

In the Matter of:

Board of Supervisors of Durbin Crossing Community Development

DISTRICT MEETING

December 18, 2017



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DURBIN CROSSING
COMMUNITY DEVELOPMENT DISTRICT

IN THE MATTER OF:

BOARD OF SUPERVISORS OF DURBIN CROSSING
COMMUNITY DEVELOPMENT DISTRICT MEETING

TRANSCRIPT OF PROCEEDINGS

December 18, 2017

5:04 p.m. - 6:03 p.m.

145 South Durbin Parkway
Saint Johns, Florida 32253

Stenographically Reported By:
Stacia A. Harper, FPR

1 A P P E A R A N C E S:

2 SCOTT D. CLARK, ESQUIRE

3 DAVID DENAGY, DISTRICT MANAGER

4 PETER POLLICINO, CHAIRMAN

5 DANIEL LAUGHLIN

6 TIM BROWNLEE

7 JASON HARRAH

8 DEBBIE DRISCOLL

9 SARAH GABLE-HALL

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1 MR. CLARK: All right. Let me note that it is
2 5:04. We're convening the shade meeting of Durbin
3 Crossing Community Development District. And on the
4 court reporter record, I want to take roll again, so
5 beginning there, if you will identify yourself for
6 the transcript.

7 MR. DENAGY: Dave deNagy.

8 MR. POLLICINO: Peter Pollicino.

9 MS. DRISCOLL: Debbie Driscoll.

10 MR. BROWNLEE: Tim Brownlee.

11 MR. HARRAH: Jason Harrah.

12 MR. LAUGHLIN: Daniel Laughlin.

13 MR. CLARK: Scott Clark. And Madam Court
14 Reporter if you would identify yourself as well.

15 THE COURT REPORTER: Stacy Harper.

16 MR. CLARK: Okay. All right. Thank you for
17 setting this up. I think this will be useful.

18 MS. GABLE-HALL: Hi.

19 MR. CLARK: Come on in, Sarah.

20 MS. GABLE-HALL: Sorry I'm late for the party,
21 but five o'clock is five o'clock.

22 MR. CLARK: Sarah Hall, another one of the
23 board members came in and joined us in progress.

24 This is fairly informal in the way that I do
25 these. I want to tell you some things that I think

1 and certainly answer any questions. When we do
2 litigation like this, you have meetings and not much
3 really gets said to report the progress of the
4 matter because we don't really want to tell the
5 other side what we're thinking because they are
6 sometimes on the phone and always reading the
7 minutes when we have litigation like this.

8 And then the primary purpose of this is that we
9 have a scheduled mediation in January. At your last
10 meeting you appointed your chairman to be your
11 negotiating representative at that. And let me just
12 explain again, maybe it's repetition, how that
13 works.

14 As a public entity, you can only settle the
15 case at a public meeting in the sunshine where the
16 public is allowed to be present and you vote as you
17 would for anything else. So the process we do is
18 that you appoint someone to negotiate in good faith,
19 is what the rule says, on your behalf and to come
20 with a settlement that he thinks would be suitable
21 to the Board, and then you discuss it and then you
22 vote on it.

23 Of course to do that, you need to have a
24 conversation with him and with all of us present so
25 that we get an idea of what we want to accomplish

1 and what some parameters might be when we go into
2 that settlement. Let me -- I'm going to pass some
3 things around that I will refer to. I hope I made
4 enough of those. I'll continue to talk while those
5 are being passed.

6 So we filed a complaint at the end of March
7 against U.S. Bank and Durbin Crossing CDD Holdings,
8 which is the special purpose entity created by the
9 bondholder and essentially our complaint was looking
10 for recovery of a million one eighty-five and some
11 change which is the interest forgiveness.

12 In addition, we have alleged that we are
13 entitled to more damages on top of that because you
14 have now refunded your bonds and you're paying
15 interest on the extra amount. So we have retained
16 an expert witness, Hank Fishkind, and he will be
17 calculating damages and is also doing some analysis
18 on some of the monetary issues.

19 There are some other things that have come to
20 light as I'm receiving and looking at documents, and
21 I will discuss those in a minute, that are going to
22 cause me to make some amendments to the complaint
23 and seek a greater amount of damages than we have
24 been seeking up to now.

25 Right now in the litigation, we are in the

1 discovery process, and I would say that our other
2 parties are kind of slow walking that for whatever
3 strategy purposes, they've got things that they
4 really don't want to give us. But early on, I did a
5 Chapter 119 public record request to the holdings
6 entity, and that's primarily run by an outfit called
7 Lerner Real Estate and Associates. I probably got
8 that name wrong. You may be familiar with them
9 because you worked with them in the course of the
10 tri-party agreement and some other things.

11 They are a real estate management and sales
12 company that bondholders like to hire to do work-out
13 situations. And I got a lot of their documents. I
14 got 20,000 pages of that, and there's -- what I have
15 given you is just some excerpts of things and
16 remarkably, there are some things that the trustee
17 took the position after this closing on December 15,
18 2015.

19 The trustee took the position that this Board
20 was not entitled to have those things in some
21 conversations with your manager. They said, "Well,
22 this is a private transaction. Essentially it's
23 none of your business."

24 That's not the words that they used, but it was
25 clearly the message.

1 And so I have gotten some of those things, and
2 there are some other things that you probably
3 already knew about and have seen, but I wanted to
4 just get a flavor of where I think our case is at, I
5 wanted to show you some things.

6 So flip for a minute past the closing
7 statement. What you have next is the Greenberg
8 Traurig letter of December 14th. I have highlighted
9 the language where I think they clearly said that
10 they contemplated forgiveness of 1,185,043.98 of
11 interest on the bonds. And then they decided that
12 that's not what they meant early in 2016.

13 Among the documents -- and there are other
14 things like this if you look at the next page. This
15 is a spreadsheet that was prepared by the Lerner
16 entity. They were constantly forecasting the return
17 for the bondholder, and you will see that they
18 clearly put a line item there that I circled and
19 highlighted that said that they anticipated
20 forgiving 1,185,043.98 of interest.

21 There are some e-mails that Mike Eckert
22 exchanged with other parties where they said that
23 again that the bondholder would be waiving and
24 forgiving accrued interest on the bond side, that's
25 their attorney, Julio Apponte, and then on the next

1 page, Mike Dady, who worked for the Lerner entity
2 and was speaking on behalf of the bondholders said,
3 "That is our understanding of the bondholder
4 agreement regarding the deal."

