 F. Supp. at 869. What's more, even if found to be analogous to a personal jurisdiction challenge, the holdings are not binding on this Court. *See People v. Gutman*, 2011 IL 110338, ¶ 17, 959 N.E.2d 621 ("[a] federal court's construction of a federal statute is not binding on Illinois courts in construing a similar state statute").

Put simply, the proposition that in Illinois a jurisdictional challenge may be brought at any time, regardless of the circumstances, is simply incorrect. This Court has

held that objections to personal jurisdiction may be waived, *People v. Matthews*, 2016 IL 118114, ¶ 18, 76 N.E.3d 1233 and the Legislature has seen fit to impose several restraints on such a challenge, *see* 735 ILCS 5/2-301(a-6) (West 2010) (providing that the filing of a responsive pleading waives objections to personal jurisdiction); 735 ILCS 5/15-1505.6 (West 2012) (requiring a jurisdictional challenge to be brought within 60 days of an appearance or participation in a hearing).

Taken to its logical conclusion, Petitioners' argument would necessarily lead to absurd results. If challenges to decrees affecting property can be brought at *any* time without regard to *laches*, the alienability of property would be forever inhibited. In this respect, *laches* allows courts to strike a balance between due process concerns and the rights of third parties that would be affected when unwinding a decree long after entry.

ii. Courts do not have an Inherent Duty to Vacate Orders for Want of Personal Jurisdiction

Petitioners contend that recognition of *laches* as a proper defense would run contrary to courts' "independent duty to vacate void orders." Petitioner Br. 9-10. In support of this assertion, Petitioners rely on *People v. Thompson*, 209 Ill. 2d 19, 805 N.E.2d 1200 (2004) which was abrogated by *People v. Vara*, 2018 IL 121823, ¶ 76, 115 N.E.3d 53 *reh'g denied* (Sept. 24, 2018). However, *Thompson* did not concern a challenge to a judgment based upon a lack of personal jurisdiction. *See Thompson*, 209 Ill. 2d at 24–25 (vacating an extended-term sentence under the "void sentence rule"). It is well established that personal jurisdiction can be waived and thus only the person to whom service is owed can raise the issue. *People v. Matthews*, 2016 IL 118114, ¶ 23, 76 N.E.3d 1233, 1240. That being the case, courts do *not* have an "independent duty" to vacate orders as void for want of personal jurisdiction.

Moreover, in *Thompson*, the only persons that could have been affected by judgment vacatur were the parties to the underlying case. *Thompson*, 209 Ill. 2d at 21. Here, the Respondents are third parties who will undoubtedly be impacted by an order unwinding the Foreclosure. Whatever inherent power courts may have with respect to void orders, it should go without saying that where the rights of third parties are implicated, any relief must be preceded by notice and an opportunity to present a defense. *See Nye v. Parkway Bank & Tr. Co.*, 114 Ill. App. 3d 272, 274, 448 N.E.2d 918, 919 (1st Dist. 1983) ("due process…require[s] that a person be given notice and an opportunity to be heard and to defend…").

iii. *Laches* may be Asserted as a Defense to the Petition

Petitioners contend that *laches* is not a viable defense to the Petition because the pleading raises "a purely legal issue." The assertion is obviously flawed since *laches* applies to both legal and equitable claims. *Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 18, 914 N.E.2d 221, 226 (1st Dist. 2009); *Coleman v. O'Grady*, 207 Ill. App. 3d 43, 51-2, 565 N.E.2d 253, 258 (1st Dist. 1990); *Villiger v. City of Henry*, 47 Ill. App. 3d 565, 567, 362 N.E.2d 120, 121 (3rd Dist. 1977). Indeed, "[t]here are…equitable exceptions for granting relief from a void judgment, including laches." *JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275 ¶ 30.

