STATE OF MICHIGAN
IN THE COURT OF APPEALS

COMMITTEE TO BAN FRACKING IN MICHIGAN AND LUANNE KOZMA,

Plaintiffs-Appellants,

v

CHRISTOPHER THOMAS, DIRECTOR OF ELECTIONS, RUTH JOHNSON, SECRETARY OF STATE, AND BOARD OF STATE CANVASSERS,

Defendants-Appellees.

______________________________________/

Court of Appeals No. 334480

Court of Claims No. 16-000122-MM

BRIEF OF DEFENDANTS-APPELLEES

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

Page

Index of Authorities ii

Statement of Jurisdiction iii

Counter-Statement of Questions Presented iv

Constitutional Provisions, Statutes, and Rules Involved v

Introduction 1

Counter-Statement of Facts and Proceedings 1

Standard of Review 2

Argument 3

I. A court's ability to enter a declaratory judgement requires the existence of an actual controversy. But there is no actual controversy in this case because CBFM never filed their petition with the Secretary of State, and even if it had done so, the petition would be facially insufficient due to a lack of signatures. 3

II. Michigan courts have held that a claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all. Here, CBFM's claims are not ripe because they have not filed, and currently cannot file, their petition with the Secretary of State, and future events may preclude them from ever doing so. 8

Conclusion and Relief Requested 12

RECEIVED by MCOA 10/27/2016 2:39:01 PM

INDEX OF AUTHORITIES

Page

Cases

Citizens Protecting Mich's Constitution v Sec'y of State, 280 Mich App 273 (2008) 8, 11

City of Huntington Woods v City of Detroit, 279 Mich App 603 (2008) 5, 12

Genesis Ctr, PLC v Comm'r of Fin & Ins Servs, 246 Mich App 531 (2001) 4

Grebner v State, 480 Mich 939 (2007) 11

King v Mich State Police Dep't, 303 Mich App 162 (2013) 3

Mich United Conservation Clubs v Sec'y of State (MUCC), 463 Mich 1009 (2001) 10

Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp, 237 Mich App 721 (1999) 3

Shavers v Attorney General, 402 Mich 554 (1978) 4

UAW v Central Michigan Univ Tr, 295 Mich App 486 (2012) 3

W A Foote Memorial Hosp v Dep't of Public Health, 210 Mich App 516 (1995) 3

White v Taylor Distributing Co, Inc, 275 Mich App 615 (2007) 2

Statutes

MCL 168.471 2

MCL 168.472a .... *passim*

MCL 168.473b 9

Rules

MCR 2.605 .... 3, 5

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STATEMENT OF JURISDICTION

MCR 7.203(A)(1) establishes jurisdiction for an appeal of right taken from a final judgment of the Court of Claims. Plaintiffs-Appellants Committee to Ban Fracking (CBFM or ballot committee) and LuAnne Kozma are appealing the Court of Claims' August 8, 2016 granting of Defendants-Appellees' Director of Elections Christopher Thomas, Board of State Canvassers, and Secretary of State Ruth Johnson's motion for summary disposition. This Court has jurisdiction under MCR 7.203(A)(1) because the Court of Claims' order was a final order.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. A court's ability to enter a declaratory judgement requires the existence of an actual controversy. But there is no actual controversy in this case because CBFM never filed their petition with the Secretary of State, and even if it had done so, the petition would be facially insufficient due to a lack of signatures. Was summary disposition properly granted where a declaratory judgment is unnecessary to guide any future conduct or preserve any legal rights?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

2. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all. Here, CBFM's claims are not ripe because they have not filed their petition with the Secretary of State and future events may preclude them from doing so in the future. Was summary disposition properly granted where CBFM's claims are not yet ripe?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

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CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Const 1963, art. II, § 9
Initiative and referendum; limitations; appropriations; petitions.

The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum. The power of initiative extends only to laws which the legislature may enact under this constitution. The power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds and must be invoked in the manner prescribed by law within 90 days following the final adjournment of the legislative session at which the law was enacted. To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required. No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.

Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided.

If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.

