No. _____

IN THE SUPREME COURT OF THE UNITED STATES

THE E-COMPANY, a dissolved Illinois Corporation, T&W EDMIER CORP., a dissolved Illinois Corporation, EDMIER CORP., an Illinois Corporation, K EDMIER & SONS, LLC, an Illinois Limited Liability Corporation, THOMAS EDMIRE, individually, WILLIAM EDMIER, individually, LAKE STREET REALTY, INC., a dissolved Illinois Corporation and E &E EQUIPMENT & LEASING, INC. an Illinois Corporation;

Applicants/Petitioners

v.

TRUSTEES OF THE SUBURBAN TEAMSTERS OF NORTHERN ILLINOIS PENSION FUND,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Supreme Court Justice Brett M. Kavanaugh, Justice to the United States Court of Appeals for the Seventh Circuit:

Under Supreme Court Rules 13(5) and 30, the Applicants request a 60-day extension to file their Petition for a Writ of Certiorari from the judgment of the Court of Appeals for the Seventh Circuit in this case.[1] The Court of Appeals entered the judgment on January 29,2019. Applicants files a petition for Rehearing With a Suggestion for Rehearing En Banc which was denied on March 4, 2019. Unless extended, the time within which to file a petition for a writ of certiorari will expired on June 2, 2019. Copies of the opinion of the Court of Appeals and the order of the Court of Appeals denying the rehearing are attached, respectively as Exhibits A and B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] All parties to this case are listed in the Caption. There are no parent corporations or publicly held companies in this case.

In this case, the sponsor of a multi-employer pension plan (the "Trustees") sought to collect "withdrawal liability" under provisions of the Employee Retirement Income Security Act. 29 U.S.C. §§ 100-1461, which allows a plan sponsor to pursue an employer for unfounded, vested benefits of the plan which purportedly attributable to the employer. The process begins with the issuance of a notice and demand for payment of the withdrawal liability. *Id.* at § 1399 (b). Any dispute between the employer and the plan sponsor as to the withdrawal liability must be resolved by arbitration. *Id.* at § 1401 (a)(1) If an arbitration is not initiated, the amounts demanded by the plan sponsor and the plan sponsor can bring an action for collection. *Id.* at 1401(b)(1) Liability extends to all trades and business which are under common control as defined in regulations promulgated by the Secretary of the Treasury. *Id.* at § 1301(b)(1)

Consistent with Rule 10 (c), Applicants believe that review is warranted because the Court of Appeals decided the constitutional issues raised by them contrary to the due process standards established in *Mullane v. Central Hanover Bank & Trust Co*., 399 U.S. 306 (1950), standards which this Court has consistently adhered to over the last seventy years. The notice of withdrawal liability issued by Trustees was defective for two reasons. First, the notice was addressed only to two bankrupt and dissolved corporations who had contributed to the plan (the E-Company and T&W Edmier) and a third dormant corporation which never contributed to the plan (Edmier Corporation), even though the identities of the owners of the Corporations were known. *Mullane* specifically holds, as do a string of other decisions by the Court, one cannot rely on theories of constructive notice, where the identities of the defendants are known. 399 U.S. at 318. See, also, *Walker v. City of Hutchison*, 352 U.S. 112, 116-17 (1956); *Schroder v.* City of New *York*, 371 U.S. 208, 210-13 (1962); Greene v. *Lindsey*, 456 U.S. 444, 450-54

(1982); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798-99 (1983); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489-90 (1988).

Second, the notice the Trustee sent out was defective. Mallane requires that the notice 'must be such a nature as reasonably convey the required information" for an appearance. 339 U.S. at 314. In *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 13-14 (1978), the Court held that the notice with more information than a statement that payment is over due and the action which will be taken if payment is not made. The information was insufficient "to apprise . . . [Applicants] of and permit adequate preparation for an impeding hearing," *Id.* at 14, failing reasonably advising them of their right to arbitrate, the deadline for its exercise or the forfeiture of their objections to the claimed withdrawal liability, if they did seek arbitration. Moreover, the notice misinformed the Edmiers about the risk of a finding of withdrawal liability altogether stating:

> If there are other corporations under common with T&W Edmier Corporation and the E Company, and *if those other corporations have also contributed to the Pension* Fund, then the contribution history of those companies should also be considered in calculating withdrawal liability. (Dkt # 48-1 at p. 52) (Emphasis Added)