Moreover, Petitioners' reliance upon the holdings in *Warren Cty. Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, 32 N.E.3d 1099 and *Studentowicz v. Queen's Park Oval Asset Holding Tr.*, 2019 IL App (1st) 181182 is misguided. Neither *Warren* nor *Studentowicz* address the applicability of *laches* to a jurisdictional challenge. Rather, the cases merely hold that equitable considerations are inapplicable when

determining whether a petitioner had established a *prima facie* challenge to a void judgment. *Walters,* 2015 IL 117783 at ¶¶ 46-51; *Studentowicz,* 2019 IL App (1st) 181182, ¶ 17 (citing *Walters,* 2015 IL 117783 at ¶ 47). In this regard, the Appellate Court in *Fed. Nat'l Mortg. Ass'n v. Altamirano,* 2020 IL App (2d) 190198 rejected an identical argument to the one now advanced by Petitioners:

> At issue in *[Walters]* was whether the trial court could relax due diligence standards in light of equitable considerations. The supreme court ultimately held that equitable considerations were relevant to a fact-based section 2-1401 petition but not to one that raises a solely legal challenge to a judgment…[P]etitioners reason [that] their voidness challenge is purely legal, so equitable considerations should not apply and the defense of laches should not be available to respondents. Thus, petitioners are attempting to extend the holding of *Warren County* from its original circumstances - whether a trial court may consider equitable matters in assessing due diligence - to the ability of a respondent to assert an affirmative defense.
>
> We do not believe that these two situations are sufficiently analogous such that *Warren County* controls here. Laches is an affirmative defense. Due diligence, conversely, is something a petitioner must show to prevail on a section 2-1401 petition. Thus, unlike due diligence, laches is not raised by the petition at all. Indeed, an affirmative defense admits the sufficiency of the petition and asserts new matter to defeat the cause of action. Thus, in resolving a laches issue, the merits of the 2-1401 petition are not a consideration. Therefore, whether the trial court can consider equitable matters in assessing due diligence - the issue addressed in *Warren County* - is beside the point. Further, it does not automatically follow that equitable defenses are precluded simply because equitable considerations are not relevant to assessing the elements of section 2-1401 petition that raises a legal challenge…It is not petitioners' 2-1401 petition that invokes the equitable powers of the trial court; rather, it is respondents' assertion of an equitable defense.

¶¶ 20-21 (citations omitted). The *Altamirano* court's reasoning is sound and directly applicable to the present case.

iv. Petitioners Fail to Distinguish Cited Appellate Court Authority

According to Petitioners, the authority relied upon by the Appellate Court is "distinguishable." In particular, Petitioners contend that *James v. Frantz,* 21 Ill. 2d 377, 172 N.E.2d 795 (1961); *In re Adoption of Miller*, 106 Ill. App. 3d 1025, 436 N.E.2d 611 (1st Dist. 1982); *Rodriguez v. Koschny*, 57 Ill. App. 3d 355, 373 N.E.2d 47 (2nd Dist. 1978); *In re Jamari R.*, 2017 IL App (1st) 160850, 82 N.E.3d 109; and *Eckberg v. Benso,* 182 Ill. App. 3d 126, 537 N.E.2d 967 (1st Dist. 1989) each concern "special interests," *i.e.* mineral and minors' rights, which "give rise to a narrow exception to the general rule that laches does not apply to challenges seeking to vacate void judgments." Petitioner Br. at 16-18. Petitioners further contend that the remaining cases cited in the Opinion - *i.e. Miller v. Bloomberg*, 60 Ill. App. 3d 362, 376 N.E.2d 748 (2nd Dist. 1978); *Slatin's Properties, Inc. v. Hassler*, 53 Ill. 2d 325, 291 N.E.2d 641 (1972); and *LaSalle Nat. Bank v. Dubin Residential Communities Corp.*, 337 Ill. App. 3d 345, 785 N.E.2d 997 (1st Dist. 2003) - are distinguishable because they either "did not reach the applicability of *laches*" or "were not concerned with…the applicability of *laches* in the context of jurisdictional challenges." *See* Petitioner Br. at 18-19. Both arguments are meritless.

Notwithstanding Petitioners' attempt to create a "narrow exception" applicable only where "special" concerns are at issue, Illinois courts have applied *laches* to bar attacks on void judgments "without language limiting its application to [such] 'special concerns.'" *Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774, ¶ 28; *see also Koberlein v. First Nat. Bank of St. Elmo*, 376 Ill. 450, 455–57, 34 N.E.2d 388, 390–91 (1941) (sustaining the defense of *laches* in a proceeding to set aside a purportedly void foreclosure decree); *Miller v. Bloomberg*, 60 Ill. App. 3d 362, 365, 376 N.E.2d 748,

750 (2nd Dist. 1978) (noting the applicability of *laches* in an attack on a judgment directing specific performance of an option to purchase real estate).

