

APPEAL NO. 34265

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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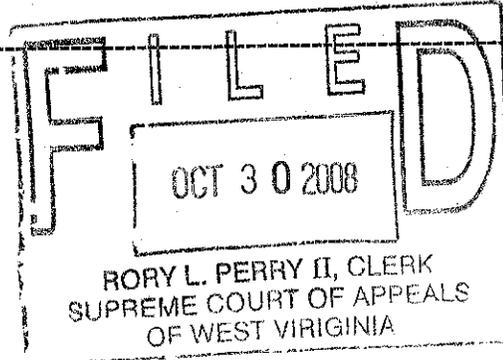
WELLS FARGO BANK, N.A.  
Assignee and Successor in Interest to  
FLEET NATIONAL BANK, a  
national banking association

Plaintiff/Appellant,

v.

UP VENTURES II LLC; IRONWOOD  
ACCEPTANCE COMPANY, a Delaware  
corporation; PALO VERDE TRADING  
COMPANY, L.L.C., an Arizona limited liability  
company; JEFFREY E. HALL and ANNETTE  
L. HALL,

Defendants/Appellees.



CIVIL ACTION NO. 07-C-26  
HONORABLE DAVID M. PANCAKE  
CABELL COUNTY CIRCUIT COURT

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BRIEF OF APPELLEES, UP VENTURES II, LLC,  
IRONWOOD ACCEPTANCE COMPANY AND  
PALO VERDE TRADING COMPANY, LLC,

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF  
WEST VIRGINIA:**

**THE KIND OF PROCEEDING AND NATURE OF THE  
RULING IN THE LOWER TRIBUNAL**

Your Appellees herein concur in the main with the matters set forth under this heading in Appellant's Brief. Simply stated, the Appellant contends that they have a entitlement to have a Tax Deed set aside even after the three (3) year Statute of Limitations under West Virginia Code § 11A-4-4(a) had expired. It is the Appellant's contention and assertion that Due Process dictates such a notice even outside the scope of the Statute hereinabove referenced.

Insofar as the Lower Court held the Statute of Limitations barred the action, the Court reached no conclusion as to the entitlement of the Appellant to notice under the terms of West Virginia Code § 11A-4-4.

It is undisputed by all parties hereto that the filing of the Complaint occurred well after the expiration of the Statute of Limitations mandated by West Virginia Code § 11A-4-4(a). It is the Appellant's contention that the Court relied solely on the three (3) year limitation period and considered no due process arguments. However, it is the Appellees' position that, the Circuit Court in basing its decision to grant Summary Judgment to Appellees herein relied upon Shaffer v. Mareve Oil Corp., 157 W.Va. 816, 204 S.E. 2d 404 (1974), which was in and of itself is a consideration by this Court of the Due Process clause of the Fourteenth Amendment of the Constitution of the United States relative to tax sales (see Syllabus Pt. 6). In fact, the very heart

of Shaffer, supra., is that the period of limitations provisions within which a party must institute action are reasonable time limitations that are not violative of the Due Process clause of the Fourteenth Amendment.

### **STATEMENT OF THE FACTS OF THE CASE**

As in prior filings, your Appellees would present the following chronology of events to provide a time line for the Court's consideration:

#### **CHRONOLOGY**

1. Jeffrey Hall and Annette Hall acquired Lot 49 by Deed dated February 17, 1995, see Deed Book 985, at Page 561.
2. Ironwood Acceptance Company (hereinafter "Ironwood") purchased the delinquent property at the Sheriff's Sale on November 9, 1999, for the sum of One Thousand Five Hundred Sixty-Five Dollars and Eighty-One Cents (\$1,565.81) (see Certificate of Sale Exhibit "1").
3. November 16, 2000, list of those to be served with Notice to Redeem submitted to Clerk for provision of Notice (see Exhibit "2").
4. January 22, 2001, Annette Hall (property co-owner) signs for Notice to Redeem (see Exhibit "3").
5. January 23, 2001, Mitchell Klein as Trustee for Atlantic Mortgage and Investment Corporation certified mail returned (see Exhibit "4")
6. January 23, 2001, Atlantic Mortgage and Investment Corp. certified mail returned

(see Exhibit "5").