5 So in their -- there are a number of other
6 things like this. What I think they are trying
7 really hard for me not to see is the communications
8 between the bondholder, primarily Goldman Sachs, and
9 the Lerner folks that backed these up. Because I
10 guarantee you that Mike Dady didn't -- on his own
11 authority -- say, "Yeah, that sounds like a good
12 idea."

13 He clearly had permission to say that, and that
14 is what they don't want to give me in my opinion.
15 Because I think it sort of blows the thing open if
16 it's not blown open already.

17 These documents and others I think are very
18 clear, and that's why early on, you know, when I
19 looked at some of these things and you asked me to
20 give you my impression on whether you should go
21 forth with this suit, I said, yes. They clearly
22 told you they were going to do this, and then they
23 didn't do that.

24 Now, why did they not do that? In my opinion,
25 and these are in the documents that they don't want

1 me to see, in my opinion, they realized after the
2 transaction closed and they had the money, that
3 "Well, we could just not forgive the interest."

4 Because there was enough money in the different
5 bond funds, there were some excess payments, and
6 they managed to just go ahead and pay their interest
7 and not forgive it. And then they made a
8 calculation and said, "Well, we just won't give it
9 back and maybe they won't do anything."

10 That was a wrong call calculation because you
11 decided to do something. Now they have to come up
12 with a story, and I haven't completely heard it yet,
13 but I think they're going to say, "Well, there were
14 monies there in different funds and under the trust
15 indenture, we have the authority to take the
16 monies."

17 But, of course, that ignores everything else
18 that they said after the trust indenture was signed.
19 But that's going to be their position.

20 What's interesting -- and I went back and read
21 this after I knew more. It's the last thing in your
22 package. There's a letter dated January 20, 2017,
23 and this was written by the trustee two-year
24 manager, and the letter came because Dave had
25 written the letter and attached a bunch of things

1 and basically said, "We want to refund our bonds.
2 We've got a problem here. So what are you going to
3 do about this?"

4 So this letter, which was actually drafted by
5 Warren Bloom, I called him and asked him that
6 because I recognized his writing style. And he
7 said, "Yeah."

8 And remarkably what they say, if you go to
9 what's page 3, the second sheet. I have highlighted
10 that statement that said, "There was never any
11 intention on the part of the trustee or the 2005A
12 bondholders to provide the district with a cash
13 windfall or credit of a million one eighty-five,
14 etc., beyond the forgiveness described above in
15 connection with the D.R. Horton sale," which is
16 forgiveness of assessments.

17 So after the fact, even though they clearly
18 said, "You can forgive this amount of assessment
19 interest and there will be a corresponding
20 forgiveness of bond interest," they say, "Well, we
21 never meant that."

22 And so this is what in the law is a fraud. If
23 you say something and when you said it you didn't
24 mean to do it, then it's not a mistake, it's a
25 fraud. It's a lie. And when you do something like

1 that purposefully, then you open the doors to
2 punitive damages.

3 And so between this and some other things that
4 I have already seen, I'm working on an amended
5 complaint, and it's -- one of the things that I'm
6 going to do is I'm going to seek punitive damages
7 against U.S. Bank for telling us something that they
8 never intended to do because that's what they said.

9 They said, "We never intended to give you the
10 interest forgiveness. We just told you that because
11 we needed your estoppel letter. We couldn't close
12 the Horton deal unless you released the estoppel
13 letter," and your attorney, Mr. Eckert, was smart
14 enough to say, "Well, before we release that, we
15 need some assurances here."

16 And they gave those assurances and your
17 attorney and staff said, "Okay, now, we'll release
18 it." And then they just didn't perform.

19 The other thing that I have discovered is that
20 there's some problems I think in how the trustee at
21 the bidding of Lerner and the bondholder handled the
22 monies. And if you look at the settlement
23 statement, I have highlighted some line items. I
24 apologize for the tiny size of it. But from the
25 proceeds -- really in my mind the money -- all the

1 money that was left over should have gone to pay
2 down bonds.

3 You had this default, and you want to pay as
4 much as you can off of the bonds. And so on the
5 front page, you see that 367,000 almost is put over
6 into the reserve account, which we choose later to
7 pay interest -- I think partially the interest that
8 they were supposed to forgive -- they fairly
9 generously paid Lerner. There is a real estate
10 commission. That's probably okay. And then a
11 \$50,000 success fee, their monies to the trustee.
12 They pay closing fee to the trustee. Another
13 348,000 of your money, sales proceeds, went to pay
14 the 2006 bondholders, and then another 261,000 went
15 into an escrow account to pay the next two years of
16 interest on behalf D.R. Horton.

17 That wasn't ever in the deal that you agreed to
18 that you were going to pay Horton's interest.
19 Horton should have paid their interest. And the
20 deal that was written up and that you agreed to in a
21 resolution that you passed was that the -- that
22 money to the 2006 bondholders, because that's the
23 impact fee issue and something had to be paid to
24 them for delinquent interest, but D.R. Horton agreed
25 to pay a third of it, which they did; they increased

1 their price. And the 2005A bondholders agreed to
2 absorb a third of it. Well, they didn't. What they
3 did was that they had you pay their third of it
4 after they agreed to absorb it.

5 Beyond that, there are about \$2,600,000 of
6 transfers that came out of the reserve account for
7 the 2005A bonds. And why that's important is when
8 you go to refund the bonds, that reserve account is
9 money that should be available for you to pay them
10 down. So to the extent that the reserve account has
11 been spent on something else, then that money is not
12 available.

13 Now, you agreed in one of the indenture
14 amendments to spend -- to allow up to 2.5 million of
15 the reserve account to be spent to do certain
16 things. And there were certain defined things. The
17 big thing was to acquire tax certificates and redeem
18 the tax deed on the DOA GMAC properties so that it
19 wouldn't be tossed because of the tax deed's issue,
20 your recovery gets very difficult.

21 In addition, they agreed some monies would come
22 to you -- and I don't think all of it did -- to pay
23 your O&M. They paid Lerner's bills; they paid a lot
24 of bills to Lerner, which haven't yet been justified
25 to me. They paid quite a few bills a Lakeland law

1 firm called Peterson & Myers, which was doing some
2 undefined work for the Crossings entity. I don't
3 think that's something we agreed to do. And they
4 paid a lot of bills to Greenberg Traurig for doing
5 what we don't yet know.