Further, even if "special" concerns have some relevance to the applicability of a *laches* defense, it should go without saying that the Current Owners' homestead interest in the Premises is a significant right worthy of protection. *Altamirano*, 2020 IL App (2d) 190198, ¶ 22. While the welfare of minors and mineral rights are undoubtedly substantial interests, it does not follow that Respondents' interests are insignificant. Indeed, it is the very same interest upon which Petitioners base their due process challenge (notwithstanding the fact that the Premises was unimproved land at the time of the Foreclosure).

Moreover, notwithstanding the Petitioners' contention to the contrary, *James* concerned circumstances analogous to those in the present matter; namely, a jurisdictional attack on decrees affecting property brought after title had changed hands. *James*, 21 Ill. 2d at 379. While mineral rights were involved and certain witnesses had passed away, the *James* court considered "[m]any factors" in applying *laches* to the petitioners' jurisdictional attack. *Id.* at 381–82. As explained in *Altamirano*, 2020 IL App (2d) 190198, ¶22, the death of witnesses merely helped demonstrate prejudice; *James* did not hold "that prejudice cannot be established in any other way." Additionally, even though mineral rights were at issue, the *James* court's broad statements regarding the availability of *laches* as a defense to a jurisdictional challenge were not limited to cases involving subterranean interests in land. *See James*, 21 Ill. 2d at 383 ("laches is a familiar defense when the validity of an earlier judgment or decree has been attacked").

Likewise, nothing in *In re Adoption of Miller*, *Rodriguez*, *In re Jamari R.*, and *Eckberg* suggests that *laches* cannot apply outside the realm of child custody or adoption. *In re Adoption of Miller*, 106 Ill. App. 3d at 1030 ("the equitable defense of laches may be interposed to an attack on a void judgment"); *Rodriguez v. Koschny*, 57 Ill. App. 3d at 361 ("Illinois cases recognize that even if service of process is defective an attack on a decree may be barred by laches"); *In re Jamari R.*, 2017 IL App (1st) 160850 at ¶ 55; *Eckberg*, 182 Ill. App. 3d at 131 ("Illinois courts have applied [*laches*] to bar claims that a decree is void for defective service of process despite contrary arguments that such a jurisdictional claim may be brought at any time"). What's more, even if the Petitioners' distorted interpretation of *In re Adoption of Miller*, *Rodriguez*, *In re Jamari R.*, and *Eckberg* is accepted, the cases are nonetheless instructive.

The judgment here - like an adoption decree - necessarily affects the rights of someone other than the contending parties. "A rule that an individual's right to set aside a judgment entered without jurisdiction over him cannot be cut off by lapse of time (assuming there is such a rule) does not and should not apply to the case *where interests exist superior to those of the party whose rights are terminated*." *Rodriguez*, 57 Ill. App. 3d at 361 (emphasis added).

In further support of their "special interest" argument, the Petitioners cite *Fox v. Dep't of Revenue*, 34 Ill. 2d 358, 359, 215 N.E.2d 271, 272 (1966) and *Hustana v. Hustana*, 22 Ill. App. 2d 59, 159 N.E.2d 265 (1st Dist. 1959). *See* Petitioner Br. at 17, 19. In *Fox*, a case involving estoppel, this Court declined to address whether *laches* could be applied in a challenge to a void judgment because "there [was] no evidentiary basis upon which [to] determine [the] question." *Fox*, 34 Ill. 2d at 361–62. Accordingly, nothing in

the opinion supports Petitioners' "special interests" argument. As for *Hustana*, the case was decided prior to this Court's decision in *James* and relied upon *Thayer v. Vill. of Downers Grove*, 369 Ill. 334, 339, 16 N.E.2d 717, 719 (1938) - *Hustana*, 22 Ill. App. 2d at 65, 159 N.E.2d at 267–68 - a decision abrogated by *James*.[11] *James*, 21 Ill. 2d at 383.

Petitioners also place great stock in the fact that the Petition seeks to vacate a lapsed *in personam* judgment included as part of the sale confirmation order.[12] Even if enforceable, Petitioners failed to raise any argument with respect to the judgment in the proceedings below. Consequently, they have forfeited the issue. *See Bowman v. Chicago Park Dist.*, 2014 IL App (1st) 132122, ¶ 59, 19 N.E.3d 75, 85 ("issues not raised in the trial court are waived and may not be considered for the first time on appeal").