7. January 23, 2001, Elaine Roberts for Atlantic Mortgage and Investment Corp., certified mail returned (see Exhibit "6").
8. January 18, 2001, Associates Financial Services accepts certified mail regarding Notice to Redeem (see Exhibit "7").
9. January 18, 2001, WV Department of Tax and Revenue accepts certified mail regarding Notice to Redeem (see Exhibit "7").
10. January 23, 2001, January 30, 2001, February 6, 2001, publication of Notice to Redeem published in Herald Dispatch (see Exhibit "8")
11. January 25, 2001 to February 1, 2001 to February 8, 2001, publication of Notice to Redeem published in the Cabell Record (see Exhibit "9")
12. **February 21, 2001, Jeffrey Hall and Annette Hall execute Deed of Trust to Fleet Mortgage (Plaintiff herein) (see Exhibit "10")**
13. **March 8, 2001, Deed of Trust from Halls to Plaintiff recorded in the Office of the Clerk of the County Commission of Cabell County, West Virginia, in Trust Deed Book 1662, at Page 722 (see Exhibit "11").**
14. May 8, 2001, Deed issued from Karen Cole, Clerk of the County Commission of Cabell County, West Virginia, to Ironwood Acceptance Company (see Deed Book 1078, Page 696) (see Exhibit "12").
15. August 13, 2001, Ironwood Acceptance Company quitclaims interest in property to Palo Verde Trading Company, LLC (see Exhibit "13").
16. September 9, 2003, Palo Verde Trading Company, LLC, conveys property to UP

Ventures II, LLC (see Exhibit "14").

17. January 11, 2007, Complaint filed in the Circuit Court of Cabell County, West Virginia, by Appellant.

Your Appellees herein do not deny that the Appellant received no notice of the tax sale but would assert that, pursuant to West Virginia Code § 11A-3-19, the tax sale purchaser (Appellees herein) were under no statutory requirement to provide notice. Indeed, at the time that the notice was required to be submitted Fleet's Deed of Trust was not recorded. It is curious to note that, for whatever reason, Fleet did not record its mortgage until two (2) weeks after the execution of the same.

It is also curious to note that the Appellant indicates on page 4 of their Brief, "From the escrow account Fleet began to pay, and for a number of years, continued to pay, the real estate taxes due on the property, beginning with the taxes due and payable from the second half of 2001 through the second half of 2006. Fleet did not learn of the tax sale until late fall/early winter of 2006, and promptly filed suit on January 11, 2007, for relief from the tax sale." However, if Fleet was paying the taxes from the escrow account they would surely have had notice much earlier than January 1, 2007, in that the attachments to the Appellant's Petition for Appeal clearly shows the tax tickets issued from the Cabell County Sheriff's Department to be in the name of Ironwood Acceptance Company as early as the year 2002 (see Exhibit A of Plaintiff's Response to Motion for Summary Judgement). This should have placed Fleet on notice that, at the very least there was some problem with the title to the real estate in question insofar as the property owner was listed as a party other than Jeffrey and Annette Hall, their mortgagors.

The Appellant contends that they are entitled to notice as a "gap lender". While the

Appellees acknowledge the novelty of the coinage of this term there is simply no statutory provision carving out such an exception.

### **ASSIGNMENTS OF ERROR**

The Appellant asserts that they were entitled to notice in contravention of the tax sale mandates set forth in West Virginia Code § 11A-3-1, et seq., and West Virginia Code § 11A-4-1, et seq.

The Legislature of the State of West Virginia has affirmatively asserted that there is a paramount necessity of providing regular tax income for state, county and municipal governments and to further provide for the speedy and expeditious enforcement of the tax claims of the State and its subdivisions as well as securing adequate notice to owners of delinquent and non-entered property of the pending issuance of a Tax Deed (see West Virginia Code § 11A-3-1).