6 And so there was lot of money that went out of
7 that debt service reserve account, which I don't
8 think you agreed to, and that's money that should
9 have reduced your bond refunding number. And I
10 think it's at least half million dollars without
11 having all the backup that I'm requesting. I think
12 it's at least about a half million dollars.

13 And so I propose prior to our mediation, to
14 file this amended complaint, which we're going to
15 seek punitive damages, and to add that into the mix,
16 that additional money that I think they essentially
17 misappropriated. They directed it to the wrong
18 place.

19 The other reason that becomes significant is
20 right now, we don't recover our attorney's fees if we
21 win because in the law you have to have a contract
22 or a statute that does that. The tri-party
23 agreement has an attorney's fee clause, and the
24 tri-party agreement says that they would hold the
25 property on behalf of the District and the

1 bondholders, and it says that when the property was
2 sold, they would disperse the money in accordance
3 with the trust indenture and the tri-party
4 agreement.

5 So to the extent that they did things that they
6 weren't allowed and we win that, I think we recover
7 attorney's fees. And then in all complex litigation,
8 putting the attorney's fees on the table is something
9 that helps you a lot. Because right now, I think
10 their posture is: Our worst day is a million one
11 eighty-five plus what we have to pay our attorneys.

12 And they're holding the million one eighty-five
13 so I think part of their strategy is: At the end of
14 the day, we just have to give it back, but maybe we
15 can give half of it back, and then we'll be that far
16 ahead.

17 So going into the mediation, I want to try to
18 convince them that it's not that, that they could
19 actually dig into their own pockets and pay some
20 significant funds.

21 So that I think kind of transitions us into,
22 you know, what do we want to accomplish at the
23 mediation? What's our posture going to be?

24 Probably before I do that, I want to quit
25 talking now for a minute because I've said a lot of

1 things, and you probably have questions. So I want
2 to just stop and entertain any questions that you
3 have.

4 MR. BROWNLEE: Didn't they make an offer for
5 settlement of some dollar amount at some point?

6 MR. CLARK: \$600,000 was the last offer.

7 MR. BROWNLEE: But they did offer to settle,
8 which kind of reinforces the fact that they owe us
9 the money.

10 MR. CLARK: The history of litigation for the
11 bondholders and for U.S. Bank is that they fight to
12 the death, and they just try to outspend you. So if
13 you go over to, I think it's Lee County, you'll find
14 a case called Fiddlers Creek where a district sued
15 U.S. Bank, and it's been going on for, I think, six
16 years. And there are 1,500 entries in the Court
17 docket if you go online. So I can only imagine the
18 types of money that both sides have spent.

19 So that's their posture. That's what they
20 usually do. For them to offer significant money up
21 front before we even filed, you know, tells me that
22 they know they are going to pay something.

23 MR. BROWNLEE: Are they now trying to wear us
24 down?

25 MR. CLARK: I think so.

1 MS. DRISCOLL: Yes.

2 MR. POLLICINO: Deep pockets.

3 MS. DRISCOLL: Yeah. I was going to say.

4 Well, and also their attorney's are salaried

5 attorney's potentially or employees of that.

6 MR. CLARK: They are using Akerman Senterfitt.

7 MS. DRISCOLL: Oh, they are?

8 MR. CLARK: Their attorney's are not cheap.

9 MS. DRISCOLL: Okay.

10 MR. CLARK: But their attorney's are not doing a

11 lot. They haven't sent me any discovery. So I

12 think their posture is just stalling.

13 MS. DRISCOLL: It seems to be.

14 MR. CLARK: Your directive is to make this take

15 as long as possible and make them spend as much as

16 possible. In strategy it works.

17 MR. POLLICINO: They know we're nonprofit.

18 They know we don't have deep pockets.

19 MS. DRISCOLL: Exactly.

20 MR. POLLICINO: They know our attorney's on an

21 hourly basis. So that's -- I mean, if I was on

22 their side, I would do the same thing, right? Wear

23 down, delay, delay, incur costs, force us into a

24 settlement that maybe we're not happy with. But we

25 want to put it behind us and just be done with it.

1 So, you know, I think we just hold the course.

2 One of the things I want to talk to you about
3 is, you know, in preparing for these things, I
4 always like to fully understand where the other side
5 is going to come in in the mediation. The word that
6 concerns me the most in their response is
7 "windfall." That they keep saying it's a windfall
8 to the CDD if they give you this money. And I read
9 there three points they made in their letter.

10 What arguments can they make or will they make
11 to support the fact that if they do reimburse us the
12 \$1.1 million dollars, it is, indeed, a windfall to
13 the CDD?

14 MR. CLARK: Here's the way they view windfall.
15 This is how they regard the money held by the
16 trustee. In fact he's uses this language --

17 MR. POLLICINO: That's why I raised it. I
18 don't like the word.

19 MR. CLARK: A couple of times in the letter he
20 -- I say "he" because it's Warren Bloom but
21 Kathy Broker signed it. So she says that the
22 bondholders did all these wonderful things for you
23 and that they paid it with their own money, the
24 bondholders own money. That's the way that they
25 view the monies that sit in the hands of the

1 trustee. But it's not their money. It's, you
2 issued bonds and you're obligated to pay it back.
3 So it's your money. It's just like borrowing money
4 from a bank. When you borrow money from a bank,
5 it's not the bank's money. It's your money, but you
6 have to pay it back.

7 And so that's the argument that they're making
8 that it's a windfall. So we covered all these
9 obligations for you and we worked so well and have
10 been so cooperative with you that it would be a
11 windfall for you to walk away with a check for a
12 million one eighty-five.

13 And it's simply not true because the reserve
14 account money is your money. I mean, if you
15 default, if you don't pay your interest, then they
16 get to take it, but you paid your interest.

17 MR. POLLICINO: It's semantics. In prepping
18 for the mediation, you know, I mean, I'm sure we'll
19 be able to rebut the windfall argument. Depending
20 on how you spin it, it could be presented in a
21 compelling way, right, to a mediator. It's like,
22 yeah, guys, this is a windfall, right. It's not --
23 but I see your point.