Finally, Petitioners' dismissive treatment of *Miller, Slatin's Properties, Inc.,* and *LaSalle Nat. Bank* is unwarranted. While the latter two cases did not involve challenges to void decrees, the decisions broadly hold that the availability of *laches* is dependent upon the facts of each case, rather than being subject to a "general rule" with "narrow exceptions" as the Petitioners suggest. *See Slatin's Properties, Inc.*, 53 Ill. 2d 325, 329–30, 291 N.E.2d 641, 643 (1972) ("The defense of laches…is dependent upon the facts of each case"); *LaSalle Nat. Bank*, 337 Ill. App. 3d 345, 351, 785 N.E.2d 997, 1001 (1st

[11] In *Hustana*, the issue was limited to whether the respondent was properly joined as a party to the petition to vacate - not the applicability of *laches* to the proceeding. *Hustana*, 22 Ill. App. 2d at 60–61. Further, in contrast to the personal jurisdiction challenge asserted in the Petition, *Hustana* involved an attack on a decree procured by fraud. *Id.* at 62.

[12] As noted above, the *in personam* judgment entered against Petitioners has lapsed and the record includes nothing to suggest that PNC ever filed a petition to revive the award. *See* 735 ILCS 5/12-108 (West 2010) ("no judgment shall be enforced after the expiration of 7 years from the time the same is rendered, except upon the revival of the same by a proceeding provided by Section 2-1601 of this Act…").

Dist. 2003) ("Whether the defense of laches is available is to be determined upon the facts and circumstances of each case").

With respect to *Miller*, Petitioners' contention that the holding should be disregarded as the court's discussion of *laches* was "*obiter dicta*" evidences a fundamental misunderstanding of the term "*dictum.*" Petitioners' Br. at 18. While *obiter dictum* is generally not biding authority, "an expression of opinion upon a point in a case…deliberately passed upon by the court…if *dictum,* is a judicial *dictum*...[and] is entitled to much weight." *Cates v. Cates*, 156 Ill. 2d 76, 80, 619 N.E.2d 715, 717 (1993). In this regard, the *Miller* court deliberately passed upon the applicability of *laches* in assessing the voidness claim at issue. *Miller*, 60 Ill. App. 3d at 365, 376 N.E.2d at 750. Consequently, the court's statements regarding *laches* have the force of judicial determination. *Cates*, 156 Ill. 2d at 80.

v. No Evidentiary Hearing was Required

In a transparent effort to rewrite the procedural history of this case, Petitioners contend that the trial court was obligated to hold an evidentiary hearing preceded by an opportunity to conduct discovery. As noted above, however, the trial court afforded Petitioners the right to conduct discovery. Inexplicably, Petitioners failed to act in response to the authorization and ultimately neglected to offer any evidence to rebut the Current Owners' Affidavits. C 288, 306-329; SUP C 23:18-23, 24:7-9. Under such circumstances, the trial court properly accepted the unrebutted statements set forth in the Affidavits as being true. *See Evergreen Oak Elec. Supply & Sales Co. v. First Chicago Bank of Ravenswood*, 276 Ill. App. 3d 317, 319, 657 N.E.2d 1149, 1152 (1st Dist. 1995) ("failure to respond to an affidavit [in support of a section 2-619 motion to dismiss]

concedes the truth of the materials the affidavit supports"). Furthermore, Petitioners failed to submit affidavits or other evidentiary materials that demonstrated diligence in pursuing their jurisdictional challenge after receiving PNC's summons and complaint. That being the case, there was no issue of fact warranting an evidentiary hearing. *See In re Adoption of Miller*, 106 Ill. App. 3d 1025, 1032, 436 N.E.2d 611, 616 (1st Dist. 1982) ("The issue of laches does not have to be decided after a trial on the merits but may properly be determined on a motion to dismiss if its applicability appears from the face of the complaint or by affidavits submitted with the motion").

Petitioners also brazenly aver that the Opinion is part of a "[t]roubling[]…recent pattern wherein the Second District has summarily applied the doctrine of *laches* as a panacea to deny jurisdictional challenges…" Petitioner Br. at 21-22. In support of this contention, the Petitioners cite *Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774; *Fed. Nat'l Mortg. Ass'n v. Altamirano*, 2020 IL App (2d) 190198; *BankUnited, Nat'l Ass'n v. Giusti*, 2020 IL App (2d) 190522; and *JPMorgan Chase Bank, N.A. v. Robinson*, 2020 IL App (2d) 190275, ¶ 30, 156 N.E.3d 98, 106, *reh'g denied* (June 4, 2020). However, *laches* was not "summarily" applied in these cases. Rather, in each instance, the Appellate Court considered the facts of the case and applied well-established precedent. *See DeGomez*, 2020 IL App (2d) 190774 at ¶ 30 (finding that it was "undisputed" that the defendants had knowledge of the foreclosure action yet did not file their section 2-1401 petition until over eight years later, which "irreparably damaged" the foreclosing lender); *Altamirano*, 2020 IL App (2d) 190198 at ¶ 16 (holding that both elements of *laches* were "easily met" where it was established that the defendants waited over eight years after acquiring knowledge of the foreclosure to file their Section 2-1401