Any law submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote. No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature. Laws approved by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof. If two or more measures approved by the electors at the same election conflict, that receiving the highest affirmative vote shall prevail.

The legislature shall implement the provisions of this section.

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MCL 168.472a Petition; signatures to be counted

The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state.

MCR 2.605(A)(1)
In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

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INTRODUCTION

This case presents a classic example of putting the cart before the horse. Plaintiffs-Appellants CBFM and Kozma seek to challenge the constitutionality of a statutory process that prohibits counting initiative petition signatures that are more than 180 days old. But even if every one of the 150,000 signatures collected on the CBFM ballot committee's petition was valid, CBFM is still over 50,000 signatures short of the bare minimum number required to have the question placed on the ballot (Compl ¶¶43, 45), and whether an arguably sufficient number of signatures can be collected in the future is speculative and hypothetical. Furthermore, any credible petition drive must collect a cushion of additional signatures because some may be duplicate or invalid for any number of reasons. Accordingly, the new law at issue, 2016 PA 142, has not been, and may never be, applied to Plaintiffs. As a result, the Court of Claims correctly concluded that Plaintiffs' claims were not ripe and that the case lacked an actual controversy.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

On April 14, 2015—over one year ago—the Board of State Canvassers approved the form of CBFM's initiative petition. (Compl. ¶41). For reasons not immediately clear, CBFM did not begin circulating their petition until May 22, 2015. (Compl ¶42). Nonetheless, CBFM alleges that by November 18, 2015, they had collected over 150,000 signatures. (Compl ¶43). However, in the roughly six months between that time and the filing of this lawsuit, CBFM collected only about 50,000 additional signatures, which means that they are still over 50,000 signatures short of the minimum number of signatures required to have the question placed on

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the ballot. (Compl ¶¶43, 45). The deadline to submit ballot questions for the November 2016 election passed on June 1, 2016, and the deadline to submit initiative petitions for the next November election is May 30, 2018. (Compl. ¶11; MCL 168.471).

On June 9, 2016, Governor Snyder signed 2016 PA 142, which enacted Senate Bill 776:

> The signature on a petition that proposes an amendment to the constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the office of the secretary of state.

The law took immediate effect.

Procedural History

CBFM and Kozma filed their complaint with the Court of Claims on June 1, 2016. Defendants-Appellees Thomas and Johnson subsequently moved for summary disposition, and on August 8, 2016, Court of Claims Judge Stephen L. Borrello entered an opinion and order granting summary disposition, concluding that the complaint failed to establish an actual controversy sufficient to invoke the Court's jurisdiction to grant declaratory relief and that the claims were not ripe. (Op & Order, Exhibit A.) CBFM and Kozma filed their claim of appeal on August 25, 2016.

STANDARD OF REVIEW

This Court reviews a lower court's decision on a motion for summary disposition de novo on appeal. *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 620 (2007). Similarly, whether the trial court has subject-matter jurisdiction is

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a question of law that this Court reviews de novo. *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 730 (1999); *W A Foote Memorial Hosp v Dep't of Public Health*, 210 Mich App 516, 522 (1995). In addition, questions regarding ripeness are also reviewed de novo. *King v Mich State Police Dep't*, 303 Mich App 162, 188 (2013).

ARGUMENT

I. A court's ability to enter a declaratory judgement requires the existence of an actual controversy. But there is no actual controversy in this case because CBFM never filed their petition with the Secretary of State, and even if it had done so, the petition would be facially insufficient due to a lack of signatures.

Declaratory judgment is a form of relief, not an independent cause of action. It is axiomatic that declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. CBFM and Kozma attempted to skip the requirement of an actual controversy and move directly to the granting of relief. However, without an actual controversy, there is no basis for a court to grant any relief.