24 MR. HARRAH: That's what I was wondering too.
25 I mean, do they have the opportunity to ask us, what

1 are you going to do with the money when we give it
2 to you? Is it, you know, a luxury pool, which they
3 consider may be a windfall as a mediator? We're
4 going to take --

5 MS. DRISCOLL: Is that income consequential?
6 What is going to be done with the money?

7 MR. HARRAH: I just don't know how that plays
8 with the mediator.

9 MS. DRISCOLL: True.

10 MR. HARRAH: If we said, "No, we wanted to pay
11 down our debt," that's what we would've done if we'd
12 had the money up front. We would've had less
13 interest over time.

14 MR. CLARK: I think the best answer to that
15 question is no, we want to be in the situation that
16 we should have started in.

17 MS. DRISCOLL: Exactly.

18 (Simultaneous cross talk.)

19 MR. CLARK: We pay our debt down and lessen the
20 obligation of our residents.

21 MR. HARRAH: That's not cash windfall. That's
22 what we're owed.

23 MS. DRISCOLL: That's not a windfall. Exactly.

24 MR. BROWNLEE: The residents are going to be
25 funding our reserve going forward, and if we're able

1 to reduce that to them, we're more or less refunding
2 the money to the residents that are still here.

3 MR. POLLICINO: There's really two components,
4 right, of my approach at the mediation. It's what's
5 owed in the agreement, right, or what we understood
6 was forgiven, the 1.1 under the contract that went
7 back and forth with the bondholders, and two, what
8 you spoke about with Chris Kind is the detrimental
9 reliance of the CDD on what we did with that letter,
10 talked about the refinancing, the increased interest
11 rates, right, the market conditions changed
12 significantly over that summer where --

13 MS. DRISCOLL: Because we had to push off on
14 the vote because of that.

15 MR. POLLICINO: Right. The rates were going
16 up. There was a lot of missed opportunities and of
17 course the punitive, right? So if we can convince
18 the -- well, not so much the mediator but if we can
19 convince the other side that there's risk if they
20 don't settle, that we can be successful in punitive
21 damages, you know, that's good for us.

22 But, you know, speaking with Scott he can
23 expand upon this, you know, the way the dealings go
24 down, I have a feeling there's no way the gentleman
25 -- what's the gentleman's name that wrote the letter

1 that we were going to depose?

2 MR. CLARK: Warren Bloom.

3 MR. POLLICINO: Warren Bloom.

4 -- wants to come in and answer question with
5 Scott for, you know, six hours under oath and put
6 letters in front of him. So it's very challenging
7 for them.

8 MR. CLARK: They have actually got a really
9 sensitive problem because Julio Aponte wrote the
10 letter at the urging of the bondholders, essentially
11 saying, "We will forgive the interest."

12 I sent a request for admission saying admit
13 that Julio Aponte had authority to say that on
14 behalf of the trustee, and they said, no. Which was
15 a remarkable position for them to take since
16 Cathy Broker was copied on the letter and didn't
17 pick up the phone and say, wait, wait, your -- this
18 is all wrong.

19 So I don't know what is going on on there, but
20 they have been really tight with Greenberg since I
21 have been doing this stuff. So that's got my head
22 spinning, and Julio Aponte, who no longer works at
23 Greenberg, I think left in unpleasant circumstances.
24 I don't know that till I take his deposition, but
25 he's the first deposition. I'm really trying to see

1 if we can do that before mediation, but they'll
2 stall that off I'm pretty sure.

3 MR. DENAGY: Scott, what about the bondholder
4 or holders? They have the vested interest in this.

5 MR. CLARK: It's interesting because I have had
6 a couple of conversations with an attorney in New
7 York City who has been hired by Goldman to deal with
8 my document request, and we talked recently about
9 the documents and, you know, resolved some issues or
10 I thought, but I still haven't seen the documents.

11 And she said, "Hey, I may be talking out of
12 school here because it's not my case, but why hasn't
13 this matter settled? I thought we made a pretty
14 robust settlement offer."

15 And I said, "Robust is in the eye of beholder.
16 It was real money, but it obviously wasn't robust
17 enough. And I said that and you guys quit
18 negotiating so we filed suit."

19 That's where we are.

20 MR. POLLICINO: My last question that I have,
21 and again, if I'm off base, just tell me, but I'm
22 just reflecting on my insurance litigation
23 experience. In insurance we are allowed to make a
24 mistake. If one of my adjusters sends out a letter
25 and it's incorrect or they made a mistake, hey, this

1 claim is covered, turns out not to be covered, we
2 could retract the mistake, but we have to make good
3 on the error that we made.

4 So if you strip away all the legalities of this
5 issue, if they come in to the mediator, "You know
6 what, we made a mistake. We didn't mean to issue
7 that letter. It was confusion. We're sorry. It's
8 clearly a mistake."

9 How does Florida case law respond to if they
10 step away and say, "Yep, you're absolutely right.
11 We screwed up. We made a mistake. We will offer
12 you a couple of hundred dollars for your trouble,
13 but that letter should have never been issued"?

14 MR. CLARK: Okay. So here in legal theories,
15 because complaints deal with different legal
16 theories so I could use several. One of them is
17 fraud, which is a lie. It was intentional on your
18 part.

19 Another one is called negligent
20 misrepresentation, and that's the mistake thing. So
21 it says even if that was a mistake, even if you said
22 it and you didn't mean to say it, or you were
23 careless saying it, we still relied on it. I mean
24 once we have relied on it, then you can't take it
25 back.

1 And the other theory is something called
2 promissory estoppel, which says you promised to do
3 something, and we relied on it. And you did. You
4 as a District made a lot of concessions to get this
5 stuff done. You gave up, I think it was four years
6 of O&M on this property just to get it done. And
7 you gave up a lot of money out of your reserve
8 account that could have been used to redeem bonds.

9 And so in my mind, no, legally they don't get
10 to say no harm no foul --

11 MS. DRISCOLL: That they made a mistake.

12 MR. CLARK: -- because there's harm.

13 MR. POLLICINO: Right. My point is if they
14 say, "Yes, we made a mistake. We're not paying you
15 back 1.1 million but we will pay your detrimental
16 reliance cost. Tell us what they are," is there any
17 way they could successfully disengage the 1.1, say
18 that was mistake, sorry about that, but we will pay
19 your detrimental reliance on the demand letter?

