

AUG 28 2014

CHRISTOPHER D. RICH, Clerk
By KIERSTEN HOUST
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF:

GREATER BOISE AUDITORIUM
DISTRICT,

Petitioner.

Case No. CV OT 1411320

ORDER DENYING PETITION FOR
JUDICIAL CONFIRMATION

Overview

Idaho's Constitution provides that, aside from ordinary and necessary expenses,

No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose . . .

Idaho Const. art. VIII, § 3.

Petitioner is a subdivision of the State of Idaho bound by this constitutional provision. Petitioner asks this Court to find that its proposed lease agreement does not constitute an indebtedness or liability within the meaning of article VIII, section 3, thereby relieving Petitioner of the requirement of submitting the proposed project to the voters for approval. Petitioner does not contend that its proposed lease falls within the

category of ordinary and necessary expenses; rather, Petitioner argues that the lease does not subject Petitioner to debt or liability beyond one year. For the reasons set forth below, the Court denies the petition for judicial confirmation.

Factual Findings

The Greater Boise Auditorium District (“District”) operates the Boise Centre in downtown Boise. The District seeks to expand its 85,000 square foot convention center because the current facilities are too small to host large trade shows and regional and national conventions. The District has two related projects, only one of which is before the Court. Therefore, although the estimated cost of the entire project is \$38,000,000, the estimated cost of the project before the Court is \$21,236,400.

The project before the Court is the Centre Building, to be located between the Grove Hotel and U.S. Bank office tower in downtown Boise. The Centre Building will consist of build-to-suit condominium units, a new ballroom facility, and kitchen and banquet facilities.

The District proposes to finance the acquisition of the Centre Building by working with the Urban Renewal Agency of Boise City aka Capital City Development Corporation (“Agency”). According to the plan, K.C. Gardner Company, L.C. (“Developer”) will sell the Centre Building to the District, which will assign its right to purchase to the Agency, which will issue revenue bonds on the District’s behalf, and then use the bond money to purchase the Centre Building. The Agency will then lease the Centre Building to the District, whose rental payments to the Agency will fund the repayment of the principal and interest on the bonds. The District will use the money it collects from hotel and motel tax to make its rental payments to the Agency under the lease. The District may renew its lease for a total of twenty-four (24) consecutive one-

year renewal terms, purchase the Centre Building at any time, or terminate the lease at any time.

The project is outlined in these documents: the 20 page Master Development Agreement between the District and the Developer, the 27 page Lease Agreement between the District and the Agency, and the 9 page Development Agreement between the District and the Agency. Attached to the Master Development agreement are exhibits, including the legal description of the property, the site plan, the lease of meeting space, the option to purchase, the project budget, construction schedule, design contract, construction contract, and a blank Purchase and Sale Agreement, to be signed in December 2014 at the earliest. Certain documents integral to the plan's implementation - the Purchase and Sale Agreement and the Bond Resolution Act - are not before the Court. The District's "financial covenants" and "additional debt requirements" are also not before the Court.

The Master Development Agreement

The Master Development Agreement requires the District to:

1. Enter into a formal Purchase and Sale Agreement whereby the District will be obligated to purchase the Centre Building from the Developer. The District can assign this right to purchase to the Agency. Section 2.2
2. Provide two security deposits, each for 2.5 million, which operate "solely as a security for the District's performance of its purchase obligation for the Centre Facilities upon completion of construction by Gardner." Section 3.1.1. If the District or the Agency do not purchase the Centre Facilities, then the Developer retains the \$5,000,000 as liquidated damages.
3. Subordinate its interest in the project to a lender under certain conditions. Sections 3.1.2 - 3.1.3.
4. Indemnify the Developer for claims for bodily injury and property damage, including attorneys' fees, for the negligent acts or omissions of the District. Section 4.3.17.2

5. Pay attorneys' fees to the Developer, should the Developer successfully litigate an action connected with the Master Development Agreement. Section 9.15.

Under the Master Development Agreement, the project budget can increase if the Developer runs into hazardous materials, unforeseen legal entanglements, or emergencies that increase the cost of design or construction. Section 4.2.3.