As to the assignment of error relative to the Statute of Limitations, it is uncontraverted by all parties hereto that the filing of the suit occurred after the Statute of Limitation's period. As was recognized by this Court in Mingo County Redevelopment Authority v. Green, 534 S.E.2d 40, 207 W.Va. 486 (West Virginia 2000), "We agree with the Auditor that confidence in one's title to the land is of paramount importance. As we have remarked previously, certainty above all else is the preeminent compelling public policy to be served" (Citing Hock v. City of Morgantown, 162 W.Va. 853, at 856, 253 S.E.2d 386, at 388 (1979)). As is readily ascertainable from the Chronology set forth hereinabove, the Appellees have been the record holder of title to the property in controversy for well over seven (7) years, five of which were prior to the filing in the lower Court.

**POINTS OF AUTHORITY RELIED UPON AND  
DISCUSSION OF THE APPLICABLE LAW**

**I. THE APPLICABLE STANDARD OF APPELLATE REVIEW**

Your Appellees herein concur that the Standard of Review relative to a lower Court's entry of a Motion for Summary Judgment is a *de novo* as is set forth in Appellant's Brief. Further, the Appellee concurs that a *de novo* standard is utilized in reviewing a Circuit Court's interpretation of a Statute (see Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995); *accord*, Syl. Pt. 1, Appalachian Power Co. v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.")).

While the Appellant contends that the Circuit Court erred in granting the Appellees' Motion for Summary Judgment and Dismissing Appellant's Complaint it is the position of the Appellees herein that the Statute, as written, is not ambiguous and therefore this Court has a duty to apply the Statute as written (see Syl. Pt. 1, State, ex rel. Fox v. Board of Trustees of the Policemans Pension or Relief Fund of the City of Bluefield, et al., 148 W.Va. 369, 135 S.E.2d 262 (1964)).

**WEST VIRGINIA CODE § 11A-4-4 AND WEST VIRGINIA CODE § 11-13-9 PROVIDE SPECIFIC PROCEDURAL DUE PROCESS SAFEGUARDS FOR THOSE PARTIES ENTITLED TO NOTICE OF A TAX SALE AND COMPORTS WITH THE LEGISLATIVE INTENT OF THE TAX SALE STATUTES IN CONFIRMING TITLE TO REAL PROPERTY BOUGHT PURSUANT TO A SHERIFF'S TAX SALE.**

Prior to any in-depth discussion of the arguments set forth in Appellant's Brief, it is important to point out that there are no allegation that the tax sale purchaser, Appellees' herein,

failed to strictly comply with all of the statutory requirements relative to notice as mandated by the West Virginia Code.

It is abundantly clear from the attachments to the pleadings herein that the mortgage lender whose Deed of Trust was of record prior to December 31, 2000, was properly notified per the Tax Sales Code Provisions and further that the record owners of the real estate likewise were given notice for which they signed a certified receipt.

Therefore, the issue before this Court is not whether the Appellees herein complied with the statutory requirements set out by the West Virginia Code but rather whether the Appellant herein are entitled to some extra consideration (i.e. additional notice) over and above those strictly mandated by the West Virginia Code.

The Appellant refers to the eighteen (18) month statutory redemption period as a "gap period". This is simply not the case. As is set forth herein, the West Virginia Legislature in its Declaration of Legislative Purpose and Policy set forth in Section 11A-3-1 declare as its purposes in the enactment of the Tax Sale Article the following:

"In view of the paramount necessity of providing regular tax income for the state, county and municipal governments, particularly for school purposes; and in view of the further fact that delinquent land not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government; and in view of the rights of owners of real property to adequate notice and an opportunity for redemption before they are divested of their interests in real property for failure to pay taxes or have their property entered on the land books; and in view of the fact that the circuit court suits heretofore provided prior to deputy commissioners' sales are unnecessary and a burden on the judiciary of the state;

and in view of the necessity to continue the mechanism for the disposition of escheated and waste and unappropriated lands; now therefore, the Legislature declares that its purposes in the enactment of this article are as follows: (1) To provide for the speedy and expeditious enforcement of the tax claims of the state and its subdivisions; (2) to provide for the transfer of delinquent and nonentered lands to those more responsible to, or better able to bear, the duties of citizenship than were the former owners; (3) to secure adequate notice to owners of delinquent and nonentered property of the pending issuance of a tax deed; (4) to permit deputy commissioners of delinquent and nonentered lands to sell such lands without the necessity of proceedings in the circuit courts; (5) to reduce the expense and burden on the state and its subdivisions of tax sales so that such sales may be conducted in an efficient manner while respecting the due process rights of owners of real property; and (6) to provide for the disposition of escheated and waste and unappropriated lands.”