petition, which prejudiced respondents); *Giusti*, 2020 IL App (2d) 190522 at ¶ 39 ("Although we do not determine if laches applies to this case, we [find]… that laches can preclude relief in an appropriate case where prejudice is demonstrated"); *Robinson*, 2020 IL App (2d) 190275 at ¶ 30 (same).

vi. The Doctrine of Uncleans Hands is Inapplicable

Petitioners' invocation of the unclean hands doctrine is misguided. As a preliminary matter, Petitioners forfeited any argument by failing to raise the contention before the trial court. *See Bowman v. Chicago Park Dist*., 2014 IL App (1st) 132122, ¶ 59, 19 N.E.3d 75 ("issues not raised in the trial court are waived and may not be considered for the first time on appeal").

Even if considered, the unclean hands doctrine "has not been favored by the courts, for it is not a judicial straightjacket intended to prevent equity from doing complete justice." *Jaffe Commercial Fin. Co. v. Harris*, 119 Ill. App. 3d 136, 140, 456 N.E.2d 224, 228 (1st Dist. 1983). Furthermore, the type of misconduct that will defeat recovery under the rule must rise to the level of fraud or bad faith, and must be connected with the "very transaction being considered." *Id.* "To determine whether a party acted with unclean hands, the court must look to the intent of that party." *Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774, ¶ 32.

Here, Petitioners failed to allege, much less establish, fraudulent intent or bad faith on the part of Respondents. Instead, Petitioners contend that Respondents, who purchased the Premises in the stream of commerce and advanced substantial sums to improve and preserve the property, C 176-179, have unclean hands simply because they

are charged with "notice of the jurisdictional defect." *See* Petitioner Br. at 23. The argument borders on the absurd.

VI. Petitioners' Claims for Other Relief were Properly Dismissed

While not addressed in the Opinion,[13] Petitioners' efforts to secure relief beyond simply quashing service were both procedurally improper and legally deficient.

A. *The Request for Extraneous Relief was not a Proper Subject for Inclusion in the Petition*

A section 2-1401 petition is a collateral attack on a previously entered judgment, *Burchett v. Goncher*, 235 Ill. App. 3d 1091, 1098, 603 N.E.2d 1, 6 (1st Dist. 1991), and its sole purpose is to bring to the attention of the trial court facts not of record which, if known by the court at the time of judgment entry, would have prevented its rendition. *In re Marriage of Oldham*, 222 Ill. App. 3d 744, 753–54, 584 N.E.2d 385, 392 (1st Dist. 1991). Consequently, the Extraneous Relief is beyond the scope of relief available under section 2-1401. *See Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774, ¶ 34 (holding that a "claim for money damages is not cognizable in [a] section 2-1401 petition, which is a collateral attack" on previously rendered judgments).

i. Petitioners Failed to Allege a Basis for the Extraneous Relief

Even if properly incorporated as part of the Petition, Petitioners failed to allege facts supporting their demand for possession of the Premises, an award of use and occupancy, and/or related monetary relief. In this regard, section 9-102 of the Code delineates the circumstances under which a person may pursue an action for possession of lands. 735 ILCS 5/9-102 (West 2010). Importantly, a party's right to maintain such an

[13] As noted, this Court is not constrained by the Appellate Court's reasoning, and may affirm on any basis supported by the record. *City of Champaign v. Torres*, 214 Ill. 2d 234, 241, 824 N.E.2d 624, 629 (2005).

action is contingent on a present entitlement to possession. *Id.*; *see also Wieboldt v. Best Brewing Co.*, 163 Ill. App. 246, 250 (1st Dist. 1911). Likewise, section 9-201, which permits recovery of use and occupancy of lands, requires that the party seeking such relief be entitled to possession of the subject property. 735 ILCS 5/9-201 (West 2010); *see also Cauley v. N. Tr. Co.*, 315 Ill. App. 307, 323–24, 43 N.E.2d 147, 154 (1st Dist. 1942).