20 MR. CLARK: My answer to that is when people
21 make mistakes, they own up to them and instead of
22 that, they have stalled us on getting basic answers
23 for almost a couple of years now. I mean, it's been
24 a couple of years since the transaction closed.
25 They sent him an e-mail and said, "This is none of

1 your business basically. This is a private
2 transaction. You're not a party to it."

3 So it's hard to come back -- it's like all the
4 stuff in the news with the sexual harassment.
5 People now come out and say, I really regret that.
6 That's not who I am.

7 Well, yeah, it is who you are. You got caught.
8 So now you feel bad about it. That's my take on it.
9 You got caught. You were counting on us not filing
10 this lawsuit, and we did. So now you're going to
11 have to react to it.

12 MR. POLLICINO: Yeah. I just want to make it
13 impenetrable from our perspective that they don't
14 come back and play that later, that, yeah, my bad.

15 MR. CLARK: Our mediator is a sharp guy. I
16 don't think he's going to let that --

17 MR. BROWNLEE: Do we know who the mediator is
18 going to be?

19 MR. CLARK: Yeah. He's a guy name Jay Cohen
20 and is considered the very best in the Orlando
21 marketplace and beyond. He's got a pretty good
22 success rate, and he carries himself in a way that
23 you're just not going to BS him. He's not going to
24 put up with it.

25 MR. BROWNLEE: Do we have to abide by what the

1 mediator says?

2 MR. CLARK: No. No. Mediation -- and I should
3 have explained it better. It's a purely voluntary
4 thing. He's going to try to work both parties
5 because that's his job. So he's going to go in
6 between rooms. He's going to tell them, you really
7 have a problem here. And he's going to come tell us
8 that we have a problem. Because his job is to move
9 the parties together.

10 MS. DRISCOLL: So it doesn't go to court.

11 MR. CLARK: But at any time in the process, we
12 can say, no, we're not going to move from where we
13 are. And then it's over.

14 MR. DENAGY: Scott, what's the best case
15 scenario we can hope for in the mediation? What is
16 our hope to achieve in January.

17 MR. CLARK: By putting more on the table, I
18 want to put them more in a mood where they will give
19 the whole million one eighty-five back or something
20 closer to that. I think we'd be naive to think that
21 we will walk out of that meeting with the whole
22 thing without compromising somewhat. Because if
23 people are going to pay what's their worst day in
24 court, they will just go to court. So they are
25 looking for something less than that, which is why

1 I'm trying to --

2 MR. POLLICINO: Raise the middle.

3 (Simultaneous cross talk.)

4 MR. CLARK: --make them think that their worse
5 day may be two million.

6 MS. DRISCOLL: Got it.

7 MR. BROWNLEE: How soon can we do that?

8 MR. CLARK: That will be done before the
9 mediation. I'm working on it right now.

10 MR. BROWNLEE: An amended complaint?

11 MR. CLARK: Yeah. I've already got it in
12 draft --

13 MS. DRISCOLL: And they can't push back the
14 mediation from that? After they get the amended
15 complaint can they request...

16 MR. CLARK: They can try. They can file any
17 motion that they want to. They threatened to and
18 they haven't yet but they could use that as an
19 excuse to do it, but I don't think the judge will
20 like that.

21 MR. DENAGY: Can the mediation be continued?

22 MR. CLARK: Yeah. And that actually happens
23 frequently. If you're making progress but you just
24 can't get there, a lot of cases settle after
25 mediation is over. More settle after mediation than

1 at mediation because a negotiation doesn't really
2 get good till somebody walks out in my opinion.
3 Especially on something this big.

4 MR. HARRAH: Real quick, let me ask you: In
5 all the research you've done, this 1185, you haven't
6 found anything that we have sent via e-mail,
7 letters, that says the District forgoes the \$1.1
8 million? There's nothing crystal clear on their
9 part that they can come after us?

10 MR. CLARK: I haven't seen it.

11 MR. HARRAH: You haven't seen e-mails, letters,
12 nothing?

13 MR. CLARK: I think that they would've been
14 more eager to give that to me.

15 MS. DRISCOLL: Because it would've ended
16 everything in the beginning.

17 MR. HARRAH: And then number two, for the stuff
18 you've requested in discovery, what's the deal with
19 that if you don't get it? I mean, what is your next
20 -- you're probably not going to get it before
21 mediation because they don't want -- it will weaken
22 the case for them, right?

23 MR. CLARK: Well, let me back up.

24 MR. HARRAH: Because a smoking gun sounds like
25 it's out there. It's just getting it.

1 MR. CLARK: Here's their excuse. They said,
2 "You've requested more than a million documents, and
3 it's just too much. And if you want that much, then
4 you need to bear part of the cost."

5 And so I said, "Give me your spreadsheet that
6 shows the documents." So we have been talking about
7 that. So it turns out that the million documents is
8 everything that eight different people have on their
9 computers.

10 So I said, "Did you insert the word Durbin as a
11 filter?"

12 "No, we didn't do that."

13 Okay. Well, that was kind of obvious. So that
14 suddenly came down from a million-something to
15 42,000 documents. And I said, "Well, that's
16 manageable. Give me those 42,000 documents."

17 And I filed a motion that said, "Judge, they
18 are stalling."

19 And we're required to try to work it out, and
20 we worked on that last week. And by the end of last
21 week, they were to have an answer, and it's now
22 Monday of this week. So in the morning, I plan to
23 file that, and I have told them that, unless we have
24 a satisfactory answer, I'm going to file it and set
25 it for hearing.

1 They probably don't really want that. It
2 doesn't look good for them to go to the judge and
3 for me to be saying, "But they haven't even given us
4 one, and we're coming on four months for this
5 request, and surely they could've found one document
6 that was relevant to this to give to me and they
7 haven't."

8 So it's a game.

9 MR. HARRAH: So what's the judge's play if they
10 keep stalling to provide it? Can he -- what
11 latitude does he have to force --

12 MR. CLARK: Order them to do it, sanction them,
13 make them pay our attorney fees for having to bring
14 the matter before the Court. But worse than that is
15 your reputation. The progress of a case is really a
16 relationship between the attorney's and the judge.
17 So part of the way you win a case is by making the
18 judge like both your position and the way that you
19 put it forward. And so if they come in and are just
20 being obstinate, that doesn't help them very much.

21 MR. HARRAH: My last question, sounds like you
22 have dealt with U.S. Bank in the past. You've had
23 other --

24 MR. CLARK: Yeah. I have been doing bond
25 defaults since 2001.

1 MR. HARRAH: Crystal ball, how does this play
2 out in January? I'm just trying to see where do you
3 think it's going to come to?