An "actual controversy" under MCR 2.605(A)(1) exists when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights. *UAW v Central Michigan Univ Tr,* 295 Mich App 486, 495 (2012). "MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness." *UAW*, 295 Mich App at 495. "The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Shavers v Attorney General*, 402 Mich 554, 588

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(1978); *see also Genesis Ctr, PLC v Comm'r of Fin & Ins Servs*, 246 Mich App 531, 544 (2001). And, as the Court of Claims noted in its opinion, "This Court's duty is to consider and decide actual cases and controversies, not to declare legal principles that have no practical effect in a case." (Opinion & Order, Exhibit A, p 3).

Here, there is no actual controversy that would support jurisdiction to grant declaratory relief to CBFM or Kozma. They may continue to circulate their petition without any interference from Director Thomas, the Board of State Canvassers, Secretary Johnson—or even MCL 168.472a. If and when Plaintiffs obtain the additional signatures they require, then they would be able to file their petition. But until the minimum number of signatures has been collected, any application of MCL 168.472a to CBFM's petition is hypothetical. Consequently, a declaratory judgment at this time is unnecessary to guide any future conduct or preserve any legal rights. (See Opinion and Order, Exhibit A, p 3-4.)

In their brief, CBFM and Kozma argue that the Court of Claims required that CBFM sustain an injury before filing suit. (Appellant's Br, p 13.) That is inaccurate. The Court of Claims made no such finding; instead, the court correctly noted that CBFM's ability to collect enough signatures was speculative, and ruled that, "[a] declaratory judgment is not necessary to guide plaintiffs' future conduct when, at this point, an application of MCL 168.472a to their efforts would be purely hypothetical." (Opinion and Order, Exhibit A, p 3-4). Unless and until CBFM collects the minimum number of signatures, CBFM does not need to decide whether to file their petition with the outdated signatures, or continue collecting additional

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signatures in time for the 2018 ballot. In other words, it is only at that point that the statute would even have any possible application to CBFM's petition. Notably, this would not require CBFM or Kozma to sustain any injury—only to present an actual controversy for a court to decide.

Next, CBFM conflates the Court of Claims' opinion on the existence of an actual controversy with its holding on ripeness. (Appellants' Br., p 14). However, these were separate arguments in the motion for summary disposition, and separate rulings by the Court of Claims. (Opinion and Order, Exhibit A, p 3-4). Contrary to CBFM's contention, the Court of Claims' ruling as to whether there is an actual controversy did not rely upon *City of Huntington Woods v City of Detroit,* 279 Mich App 603 (2008); instead the Court cited that case as authority for its ruling on ripeness. (Opinion and Order, Exhibit A, p 4).

The Court of Claims' ruling on the existence of an actual controversy rested upon a plain reading of MCR 2.605(A)(1) and *UAW, supra*. While CBFM insists that the Court in *UAW* rejected any requirement for showing a past harm, no such requirement is being imposed here. But CBFM must have at least the bare minimum number of signatures to be able to show that the statute they seek to challenge has any application to them. If they succeed in reaching that minimum threshold, then they would have a cognizable legal interest that would support jurisdiction for a declaratory ruling.[1]

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[1] CBFM has constructed an awkward analogy to building a house, but the analogy bears little resemblance to the facts here. (Appellants' Br., p 15-16). However, even if this Court were to indulge the analogy, it should not escape notice that CBFM's

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CBFM argues that requiring the collection of signatures *that they would have to collect anyway* is unreasonable because then there would be no future conduct left to guide once those signatures are collected. (Appellants' Br., p 16 (emphasis added).) That is an inaccurate statement of the situation. The more accurate characterization is that CBFM needs to collect the requisite signatures in order to have any need for guidance whatsoever. Until they have acquired at least an arguably sufficient number of signatures under their legal theory, their arguments are purely hypothetical in nature.

Stated another way, if CBFM never reaches the over 250,000 signatures necessary to even arguably have enough to file the petition, how has MCL 168.472a injured them? Or, more pointedly, if the Court of Claims had entered the declaratory judgment CBFM sought, and they still failed to reach the bare minimum number of signatures, what practical effect would that judgment have had? Until CBFM has the bare minimum number of signatures required to be able to file its petition and appear on the ballot, their claims are speculative and hypothetical.