It is abundantly clear from the above recitals that the Legislature thoroughly considered adequate notice and Due Process requirements in its construction and enactment of the Statutes relative to the sale of real property for tax liens.

The Appellant’s Brief sets forth West Virginia Code § 11A-3-19(a) which establishes the time line for identifying those parties who are entitled to notice to redeem. It is here that the Appellant seeks to make their case that they were among these parties who should have been given notice to redeem, prior to delivery of the tax sale deed to Appellees.

This Court has spoken to the issue of those parties who are entitled to such notice in the case of Rollyson v. Jordan, 205 W.Va. 368, 374, 518 S.E.2d 372, 378 (1999). This Court held in Syl. Pt. 4 of Rollyson, that “the persons entitled to notice to redeem in conjunction with a

purchaser's application for a tax deed, pursuant to W.Va. Code § 11A-3-19(a)(1) (1994) (Repl. Vol. 1995), (FN3) are those persons who are permitted to redeem the real property subject to a tax lien or liens, as contemplated by W.Va. Code § 11A-3-23(a) (1995) (Repl. Vol. 1995), (FN4) which persons include "the owner" of such property and "any other person who was entitled to pay the taxes" thereon."

West Virginia Code § 11A-1-9 defines those parties who are entitled to pay taxes on real estate as follows, "any owner of real estate whose interest is not subject to separate assessment, or any person having a lien on the land, or on an undivided interest therein, or any other person having an interest in the land, or in an undivided interest therein, which he desires to protect, shall be allowed to pay the whole, but not a part, of the taxes assessed thereon."

It is apparent that the notice provisions § 11A-3-19(a) do not require the tax sale purchaser to update any list after the "cutoff date" of the 31<sup>st</sup> day of December of the year following the tax sale. As is set forth in the Chronology, the Deed of Trust now owned by the Appellant herein was not recorded until March, 2001, some three (3) months after the notice provisions set forth in the Statute.

This Court has recognized in its holding in Lilly v. Duke, 180 W.Va. 228, 376 S.E.2d 122, (1988), that "there are certain constitutional due process requirements for notice of a tax sale of real property. Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice." Lilly, in essence, recognizes the Constitutional Due Process notice requirements relative to parties having a interest of record in real estate.

The Court's reasoning in Lilly, supra., was echoed in its rulings in Mingo County

Redevelopment Authority v. Green, 534 S.E.2d 40, 207 W.Va. 486 (W.Va. 2000). In the Mingo County Redevelopment Authority case the Court reasoned that “if we allow a call to the office to equal notice, then we place upon the Auditor (and presumably every Sheriff) the near impossible burden of creating a duplicate system of recordation of property interest for “people who called in” which the purchaser would also have to search to find additional interested parties. This we will not do.” (id. at 49). The Court in the Mingo County Redevelopment Authority holding declined to create a new class of parties entitled to notice. That is, those parties who have failed to make their real property interest of record. This case is analogous to the one before the Court. Simply stated, the recorded interest of the Appellant herein did not exist during the Statutory time frame established by the West Virginia Legislature and to carve out an exception is in direct contravention of both the stated purpose of the Tax Sale Statute and the intent of the same.

**II. DUE PROCESS REQUIREMENTS ARE SATISFIED BY THE PROVISIONS OF WEST VIRGINIA CODE § 11A-3-19(a) PROVIDED THERE IS STRICT COMPLIANCE WITH THE STATUTORY PROCEDURES SET FORTH REGARDING TAX SALES**

The Appellant correctly identifies that a party seeking to obtain ownership of property sold for taxes must comply literally with all of the statutory requirements (see State, ex rel. Morgan v. Miller, 350 S.E.2d 724, 177 W.Va. 97 (W.Va. 1986)). As is set forth in the prior argument there is no disagreement that the Appellees herein conformed with all of the statutory requirements. Thus, the only argument propounded by the Appellant is that Due Process requires something additional by way of notice from a tax sale purchaser prior to recordation of the tax sale deed. There is simply no provision in the West Virginia Code nor in any relevant case law

which mandates the same.