4 MR. CLARK: I think they will move north of the
5 600. I don't know how far north. Before we filed
6 this, I think we wanted to be around nine
7 thereabouts. And now you have spent money, and I
8 don't know if that's a good number anymore but
9 that's part of what we're here to talk about.

10 MR. HARRAH: And that's what I was going to get
11 at. I mean, do we need to give the chairman our
12 opinions of what that value is?

13 MR. CLARK: Yeah. He needs to know -- although
14 we're not going to vote on it --

15 MS. DRISCOLL: It's a matter of opinion.

16 MR. CLARK: -- it's not binding. It's just
17 discussion, but I think he needs to have some idea
18 of a range.

19 MR. HARRAH: And for the 900, I mean, as you
20 say it's almost like back and forth horse trading
21 between the rooms, I mean, could it be as much as
22 900 plus our attorney fees? Would the mediator look
23 favorably on that?

24 MR. CLARK: They won't quantify it that way.

25 MR. HARRAH: But we will have that value of

1 attorney fees to date that we can bring into the
2 discussion?

3 MR. CLARK: Yeah. When we start the mediator
4 says -- looks at me and says, "What do you want?"
5 And I will have a sheet or PowerPoint or however I
6 present it. And say: Well, here is what we think
7 we're entitled to."

8 And that number is going to be a high number.
9 We're going to through all the stuff -- like when
10 you buy a car, throw some dealer fee --

11 MS. DRISCOLL: And you're going to go with the
12 punitive damages as well as part of all of that too?

13 MR. POLLICINO: I think the level of
14 sophistication -- I mean, my opinion, you know, the
15 settlement point with the mediator -- says, listen,
16 we're on the board. We volunteer. We represent the
17 residents. We've been taken advantage by a
18 multinational corporation, right, that's strong
19 arming us in this situation where we're just looking
20 out for the best interest of our residents. And,
21 you know, we relied on the information that was
22 provided to us. Our residents were hurt by it.
23 Here's how much they were hurt by it. And, yeah,
24 1.1 is great starting point, but these are real
25 damages --

1 MR. HARRAH: That would be good to know --

2 MR. POLLICINO: -- to report to the mediator.

3 Listen, these are real residents, real people --

4 MR. HARRAH: Well, how much does the 1.1 equate

5 to per resident? That would be interesting to know.

6 To put it in perspective, look, this is how much

7 each resident is out because of this.

8 MS. DRISCOLL: But it's more than that now

9 because there's also the attorney's fees, and it's

10 also the other damages --

11 MR. HARRAH: That's what I'm saying.

12 MS. DRISCOLL: -- that we could've refinanced

13 at a different rate. So the damages are more than

14 just the 1.1.

15 MR. DENAGY: Scott will Hank be at mediation?

16 MR. CLARK: He's got it on his calendar. I

17 don't want to have him there as window dressing

18 because he charges money, but he's working on trying

19 to quantify these damages. And if he's in a place

20 where I think he's ready to do that, then it's

21 valuable to have him present the number instead of

22 me.

23 MS. GABLE-HALL: How many homes do we have?

24 2100?

25 MR. HARRAH: Let me ask you this then, Scott:

1 Let's assume we go to mediation. Peter, you guys go
2 back and forth and ultimately at the end of the day
3 agree to disagree, we can't come to a fair price,
4 walk me through hearing dates -- I mean, how long of
5 a timeline are we looking to be in front of a judge?
6 Will the judge ask you to go back to mediation again
7 or something.

8 MR. CLARK: She can. That doesn't usually
9 happen but she can. Our timeline right now is
10 looking for a court date toward the end of next
11 year. There is noise that the judge assignments are
12 going to shift and the court divisions are going to
13 shift a little bit January 1st. And I'm almost
14 certain it's going to push us back.

15 MR. HARRAH: So at least a year before we get
16 in front the judge then?

17 MR. CLARK: Yeah. It will be more than a year.

18 MR. HARRAH: So that's what I'm looking at. I
19 don't know what our monthly rate is or what we're
20 spending, but, I mean, if it stretches out for
21 another year, I mean, it has to come into the
22 account of reducing from the 900 or whatever that
23 value is.

24 MR. POLLICINO: That would be their strategy,
25 right?

1 MS. DRISCOLL: Well, it is their strategy. He
2 already just said that that's been their strategy
3 before.

4 MR. POLLICINO: No. It's a good strategy then,
5 right?

6 MR. HARRAH: I deal with it every day.

7 MS. DRISCOLL: Yeah, it's a great strategy.

8 MR. POLLICINO: If I were them, I would be
9 doing the same thing.

10 MR. HARRAH: They're paying hourly fees to some
11 law firm too, right? I mean they got a firm on the
12 books that say in house U.S. Bank attorneys.

13 MS. DRISCOLL: Yeah. That's what I thought it
14 would be.

15 (Simultaneous cross talk.)

16 MS. DRISCOLL: Peter, have you thought, like,
17 of a number in your head at this point in time?

18 MR. POLLICINO: It's so hard. You know, you
19 guys know me. I won't leave a penny on the table,
20 but I think it really just comes down to how
21 compelling the opening argument is and the reaction
22 of the mediators to the opening argument. Like
23 Scott says, I have been to thousands of these
24 mediations. He's exactly right. They're going to
25 come back. They're going to beat us up. Right?

1 And say, you guys are going to lose. And then
2 they'll go back to them and say, you guys are going
3 to lose.

4 It really comes just down to how willing they
5 are and if we're ready to go.

6 MR. HARRAH: And I understand that from the
7 aspect of the 1.1 to 1.7 whatever that 500 delta we
8 add to that is --

9 MS. DRISCOLL: Right.

10 MR. HARRAH: I understand that. The mediator
11 to think that we should agree to anything less than
12 exactly -- I mean, it's down to the penny. We're
13 talking .98 is an exact amount. So that -- we think
14 we owe less than that --

15 MS. DRISCOLL: We're owed less than that.
16 That's my thought process.

17 MR. POLLICINO: It's going back to what we said
18 before. They're going to come back and be like, "We
19 made a mistake. We didn't mean it. The letter was
20 sent erroneously," you know, "but I'll tell you
21 what, we'll give you 900 grand."