The Development Agreement

The Development Agreement requires the District to:

1. Assign the Purchase Agreement to the Agency, which shall purchase the project following successful completion of the judicial confirmation proceedings and issuance of the bonds. Section 2.
2. Enter into the Lease Agreement with the Agency and pay the principal and interest due on the bonds "subject to the District's determination, in its discretion, to annually renew the Lease Agreement." Section 3.c.
3. Indemnify the Agency against "losses, costs, damages, expenses, and liabilities of whatsoever nature . . . and reasonable attorneys' fees," which indemnification provision "shall survive the expiration or termination of this Agreement." Section 6.
4. Pay the Agency:
 - a pre-financing fee of \$5,000 (Section 5(a)(i));
 - a \$40,000 financing fee for issuing the bonds, against which the \$5,000 would be credited (Section 5(a)(ii)); and
 - for so long as the bonds are outstanding and the Lease Agreement is in effect, an annual \$5,000 fee (Section 5(a)(iii));
 - all out of pocket costs, expenses and fees associated with issuing the bonds, or the project generally, which obligation shall survive the termination of the Agreement (Sections 5(b) and 10);
 - all taxes, assessments, licenses, fees, charges or other impositions levied based upon issuing bonds, which obligation shall survive the termination of the Agreement (Sections 7 and 10).
5. Pay charges or penalties assessed if the District unsuccessfully contests taxes, assessments or other charges. Sections 7 and 10.

The Development Agreement mentions that if the District defaults on its Agreement, the Agency has rights which accrue by reason of that default. Section 7. These rights are not specified or otherwise limited. The Development Agreement specifically provides both parties the right to sue, should the other party default. Section 9.

The Lease Agreement

Among other things, the Lease Agreement requires the District to:

1. Seek long term financing for the purchase the Unit which will contain the new ballroom facility, the related kitchen, and ancillary facilities in the Centre Building, along with related soft costs and equipment. Lease Agreement at 2.
2. Possibly secure the repayment of the bonds. It is unknown whether the District would be securing the repayment of bonds. The Executive Director of the District testified by affidavit that "the Lease Agreement and the Rent paid thereunder will be the security and sole source of payment for the Bonds, and not any other resources or credit of the Agency." Aff. Patrick Rice ¶ 13 at 5. However, the Lease Agreement states that the Bonds shall be secured by, "among other things, the Pledged Revenues as that term is defined in the Bond Resolution." Lease Agreement at 3. The Bond Resolution does not yet exist.
3. Engage in unidentified debt requirements. Article VIII, Section 8.13 of the Lease Agreement is a caption only. The caption is entitled: "**Additional Debt Requirements for the District.**" The body of this section notes only "[to be determined with lender/bondholders]."
4. Take any action, or forgo taking any action, to avoid the result that the interest on the Bonds be included in gross income for federal income tax purposes or cause the interest on the Bonds to lose its exclusion from State income taxation under State law. Article IV, Section 4.6.
5. Pay rent to the Agency. If the District defaults on its rental payment, it is not simply liable for rent owed. In addition to collecting rent owed by the District, the Agency may enforce performance of any obligations, agreements, or covenants of the District under the Lease. Article X, Section 10.2 (emphasis added). In the event of a non-renewal by the District, the Lease Agreement notes that the Agency and the Trustee "may exercise the remedies provided herein and in the Bond Resolution." Article V, Section 5.1(b).

6. Pay "additional rent" to the Agency. Article V, Section 5.3(e).
7. Pay interest for any late or missing rental payments. Article V, Section 5.3(f).
8. Pay the rent on the particular project "prior to all other expenses of the District." Article V, Section 5.5 (emphasis added).
9. Under certain circumstances, pay any amounts required to cause the amount in the Debt Service Reserve Account to equal the Reserve Requirement for all outstanding Bonds which are secured by the Debt Service Reserve Account. Article V, Section 5.3(c).
10. Keep the property in good repair, making any necessary improvements. Article VI, Section 6.1.
11. Pay taxes on the property. Article VI, Section 6.2.
12. Insure the project each fiscal year. Article VI, Section 6.3.
13. Repair or rebuild the facilities if damaged or destroyed. Article VII, Section 7.1(a).
14. Indemnify the Agency against losses, costs, damages, expenses, and liabilities, including attorneys' fees, arising from claims, lawsuits, causes of actions, claims in equity, injunctive relief and other legal actions. By its own terms, this indemnification provision survives the expiration of the termination of the Agreement. Article VIII, Section 8.15.
15. Indemnify the Agency in any bankruptcy or arbitration proceeding arising from causes listed in the Lease Agreement. By its own terms, this indemnification provision survives the expiration of the termination of the Agreement. Article VIII, Section 8.16.
16. Forgo entering into any lease or agreement that impairs the rights of the bondholders during the lease term. Article VIII, Section 8.17(a).
17. Neither sell nor otherwise dispose of any property essential to the proper operation of the project of the Boise Centre during the lease term. Article VIII, Section 8.17(a).