Ultimately, CBFM and Kozma argue that they need to have a judgment now in order to decide whether to keep the signatures already collected or to not file the outdated signatures and "intensify" collection efforts. (Appellants' Br., p 21-22). However, this is a false choice. Until they reach the minimum number of

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"house" is an incomplete project, which is over a year behind schedule; it does not have all the materials (i.e. signatures) necessary to finish construction, and it very well might never be completed.

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signatures, there is no need to decide whether to file the petition with the statutorily disallowed stale signatures, or to attempt collection of a sufficient number of signatures within the six-months before the actual filing. But until they reach the bare minimum number, there is no need for a declaratory judgment to guide them.

Kozma argues that there is an actual controversy as to her that is somehow distinct from CBFM. Kozma contends that her signature on the petition is now over 180-days old and thus could not be counted under MCL 168.472a, and has a right to contest that result. (Appellants' Br., p 22). However, Kozma has demonstrated no actual controversy as to herself, either. Kozma does not articulate any need to guide her future conduct or preserve her rights. MCL 168.472a has not yet been applied to her signature because CBFM has not filed, and cannot file, the petition because it lacks the minimum number of signatures. While MCL 168.472a might one day be applicable to Kozma's signature on this petition if it is ever filed, that possibility remains speculative at this time. Accordingly, there is no actual controversy as to Kozma as an individual, either.

Finally, Kozma argues that there is an actionable controversy through the possibility of petition signers being confused about whether they had signed before and would be prevented from signing it again. (Appellants' Br., p 23). Ironically, this argument actually underscores and supports the need for limits like that imposed by MCL 168.472a. The longer a petition is in the field, the more likely it is that people will forget if they previously signed it. The difficulty for signers to know

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or understand that a petition they signed over a year earlier is still circulating is a reason to encourage speedy circulation—not a reason to accept stale signatures.

Regardless, this argument fails to show that Kozma needs a declaratory judgment to guide her future conduct or preserve her rights in any way. Kozma speculates about election violations, being viewed as the "cause of it all," and being drawn into "legal proceedings,"[2] but she fails to demonstrate how the requested declaratory judgment would help her in that regard. Even if MCL 168.472a were held unconstitutional, such a decision would only address whether signatures older than 180 days could be counted. But, it would not render <u>duplicate</u> signatures valid, or obviate violations for willfully signing the petition multiple times.

Accordingly, CBFM and Kozma lack an actual controversy, and the Court of Claims correctly concluded that it lacked jurisdiction to issue a declaratory judgment. CBFM's claims were properly dismissed.

II. Michigan courts have held that a claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all. Here, CBFM's claims are not ripe because they have not filed, and currently cannot file, their petition with the Secretary of State, and future events may preclude them from ever doing so.

A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all. *Citizens Protecting Mich's Constitution v Sec'y of State*, 280 Mich App 273, 282 (2008)(citing *City of Huntington Woods,* 279 Mich App at 615-616). In the context of ballot proposals, a controversy is ripe if, "it

[2] Kozma does not specifically identify any legal claim that might be brought against her by circulators or signers.

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is not dependent upon the Board of Canvassers' counting or consideration of the petitions but rather involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance," and where "[a]ll of the information necessary to resolve the controversy . . . is presently available." *Citizens Protecting*, 280 Mich App at 283 (internal quotations and citation omitted).

As discussed in the argument above, CBFM has not filed their petition yet, and unless and until they collect tens of thousands of additional signatures, their petition may never be filed. But, under MCL 168.473b, signatures collected prior to a general election in which a governor is elected cannot be filed after that election. So, even if this Court were to accept CBFM's argument regarding MCL 168.472a, they must collect all of the necessary signatures in time to be on the ballot for the 2018 election, or any signatures they have collected will be discarded anyway. It is entirely unclear when—or even if—CBFM's petition will be filed.