Here, Petitioners failed to allege any facts demonstrating an entitlement to possession. Likewise, the Petition is devoid of any allegation quantifying the Petitioners' "restitution" claim. The absence of these allegations presumably relates to the fact that Petitioners never resided on the then vacant lot. C 57, 61, 176-179.

ii. Section 2-1401(e) of the Code Bars the Extraneous Relief

Assuming, *arguendo*, that Petitioners can demonstrate a factual basis for a possessory claim, section 2-1401(e) nonetheless bars such relief. In response to the recent wave of jurisdictional attacks on long-completed foreclosures,[14] section 2-1401 was amended to protect the possessory rights of subsequent purchasers of foreclosed property. Section 2-1401(e) now provides:

> Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment. *When a petition is filed pursuant to this Section to reopen a foreclosure proceeding, notwithstanding the provisions of Section 15-1701 of this Code, the purchaser or successor purchaser of real property subject to a*

[14] *Hearing on S.B. 2432*, Illinois House Transcript, 2018 Reg. Sess. No. 141 at 73-75, 79-80 (statements of Representative Martwick and Representative Thapedi).

> *foreclosure sale who was not a party to the mortgage foreclosure proceedings is entitled to remain in possession of the property until the foreclosure action is defeated or the previously foreclosed defendant redeems from the foreclosure sale if the purchaser has been in possession of the property for more than 6 months.*

735 ILCS 5/2-1401 (West 2018) (emphasis added).

In the case *sub judice*, the Current Owners were not a parties to the Foreclosure and have been in continuous possession of the Premises for period far exceeding 6 months. C 20-132, 177, 179. Consequently, the Current Owners have been and will continue to be entitled to possess the Premises unless and until such time as Petitioners successfully defeat any renewed Foreclosure or redeem from any subsequent judicial sale. What's more, inasmuch as the second clause of section 2-1401(e) is not dependent upon the first, the Current Owners need not demonstrate the absence of a jurisdictional defect from the face of the record in order to avail themselves of the possessory protections afforded by the second clause of section 2-1401(e).[15] *Id.*

iii. Restitution is not a Panacea

In the proceedings below, the Petitioners cited the restitution doctrine in support of their claim to possession of the Premises and as a basis for monetary relief. The restitution doctrine, however, merely contemplates the parties being restored to the *status quo ante*. *See, e.g.*, *In re Marriage of Lehr*, 317 Ill. App. 3d 853, 859, 740 N.E.2d 417, 422 (1st Dist. 2000); *see also Thompson v. Davis*, 297 Ill. 11, 15, 19, 130 N.E. 455, 457-

[15] To the extent that Petitioners contend otherwise, such a reading of section 2-1401(e) renders the second clause superfluous. Obviously, this is contrary to well-established precedent that a court must construe a statute so as to "avoid rendering any part of it meaningless or superfluous." *Cent. Mortg. Co. v. Kamarauli*, 2012 IL App (1st) 112353, ¶ 16, 980 N.E.2d 745, 750. More specifically, if a lack of jurisdiction does not appear from the record *all* "right, title or interest" of a subsequent purchaser, including possessory rights, are protected and there would be no need to consider the second clause.

458 (1921) ("The decree of foreclosure was reversed and set aside, and the parties became entitled to be restored to their former rights as nearly as possible"); *McJilton v. Love*, 13 Ill. 486, 494–95 (1851) (holding that upon reversal of a judgment, "the parties are to be restored to their *original* rights"" (emphasis added)). Applied to the facts of this case, this general rule would simply require that Petitioners be restored to the position they enjoyed at the time of the Foreclosure; namely, holders of legal title to the Premises (or its monetary substitute), subject to a mortgage lien. Petitioners cite no authority that permits them to monetize their due process rights and/or recoup damages from strangers to the underlying litigation under the guise of restitution. In fact, it has long been the law of this State that where a judgment is reversed, the parties are to be restored to their original rights, but only "*so far as it can be done without prejudice to third persons*." *Id.* at 494 (emphasis added).