22 MS. DRISCOLL: Well, if the letter was sent
23 erroneously, then at some point in time there
24 should've been an e-mail back saying, my mistake on
25 the previous e-mail.

1 MR. POLLICINO: All stuff -- hopefully the
2 mediator is sharp enough and say, "Look guys, this
3 is the starting point."

4 MR. CLARK: The mediator is going to -- he's
5 going to listen to a little bit of that, and he's
6 going to say, you know, "You're talking to the wrong
7 guy. If you want to argue with each other, then
8 schedule a hearing and go argue in front of the
9 judge. I'm just here to see if you want to settle
10 the case. Don't tell me how badly you're going to
11 beat them up. Tell me what you want to do today."

12 MR. POLLICINO: His argument is going to be
13 like, your day in court is coming. Right. Come up
14 with a number you can both hate basically, right?
15 That's what it comes down to.

16 MR. HARRAH: And that's what it is. The 1.7
17 number or whatever we come up with, that's our
18 January 2019 court date number. Right? But our
19 mediation in January 2018 number is we simply want
20 our money back. That's it. We're not asking for a
21 dollar more.

22 MS. DRISCOLL: Right. But I think you go into
23 it with the larger amount and then the negotiating
24 power, this is what we want. We want some money
25 back, to the penny, that amount.

1 MS. GABLE-HALL: Why can't you just say pay
2 that amount in January or we want this amount the
3 following January.

4 MR. POLLICINO: That's the plan.

5 MR. CLARK: That's what we're saying.

6 MR. POLLICINO: I have been to a number of
7 these. They are not going to offer the 1.1 out of
8 the gate.

9 MS. DRISCOLL: No way. Why would they? It's
10 like going to buy a car.

11 MR. HARRAH: How much would you presume
12 attorney fees we would incur between now and January
13 2019, just ballpark? If we wanted to come off the
14 1.1 and reduce by that amount attorney fees,
15 100,000 --

16 MR. CLARK: I think you're going to pay about
17 ten thousand a month until you get close to trial.
18 When you start preparing for trial, then those
19 numbers just -- you've seen it before --

20 MR. HARRAH: Yeah.

21 MR. CLARK: -- they exponentially --

22 MR. POLLICINO: The worst thing that can happen
23 in this case is we stonewall, we stonewall, the day
24 of trial, Scott give us a call and says, "Hey, you
25 know, they're offering 975 to settle, and I think we

1 should take it because X, Y, and Z." We'll we
2 could've got a 975 a year earlier without spelling
3 100 grand in legal fees. So we just have to be
4 smart about it.

5 MR. CLARK: There was a speech that I always
6 give because it's remarkable how many cases settle
7 on the court steps for the last number that was on
8 the table at the mediation.

9 MS. DRISCOLL: Absolutely.

10 MR. CLARK: It's remarkable how much it happens
11 except that now it's not as good a number because
12 you've spent a lot more.

13 MS. DRISCOLL: Because you've spent money
14 getting to that number.

15 MR. HARRAH: Okay. So the 1185 -- if you take
16 150,000 that's projected to spend, we're right at
17 million bucks even. So I think 900 is still a valid
18 number. I can't imagine -- if we could spend
19 \$150,000 and go to court and if we would do that, do
20 you think based on your experience, would the 1.1 be
21 a settlement or do you think we would get somewhere
22 between 1.1 and 1.7 if we held out till January '19?

23 MR. CLARK: The key to that will be --

24 MR. HARRAH: I'm just trying to see where we
25 stand.

1 MR. CLARK: -- the key to that will be whether
2 we can make the punitive damages claims stick. Here
3 is why I say that: In Florida you can't -- you have
4 to get permission from the Court after a hearing to
5 seek punitive damages. Okay. So in the amended
6 complaint, all the magic words will be in there, but
7 there's a point in which you go to a hearing and
8 present some of the evidence that you found and say,
9 "Judge, this is why we think we're entitled the
10 punitive damages because what they have done is not
11 just wrong it's outrageous, it shocks the conscious
12 so much that they should be punished for doing
13 this."

14 MR. HARRAH: I mean, if they come back with a
15 600, 700, I mean, do you have a number that you
16 would advise Peter that you feel comfortable with
17 that you think -- based on everything that's
18 forecasted to go on, that you feel that would be a
19 good number?

20 MR. CLARK: I think my thought is the 900 to a
21 million range.

22 MS. DRISCOLL: Yeah. That's exactly what I was
23 thinking too.

24 MR. HARRAH: That's my thought. It really is.

25 MR. POLLICINO: I'm there.

1 MR. HARRAH: I think the 900 -- I would --
2 anything less -- 6- 700,000, I would rather spend
3 150 and take it court in January of '19.

4 MS. DRISCOLL: Because now you're looking
5 double of that in January. I agree with that.

6 MR. POLLICINO: We have to feel out the
7 mediator. It's hard to assess until you go in there
8 because, I mean, you know, we can make an extremely
9 compelling argument, and if the mediator is as good
10 as he claims to be --

11 MR. HARRAH: They still have to agree.

12 MR. POLLICINO: We can still make an argument
13 that, look, you may pay a couple bucks more than the
14 base demand, but you're putting it away. And the
15 CDD has a really good argument to make against
16 punitive damages and detrimental reliance but it
17 just depends.

18 MR. BROWNLEE: The amended complaint is going
19 to include the punitive damages, which may be touch
20 and go at this point, but it also includes the money
21 that they spent out of the reserve, which is very
22 clear in my opinion --

23 MS. DRISCOLL: Correct. Wrongdoing.

24 MR. BROWNLEE: -- so I don't think we should
25 just write that off.

1 MR. CLARK: What's not clear is that I have not
2 quantified that because I lack some of the records
3 that I should have by now, but it's pretty clear to
4 me that they have overstepped what we agreed by a
5 few hundred thousand dollars.

6 MR. BROWNLEE: It's more than that --

7 MS. DRISCOLL: Oh, it is way more.

8 MR. HARRAH: We keep saying the word "punitive
9 damages" for the additional 500, but really this
10 1185 is wrong. Do you know what I mean,
11 theoretically?

12 MR. BROWNLEE: Well, if the 500 is punitive.
13 We're talking about something different here.
14 Totally different. This is money that came out of
15 the reserve.