The Appellant cite Jones v. Flowers, 547 U.S. 220 (2006) (quoting Mullane, 339 U.S. at 314), as being supportive of their position. Jones, supra., involved a tax sale wherein a certified letter was mailed to the owner of the property and returned unclaimed. The United States Supreme Court indicated that “when mailed notice of a tax sale is returned unclaimed, a state must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.” (Syl. Pt. 1) This case is readily distinguishable in two (2) areas. Initially, Jones, supra, deals with the interest of a property owner and not that of a lienholder. Secondly, the Supreme Court’s holding in Jones was limited to its facts, in that it held that mailed notice of a tax sale when returned unclaimed is insufficient under Due Process guidelines.

In the case at bar, we are neither dealing with a property owner nor with any unclaimed notice.

The Appellees herein recognize that lienholders of record have a statutory right to redemption under the West Virginia Code. However, Jones, supra., does not stand for that particular proposition. If anything, the West Virginia Code affords additional Due Process safeguards in that it does protect the rights of lienholders whose liens are **of record** at the time of the notice mandated by the Code.

The Appellant herein points to Jones to buttress their position that the notice provisions set forth in the West Virginia Statute are constitutionally deficient. They isolate that portion of the holding that defines notice as being constitutionally sufficient if reasonably calculated to reach the intended recipient (emphasis added). However, the Appellant herein fails to acknowledge or

recognize that, under the West Virginia Statutory scheme they are not the intended recipient for notice purposes. Given the chronology of events the lienholder herein (Appellant) was not a lienholder of record at the time the Statute mandated notice be given to interested parties.

The Appellant then attempts to turn this Court's focus to the case of Plemons v. Gale, 396 F.3d 569 (4<sup>th</sup> Cir. 2005). Plemons is similarly distinguishable from the facts in the case before this Court. In Plemons, a property owner was listed as a party to be served with notice to redeem. However, the certified mailings were returned unclaimed at three (3) different addresses. The Fourth Circuit held that the Appellant therein had not received constitutionally adequate notice of her right to redeem the real property in that the purchaser at the tax sale failed to exercise reasonable due diligence in obtaining a proper address. Nonetheless, Plemons recognizes that "There may be instances when reasonable follow-up efforts would yield no different address; and the Constitution requires only reasonable efforts, given all the circumstances of a particular case, not receipt of actual notice" (Plemons, 369 Fed.3d 569 at 577).

It is clear from both the holdings in Jones and Plemons that neither the United States Supreme Court nor the Fourth Circuit Court of Appeals have strictly mandated any specific statutory scheme for tax sales. The common thread through both decisions is that the property owner must be given adequate notice. Neither of these opinions speak to the issue before this Court. Jones nor Plemons address the issue of adequate constitutional notice outside the statutory scheme of those to be notified by State Statute.

The protection for a "gap lender" is the proper conduct of a title abstract or examination upon the property upon which it seeks to impress a lien. It is common practice for title examiners to ascertain that the property has been placed upon the rolls of County Assessor for a

period of at least five (5) years (see W.Va. Code § 11-3-5). A mere cursory glance would have indicated from, the Sheriff's Tax records, Land Book or website that the property was sold for taxes for the tax year 1998 (see Circuit Court Order Page 3).

The Appellant herein never raises the issue as to why any title examination did not reveal the 1998 delinquency and moreover the same has not been made part of any record, based upon information and belief, in this case. The "gap lender" herein seeks to overcome the plain statutory procedures relative to tax sales as well as the stated purpose of the same in order to resolve a problem of its own making.

The Appellant attempts to circumvent the plain meaning of West Virginia Code § 11A-13-19(a) by a recitation of various Code sections related to tax sales. However, none of the Statutes cited therein provide this Court any basis for overcoming the clear and unambiguous language contained in West Virginia Code § 11A-3-19(a).