Without citation or explanation, the Court of Appeals found that standards announced in *Mullane* for notice under the Due Process Clause are limited to service of process in lawsuits. (Ex A, Opinion of Court of Appeals at 5-6) This conclusion is anomalous with Mullane itself which does not limit its holding to judicial proceedings but specifically announce the standard as "An elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* . . . ." 339 U.S. at 314. (Emphasis Added)

Any doubt as to whether *Mullane* is confined to court proceedings, is certainly resolved by several subsequent cases by the Court. The most obvious, of course, is *Memphis Light, Gas*

and Water, *supra*, which involved nothing more than a final notice, establishing for the cut off of service, if the municipality was not paid. Due Process was held likewise found to apply to tax sale notices in *Minnonite Board of Missions*, *supra* at 793-95, and *Jones v. Flowers*, 547 U.S. 220, 223-25 (2006), even the tax sale was separate proceeding form the judicial proceeding in which the issue of due process was raised. Tulsa Professional Collection Service v. Pope, 485 U.S. 476 (1988) provides a further example. It involved a non-claim statute in a probate proceeding, intended to advise creditors of the deadline for their claims. *Id.* at 470-81 The notice was administrative; it did not necessary lead to litigation if the creditor filed, but a failure to file automatically barred the claim. Citing *Menmonite* and *Memphis, Light, Gas and Water*, the Court found, 'It is not necessary for a proceeding to directly adjudicate the merits of a claim in order to "adversely" . . . [affect a property] interest. *Id* at *488.*

The Court of Appeals also deviated from the Court's controlling precedents when it decided that procedural due process issue was resolved by the District Court's review of the Edmiers' membership in the alleged membership group. It relied on the its earlier decision in *Central States, Southeast and Southwest Area Pension Fund v. Slotsky*, 856 F.2d 1369, 1369 (7th Cir. 1992) determining whether an exception should be made to the forfeiture Rule. (Ex. A Opinion at 3-4) However, the Court's decision in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1980), rather than Slotsky, governs the standard of review when one is deprived of procedural due process by the failure to provide reasonable notice. It held that a violation of due process could only be obviated by "wiping the slate clean" and restoring the defendant to the position he previously occupied. *Id.* at 87.

Moreover, Slotsky is an imprecise and flawed substitute for procedural due process. It promulgates an exceedingly extreme, evidentiary standard for review – absolutely no reason to

believe that they might be deemed members of a control group." 653 F.3d at 1373. This standard diverts the inquiry from the circumstances and the contents of the notice, ignores the duty of the plan sponsors to provide reasonable notice and invites speculation as to the independent speculation of the recipient of the notice. Indeed, the Court of Appeals engaged in such speculation when stating the Edmiers "chose to ignore" the Trustee's Notice and "had every opportunity to arbitrate and yet failed to do so . . . . (Ex A Opinion)

The requested extension is necessary because the undersigned's co-counsel, George L. Grumley is seriously ill and has been unable to help him. Mr. Grumley was the principal attorney in the case in the District Court. He worked with me on the Applicants' Briefs in the Court of Appeals and on their Motion For Reconsideration. He argued the appeal before the Court of Appeals and the Edmiers' have been long standing clients of his. I had counted on Mr. Grumley's help in dealing with the clients and working on the Petition for a Writ of Certiorari.

Mr. Grumley had an operation last Summer to remove a cancerous growth on his ear and head. Although the operation was a long one, it was thought the problem was behind him and he and he regularly came into the office until he had some cosmetic surgery in late February. He missed a few days in March when he claimed of pain after the February surgery, but his absences became more prevalent after another operation in April on an arm, but assured me and other in the office that he would be fine shortly thereafter. In May, however, his absences have been pronounced and has not been to the office for the last three weeks and unable to work at home. Initially, these absences were attributed to a fare up of his diabetes and we were told that it would pass. However, we have since learned that his cancer has returned. Throughout this period, I and others in the office have tried to cover Mr. Grumley's commitments, as well as our own.

While I have done some work on a Petition for a Writ of Certiorari, I cannot complete by the due date. Because of my continuing efforts to assist Mr. Grumley during his illness, as well as in discharging my own commitments, I believe I will require a full sixty day extension.

Respectfully Submitted,

By: /s/ Merle L. Royce
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