Furthermore, to the extent the Foreclosure is unwound, the Petitioners will undoubtedly be in a *worse* position than the one they currently enjoy. More specifically, upon vacatur, Petitioners would face: (1) renewed liability under PNC's note and mortgage; (2) the prospect of new deficiency judgment (as previously noted, pursuant to 735 ILCS 5/12-108, the *in personam* judgment entered in the Foreclosure lapsed on June 12, 2019); and (3) additional liability to the Current Owners for the significant sums they advanced for the benefit of the Premises, *see Yugolsav-Am. Cultural Ctr., Inc. v. Parkway Bank & Tr. Co.*, 327 Ill. App. 3d 143, 150 (1st Dist. 2001) ("a reversal by the appellate court opens the door to [an] unjust enrichment" claim on behalf of the party who relied on the reversed decree). In this regard, the trial court astutely observed that petitioners, like the ones in this case, are "playing a very dangerous game" by "opening up

[themselves] to a lot of liability" without "understand[ing] what's at risk." SUP R 16:4-19:10, 20:5-7.

iv. Orders Entered Against Properly Joined Defendants Must Stand

In addition to monetary and injunctive relief, the Petition improperly requested that the trial court "[v]acate *all* orders and judgments entered in the case…" C 138. As an initial matter, Petitioners lack standing to assert a jurisdictional challenge on behalf of other parties to the Foreclosure. *See People v. Matthews*, 2016 IL 118114, ¶ 23, 76 N.E.3d 1233, 1240 ("Because service and personal jurisdiction can be waived, only the party to whom service is owed can object to improper service"). Moreover, any alleged jurisdictional defect as to Petitioners does not impact orders entered against other defendants properly before the court. *See In re J. W.*, 87 Ill. 2d 56, 59-60, 429 N.E. 2d 501, 502-503 (1981) (holding that a mistake in the decision to proceed in the absence of necessary parties "does not deprive the court of the power to adjudicate as between the parties before it"); *In re Estate of Thorp*, 282 Ill. App. 3d 612, 618–19, 669 N.E.2d 359, 363–64 (4th Dist. 1996) ("failure to join an indispensable party is not…a 'jurisdictional' defect: the court can decide the case before it as to defendants who have been made parties …"); *Just Pants v. Bank of Ravenswood*, 136 Ill. App. 3d 543, 546, 483 N.E.2d 331, 334 (1st Dist. 1985) (holding that the failure to join a necessary party "does not deprive a court of jurisdiction over the parties properly before it"). Consequently, the Confirmation Order and subsequent conveyances of the Premises remain in effect as to the properly joined defendants and Respondents succeed to the interests of those parties.

CONCLUSION

For all of the foregoing reasons, the judgment of the Appellate Court should be affirmed.

Respectfully submitted,

NELLISA S. RAGLAND, BRIAN T. HEATH, AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR STC CAPITAL BANK

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 43 pages.

James A. Larson

No. 126606

IN THE SUPREME COURT OF ILLINOIS

PNC BANK, NATIONAL ASSOCIATION,

Plaintiff-Appellee,

v.

JERZY KUSMIERZ and HALINA KUSMIERZ,

Defendants-Appellants,

and

THE TOWNSHIP OF YORK and PNC BANK, NATIONAL ASSOCIATION,

Defendants,

JERZY KUSMIERZ and HALINA KUSMIERZ,

Section 2-1401 Petitioners-Appellants,

v.

PNC BANK, NATIONAL ASSOCIATION, NELLISA S. RAGLAND, BRIAN T. HEATH, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, as Nominee for STC Capital Bank, and STC CAPITAL BANK,

Section 2-1401 Respondents-Appellees,

and

THE TOWNSHIP OF YORK,

Section 2-1401 Respondent,

NOTICE OF FILING

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PLEASE TAKE NOTICE that on May 11, 2021, we caused to be filed with the Clerk of the Supreme Court of Illinois, by electronic means, the following: Brief of Section 2-1401 Respondents-Appellees Nelissa S. Ragland, Brian T. Heath and Mortgage Electronic Registration Systems, Inc., as Nominee for STC Capital Bank, a copy of which is included herewith and hereby served upon you.

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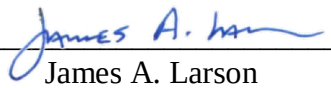
Certificate of Service

James A. Larson, an attorney, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that he served the above and foregoing notice, together with a copy of the document referred to therein, upon the individuals identified above, by electronic (E-Mail) transmission to the indicated e-mail addresses, on or before the hour of 5:00 p.m. on May 11, 2021.



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