18. Pay attorneys' fees to the Agency or the Trustee if the Agency or Trustee is a prevailing party against the District in a legal action related to the Lease Agreement. Article X, Section 10.5.

19. Waive future claims for offsets against any rent payments. Article XIII, Section 13.6.

If the District does not maintain insurance required by the Lease or does not keep the property in good repair, the District will owe money (including interest) to the Agency or the Trustee for its failure to do so, which money the "District agrees to pay on demand." Article VI, Section 6.5.

According to the Lease Agreement, "[n]o assignment or subleasing shall relieve the District from primary liability for any of its obligations." Article IX, Section 9.1(a). Even if the District assigns or sublets, it remains primarily liable for rent payments and continues to be liable for indemnification and insurance.

The Lease specifically notes that the Lease will terminate at the end of each annual term and will only be renewed by the District subject to legislative appropriation for that purpose.

Discussion

As a political subdivision of the State of Idaho, the District is subject to Idaho's Constitutional debt limitation. There is no dispute that the District has the statutory authority "to acquire, dispose of and encumber real and personal property" as proposed here. I.C. § 67-4912(f). The question is whether the District's twenty-four (24) year rent-to-own program complies with Idaho's Constitution.

Generally speaking, these types of leasing arrangements will be constitutional if liability is confined to each installment as it falls due, but not if the leasing agreement is a subterfuge for a sales contract wherein indebtedness or liability beyond one year

could arise. The California Supreme Court, writing in one of the few states whose constitutional language is similar to Idaho's,¹ has articulated the law thus:

It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments there provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. If however, the instrument creates a full and complete liability upon its execution, or if its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void.

Dean v. Kuchel, 218 P.2d 521, 522-23 (Cal. 1950) (internal citations omitted).

In this case, the leasing agreement may create a full and complete liability for the District upon its execution. It is not clear whether it does because the documents, read as a whole, are not clear. Respondent argued that a full and complete liability is created for the District upon execution because the Agency merely has the option, not the obligation, to purchase the Boise Centre. Section 2.2. of the Master Development Agreement supports this position. ("The PSA shall include the right of the District to assign it and the right to purchase therein provided to [the Agency].") Petitioner argued the opposite. Petitioner argued that the Agency has an obligation, not merely an option, to purchase the Boise Centre. Section 2 of the Development Agreement supports this

¹ California's Constitution provides, in relevant part:

No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose. . .

Cal. Const. art. XVI, § 18.

position. (“The Agency shall purchase the Financed Project . . .”) The Lease Agreement could be read to reconcile these positions such that, upon execution, the District will have a full and complete liability, which the District will immediately assign to the Agency, and which the Agency intends to – and has bound itself to – accept from the District.² The Court concludes that the Lease Agreement does create a full and complete liability for the District upon execution.

The next key question is whether the lease acts as a subterfuge for what is actually a conditional sales contract. Although Idaho does not yet have an appellate case on point, Petitioner points out that “a majority of appellate courts in other states have held that leases subject to annual appropriation are not a prohibited indebtedness or liability under similar state constitutional provisions.” Mem. Supp. Pet. for Judicial Confirmation at 11. Petitioner cites cases from Alaska, South Carolina, Alabama, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Nebraska, Nevada, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Mem. Supp. Pet. for Judicial Confirmation, App. A. However, with the exception of California, Colorado, Oregon, and

² The Lease Agreement states:

As of the Effective Date, the District has assigned the Purchase and Sale Agreement for the Financed Project to the Agency. After issuance of the Bonds pursuant to Article IV hereof, and receipt of written consent from the District to proceed with the purchase of the Financed Project, the Agency shall, solely using funds from the Acquisition Fund, purchase the Financed Project from the Developer pursuant to the terms and conditions of the Purchase and Sale Agreement.

Article III, Section 3.1.

Wisconsin, the states cited do not have language in their state constitutions that is substantially similar to Idaho's.