16 MR. HARRAH: Oh, I thought you were talking
17 with everything else you would add another 500 to
18 the 1.1.

19 MR. CLARK: No. That's the money from the
20 reserve when I say 500.

21 MS. GABLE-HALL: What money came out of the
22 reserve?

23 MS. DRISCOLL: They used money out of the
24 reserve to compensate Lerner --

25 MS. GABLE-HALL: Oh, that's what that statement

1 was?

2 MR. BROWNLEE: It was used inappropriately.

3 MS. DRISCOLL: Inappropriately to pay bills.

4 MS. GABLE-HALL: So that's what that statement
5 was, right?

6 MR. BROWNLEE: That should be in my opinion
7 included in the 185. Maybe not the 500, but if we
8 say 900, then we're foregoing a million four.

9 MR. HARRAH: Yeah. And just real quick I want
10 to ask you is there was letters signed, money
11 released, I mean, in my profession, professional
12 licensure, broker, licensure whatever, is there
13 something else into this that was mishandled that
14 will be discussed or is that -- you know what I
15 mean? It sounds like you kept using the word
16 "fraudulent." When I send a wire of money to
17 someone else, I have to make damn sure that
18 everything is straight before I do it or I could
19 lose my license.

20 MR. CLARK: I think they're breaking their
21 promise on the million one eighty-five is
22 fraudulent. That's my analysis.

23 The other stuff is the cowboy mentality that
24 U.S. Bank and bondholders have in every one of these
25 deals and I have seen it over and over again, as

1 soon as they get involved with their default
2 department, they think the money is all theirs, and
3 they spend it the way they want to spend it. That's
4 what the Fiddler's Creek litigation is all about
5 because they just started bleeding money that was in
6 a construction account and paying trustees and
7 paying attorneys, and it got to be a couple million
8 dollars and the CDD sued them. Nobody had ever done
9 that before.

10 MR. DENAGY: Scott, what do you need from the
11 Board tonight to direct Peter at the mediation.

12 MR. CLARK: I think Peter needs a range and
13 there are a couple of different opinions I have
14 heard, and one is if we get 900, let's put it in the
15 bank and go. And then there's the thought of why
16 settle for that if it's more than that?

17 MR. HARRAH: Do you just want to go through
18 each one of us and try to get a consensus? Or how
19 do you want to do it?

20 MR. CLARK: I think so. Let me say this first:
21 You will not walk out of that mediation with more
22 than a million one eighty-five.

23 MR. HARRAH: I absolutely agree.

24 MR. CLARK: That's not going to happen.

25 MS. DRISCOLL: Why would they? Yeah. I get

1 that.

2 MR. CLARK: They don't have incentive to cave
3 in that much. Can we push the 900 to a million, a
4 million fifty? I don't know. We will see how good
5 a job I do, I guess.

6 I think you need to give him some authority so
7 he can make an assessment kind of on the ground
8 watching the interaction, which you're not going to
9 have the benefit of, and say I think 900 is the best
10 we're going to do. And then have the ability -- if
11 that's what he thinks -- to come back to you and
12 say, I think we are going to settle for 900 now, or
13 we're going to go another year with this and spend
14 more money.

15 You can still reject it at that time. It will
16 still be your decision when a vote is taken to say,
17 "No, I really like a million two or a million
18 three."

19 But I think you do need to give him a floor so
20 that we can try to get something done.

21 MS. DRISCOLL: I would like to see nine or
22 better. I mean, I trust your judgment based on how
23 the circumstances go and how the mediation goes, and
24 if it's below that, I know it would be close. But I
25 know how you negotiate, so -- I mean, I would like

1 to get the full amount, but you go the route you
2 need to go.

3 MR. BROWNLEE: I don't think 900 is enough. I
4 don't think we should settle for 900. In my
5 opinion, we shouldn't settle for anything else less
6 than a million based on what I've heard tonight.

7 MR. HARRAH: Mine is based on litigation that
8 I've been through and how this could get extended,
9 my number is 800 or above, Peter, based on what I
10 think.

11 MR. POLLICINO: Okay.

12 MS. GABLE-HALL: I mean, I don't want to drag
13 it out because it's going to rack up fees. So I
14 would say nine or better.

15 MR. POLLICINO: Okay. Like I said, I will do
16 my best. Just the expectation is they're not going
17 give us punitive damages in mediation.

18 MS. DRISCOLL: Absolutely not. They're going
19 to want that to go to court.

20 MR. POLLICINO: They'll be like, "We're not
21 going to give punitive until the judge or a jury
22 tells us we have to."

23 MR. BROWNLEE: Clark, can you get back to us
24 with that other number that you said you need to
25 finish some calculations on as far as --

1 MR. CLARK: Yeah. It's not going to be
2 tomorrow but I can -- before we go to mediation --

3 MR. BROWNLEE: Sometime in early January?

4 MR. CLARK: Yeah.

5 MR. HARRAH: Do you want these back today?

6 MR. CLARK: Yeah. I'm glad you mentioned that.
7 I don't want you to walk out of here with anything
8 that becomes a public record.

9 MR. HARRAH: I just want to say I appreciate
10 everything you have done --

11 MS. DRISCOLL: I agree.

12 MR. POLLICINO: Yep. Good work.

13 MR. HARRAH: -- great work so far.

14 MS. DRISCOLL: You even uncovered more than we
15 asked. Do you recall the date as January 6 for
16 that?

17 MR. CLARK: 17th.

18 MR. BROWNLEE: Do we call this meeting over or
19 do we just go back in there?

20 MR. CLARK: What we do is on this record, we'll
21 indicate the time and indicate that we are
22 adjourning the shade meeting.

23 This will be transcribed, and if you would send
24 it to me in the ordinary course. No rush on that.
25 It will be sealed in my files until this litigation

1 is over. So until then, everything that we've said
2 will be confidential, but it will become part of the
3 District's record.

4 And so indicate that it's 6:03, 59 minutes. A
5 good productive session and we will recess the shade
6 meeting at this time and the board will reconvene.

7 (This proceeding was concluded at 6:03 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
)
COUNTY OF ST. JOHNS)

I, Stacia A. Harper, FPR, Notary Public, State of Florida, I was authorized to and did stenographically report the foregoing proceedings; and that the transcript, pages 3 through 49, is a true and accurate record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, or employee, or attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 28th day of December, 2017.

Stacia A. Harper

STACIA A. HARPER, FPR

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