Nor does the Appellant reference West Virginia Code § 11A-4-4(a) which sets forth the time period wherein an action to set aside a tax sale deed may be maintained. Once again, it is uncontraverted that the action commenced in the Lower Court was well outside the three (3) year Statute of Limitation mandated by the West Virginia Code. So too, the Appellant have failed to follow the mandate of West Virginia Code § 11A-4-5 in that the underlying action was brought by the lienholder in its name and not on behalf of the former property owner. This Code provision specifically states "that any civil action instituted of the provisions of Section Two, Three or Four of this Article by a person other than the former owner, his heirs or assigns must be brought on his or their behalf". In fact, the relief prayed for in the Complaint filed in the Circuit Court speaks to payment to one or more of the Defendants (West Virginia Code § 11A-4-4(a)). It is apparent

on the face of the Complaint that the former property owners, Jeffrey and Annette Hall, are listed as Defendants. Therefore, the action is not brought on their behalf, but is brought in derogation of their property interest.

It appears that the relief sought for by the Appellant is to protect solely their interest in the real property and not that of Jeffrey and Annette Hall, the Defendants herein. At no time was the property ever subject to foreclosure which affords the presumption that all of the payments made by the Halls were timely. While it is uncontraverted that the Halls received actual notice of their notice of right to redeem, they took no action upon the same nor did they advise the Appellant herein of the receipt of such notice. At the end of the day, if this Court should order the tax sale set aside, who would become the owner of the property and under what terms and conditions?

The Appellant recognizes the long redemption period provided for in West Virginia Code § 11A-3-19(a). However, they refer to a record search on the sale date. This is simply not the case. The provisions of West Virginia Code § 11A-3-19(a) provides that the list to prepared of the parties to be served with notice to redeem occurs after the 31<sup>st</sup> day of October of the year following the Sheriff's sale. The Appellant speak to the interpretation of a Statute resulting in an absurdity. That is exactly the position that they are asking this Court to take in this Appeal. Once having carved out this exception (in direct contravention of the statutory provisions of the tax sale Statutes), a "Pandora's Box" is opened wherein there can be no reasonable finality to any tax sale.

The Appellant further cites the reasonableness of a re-examination of the records closer to the actual recordation of the tax sale deed. Assuming arguendo, that this Court mandates the same, does this just not provide an additional "gap lender" period such that the same could be argued *ad infinitum* before this Honorable Court? The only protection for a tax sale purchaser who has

acquired his Deed is the three (3) year Statute of Limitations period assuming strict compliance with the Statutory Sale Scheme is met. The protection for a lender is an adequate and proper title examination, including tax records, such that the interest may be protected within the three (3) year Statute of Limitations period as opposed to some five (5) years later. The Appellant wishes to impose an additional re-examination of the records for purposes of the tax sale. However, they fail to acknowledge that likewise, the lienholder has a duty to examine the records as well to insure that the lienholder has an apt and proper first lien position. The Appellant wishes to impose an additional duty on the tax sale purchaser and thereby relieve the lienholder of his duty to insure a proper first lien position.

The Appellant then cites out-of-state authority for their position apparently recognizing that the West Virginia Supreme Court has not spoken directly to this issue.

The Appellant cites the Rhode Island Supreme Court Decision in Killdeer Realty v. Brewster Realty Corporation, 826 Atlantic 2d. 961, as being dispositive or analogous to this issue. A thorough reading of Killdeer would indicate the contrary. The factual scenario set forth in Killdeer is different than that before this Court. In Killdeer the issue was failing to properly notify the purchaser under a foreclosure deed of the pendency of a tax sale. In that instance, the Appellant was a property owner in fee who was not given notice. Curiously however, the Rhode Island Supreme Court denied the Appeal based upon the fact that the Appellant therein “utterly failed to protect its interest or assert its rights on or before the return day”. Rhode Island Code § 44-9-31 explicitly provides that failure to raise any question concerning the validity of a tax sale on or before the return day will result in the parties being forever barred from contesting or raising the question in any other proceeding (Killdeer at 966).