Alternatively, it is also conceivable that CBFM might benefit from a spontaneous surge of popular support and quickly collect all of the necessary signatures within a 180-day span of time. That would render the earlier and outdated signatures unnecessary to a determination of whether the proposal reaches the ballot. CBFM and Kozma dismiss this option, citing a "diminished pool" of sympathetic voters. (Appellants' Br., p 22). This is a curious lament, considering that—as of 2014—there were 7,413,142 registered voters in Michigan.[3] In any

[3] Primary Voter Registration/Turnout Statistics, http://www.michigan.gov/sos/0,8611,7-127-1633_8722-195479--,00.html, last visited 10/11/2016.

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event, CBFM's claims presently depend upon contingent future events that may not occur, or might occur in an unexpected way.

Also, this is not a case involving a "threshold question" about the satisfaction of constitutional requirements, and instead is entirely about the counting or consideration of the petitions. *Mich United Conservation Clubs v Sec'y of State (MUCC)*, 463 Mich 1009 (2001). Likewise, this is not a case involving an examination of the face of the petitions—again, the petitions have not been filed and so the "face" of the petitions is not before this Court. In addition, the information necessary for the Court to make a determination—the date of filing, how many signatures were collected, whether the signatures belong to valid registered voters, or whether CBFM would have a sufficient number of valid signatures even without the 180-day expiration law—is not presently available.

CBFM argues that the *MUCC* case supports its claims and rejected ripeness, but appears to miss the significance of the quoted section:

> The issue in this case is whether the referendum sought is with respect to a law [regarding appropriations or state funding, which is excepted from article 2 section 9]. **This controversy is ripe for review because it is not dependent upon the Board of Canvassers' counting or consideration of the petitions** but rather involves a threshold determination whether the petitions on their face meet the constitutional prerequisites for acceptance. All of the information necessary to resolve this controversy . . . is presently available. [MUCC, 463 Mich at 1009 (emphasis added).]

Here, the entirety of CBFM's claims center on what signatures are counted or considered. *MUCC*, in contrast, centered on whether the statute at issue was exempted from referendum as a law making an appropriation of funds. There is

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nothing in *MUCC* that would support the sweeping conclusion that ripeness arguments must be rejected in ballot-access cases, as CBFM appears to suggest.

Similarly, CBFM's citation to *Grebner v State,* 480 Mich 939, 942 (2007) is misplaced. *Grebner* does not support ripeness premised upon hypothetical events. Instead, the case was ripe because the plaintiff's business would be directly affected by the statute in question, and also because if the statute were unconstitutional, the primary election could not be held. *Id. Grebner,* therefore, has no application to the facts or issues here. CBFM has not alleged any business injury or the inability to proceed with an election. Instead, their claims are premised upon the viability of an as-yet-unfiled petition.

CBFM also attempts to rely upon *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282-283 (2008)—which, curiously, relies on the same *Huntington Woods* case that CBFM urges against. But *Citizens* held that the case was ripe because of a "threshold determination" of whether the proposal was eligible for the ballot for reasons *other than the sufficiency of the petition itself*. *Citizens*, 280 Mich App at 283. That is not the case here, and *Citizens* offers no support for the ripeness of CBFM's claims.

CBFM is thus left with only a general argument that declaratory actions are to be "liberally construed." (Appellants' Br., p 18). But, to construe a complaint "liberally" does not mean that courts can decide speculative or hypothetical claims. Indeed, this Court has repeatedly recognized that, "a claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur

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at all." *Citizens*, 280 Mich App at 282 (quoting *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 616 (2008)). Here, CBFM's claims are premised entirely upon hypothetical and contingent future events that have not—and may not ever—come to pass. By every measure, the claims are not yet ripe and should be dismissed.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs-Appellants CBFM and Kozma have failed to demonstrate any actual controversy, and their claims rest entirely upon hypothetical events that may never occur. Their claims thus fail to invoke the jurisdiction of the courts to enter a declaratory judgment, and their claims are not ripe.

For these reasons, Defendants-Appellees Director of Elections, Christopher Thomas, the Board of State Canvassers, and Secretary of State Ruth Johnson respectfully request that this Honorable Court enter an order affirming the Court of Claims' order granting summary disposition in their favor and dismissing the complaint, together with any other relief that this Court determines to be appropriate.

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