While the Appellant notes the Court's concern over notice, they fail to recognize that the Rhode Island Supreme Court barred the Appellant's claim therein for failure to abide by a statutory deadline regarding redemption (i.e. a limitations period). This is exactly the result that was reached by the Circuit Court of Cabell County, West Virginia, in determining that the Appellant's claim was barred by the Statute of Limitations set forth in West Virginia Code § 11A-4-4(a).

While your Appellees certainly understand that the Appellant's arguments relative to notice and their relationship to the Statute of Limitations are necessarily intertwined, one must look to the clear unambiguous language of West Virginia Code § 11A-4-4 as setting the parameters within which a suit to set aside a tax sale must be brought and West Virginia Code § 11A-4-5 which mandates how such action may be brought and on whose behalf. In neither of these instances have the Appellant complied with the statutory mandates. The arguments of Appellant, while compelling on their face, belie the fact that there is simply no case law or statutory provision which provides the relief sought by the Appellant. None of the cases cited by the Appellant is persuasive in that each is distinguishable from the case at hand on its facts and none deal with the Statute of Limitations issue and the right of a lienholder to a "gap period" exception.

While the Appellant attempts to draw this Court's attention to Supreme Court's Decision in Menonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), this Court's decision in Lilly, supra, militates against drawing the conclusion sought by the Appellant. Once again, Lilly (decided after Menonite) stands for the proposition that a mortgagee has a recognizable interest in property such that he may not be deprived of the same

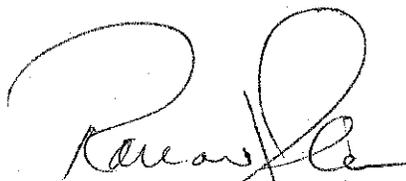
without adequate notice prior to the sale of property at a Sheriff's sale for failure to pay taxes. However, the mortgagee therein had a recorded interest prior to the preparation of any delinquent list or notices. This is clearly distinguishable from the case at hand.

In sum, the Appellant has failed to present any argument to this Court that would, in essence, re-write West Virginia Code § 11A-3-19(a). Further, the clearly stated intent and purpose of the West Virginia Code as the same relates to tax sale necessitates that West Virginia Code § 11A-4-4 must be strictly enforced as to its terms or the purpose of the same is simply thwarted. For those reasons, your Appellees herein respectfully request that this Honorable Court dismiss the Appeal heretofore filed and affirm the Order of the Circuit Court of Cabell County, West Virginia, in the underlying action.

**DENY APPEAL.**

Respectfully submitted,

UP VENTURES II, LLC, IRONWOOD  
ACCEPTANCE COMPANY and PALO  
VERDE TRADING COMPANY, LLC  
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**WELLS FARGO BANK, N.A.**  
**Assignee and Successor in Interest to**  
**FLEET NATIONAL BANK, a**  
**national banking association**

**Plaintiff/Appellant,**

v.

**CIVIL ACTION NO. 07-C-26**  
**HONORABLE DAVID M. PANCAKE**  
**CABELL COUNTY CIRCUIT COURT**

**UP VENTURES II LLC; IRONWOOD**  
**ACCEPTANCE COMPANY, a Delaware**  
**corporation; PALO VERDE TRADING**  
**COMPANY, L.L.C., an Arizona limited liability**  
**company; JEFFREY E. HALL and ANNETTE**  
**L. HALL,**

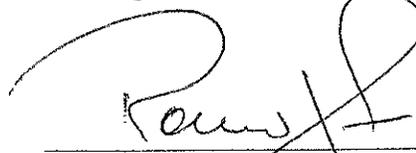
**Defendants/Appellees.**

**CERTIFICATE OF SERVICE**

I, RONALD J. FLORA, counsel for the Appellees, UP Ventures II, LLC, Ironwood Acceptance Company and Palo Verde Trading Company, LLC, do hereby certify that I served a copy of the foregoing "**BRIEF OF APPELLEES, BRIEF OF APPELLEES, UP VENTURES II, LLC, IRONWOOD ACCEPTANCE COMPANY AND PALO VERDE TRADING COMPANY, LLC**" by depositing a true copy thereof in the United States mail, postage prepaid, on the 29<sup>TH</sup> day of October, 2008, in an envelope addressed to the following:

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