Regardless of what other states have done, this Court is not charged with deciding whether the District's agreement complies with other states' constitutions. It may.³ The question is, of course, whether the District's agreement complies with Idaho's Constitution. Article VIII, section 3 of Idaho's Constitution has been narrowly interpreted by Idaho's appellate courts, which have resisted attempts to circumvent the Constitution's debt prohibitions. For example, in rejecting the special fund doctrine adopted by other states, the Idaho Supreme Court wrote:

The courts, to whose decisions we have above referred, have indulged in various subtleties and refinements of reasoning to show that no debt or indebtedness is incurred where a municipality buys certain property, and specifically provides that no liability shall be incurred on the part of the city, but that the property shall be paid for out of a special fund to be raised from the income and revenue from such property. The reasoning, however, of those cases utterly fails when applied to our Constitution, for the reason that none of those cases deals with the word 'liability,' which is used in our Constitution, and which is a much more sweeping and comprehensive term than the word 'indebtedness' nor are the words 'in any manner or for any purpose' given any special attention by the courts in the foregoing cases. The framers of our Constitution were not content

³ Then again, it may not. In a case cited by Petitioner, the Nebraska Supreme Court held that a lease provision violated Nebraska's Constitution where it required the State, upon termination of a year to year lease, to pay the costs of reletting the public facility or the costs to place the facility in a condition for reletting. The Court wrote that: "This kind of an open-ended promise violates the spirit and purpose of the constitutional limitation against indebtedness. . ." *Ruge v. State*, 267 N.W. 2d 748, 752 (Neb. 1978).

In this case, the District has not agreed to pay the costs of reletting the Boise Centre upon termination of the lease; however, it has undertaken an open-ended promise to remediate any violations of environmental laws (Lease Agreement, Article VIII, Section 8.16) and to promptly rebuild, repair or restore facilities damaged or destroyed by fire or other casualty (Lease Agreement, Article VII, Section 7.1). These open-ended promises violate the spirit and purpose of the constitutional limitation against indebtedness.

to say that no city shall incur any indebtedness 'in any manner or for any purpose,' but they rather preferred to say that no city shall incur any indebtedness or liability in any manner, or for any purpose. It must be clear to the ordinary mind, on reading this language that the framers of the Constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants.

Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643, 649-50 (1912), *superseded by statute*, H.J.R. No. 9 (November 7, 1950), *as recognized in Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983).

The language of Idaho's Constitution is exceptionally limiting:

No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose . . .

Idaho Const. art. VIII, § 3 (emphasis added).

Against this limiting constitutional language, strictly construed by Idaho's appellate courts, the District has attempted to craft unobjectionable financing for its Boise Centre. The strongest argument that Petitioner's plan complies with the Constitution is the "scot free" argument. As articulated by Petitioner's counsel at oral argument:

If at any point the District chooses not to budget and provides affirmative notice of its intent to renew, the District's obligations to make lease payments by the express terms of the lease will terminate and have no further liability. It can walk away scot-free. And that's set forth in Section No. 5.3 of the lease agreement, Your Honor.

Draft H'rg Tr. at 6:14-21 (Aug. 4, 2014).

Section 5.3 of the Lease Agreement supports Petitioner's argument. However, the documents as a whole do not. Although Petitioner characterizes the proposed lease as a "pay as you go" transaction, which subjects the District to no liability beyond any given year, the documents suggest that the District will indeed be liable beyond one year for more than simply rent.

Areas of ongoing liability are outlined in the factual findings above. They include, but are not limited to, the District's obligation to pay (1) all out of pocket costs, expenses and fees associated with issuing the bonds, or the project generally, which obligation shall survive the termination of the Agreement (Development Agreement, Sections 5(b) and 10) and (2) all taxes, assessments, licenses, fees, charges or other impositions levied based upon issuing bonds, which obligation shall survive the termination of the Agreement (Development Agreement, Sections 7 and 10). In addition, the District will be liable for indemnifying the Agency, the cost of ongoing insurance, and litigation costs. The indemnification and insurance clauses specifically survive the termination of the Lease Agreement.

At oral argument, the District's counsel took the position that, contrary to the plain language and expressed intent of the Lease Agreement, the clauses cannot survive the termination of the Agreement if the provisions fail. Counsel argued:

And [Respondent's] in a Catch 22 there, I would submit, Your Honor. Because if it is not permitted by law, then the whole thing fails. The fact that there's a survival provision that says this failed provision survives doesn't get you anywhere. Zero times zero is still zero.

Draft Hr'g Tr. at 42:19-24 (Aug. 4, 2014).

To reach the point where this argument begins, to even begin the process of multiplying zeroes, requires litigation. And should the District be on the losing side of the litigation interpreting the Lease Agreement, the litigation costs would be assessed against the District. The scot free argument is unavailing upon close examination of the documents as a whole.

Another argument in favor of the District's position is exigency. The government needs to be able to act. If courts construe Idaho's constitutional prohibition on debt and liabilities as narrowly as Respondent argues, then nothing can ever get done. In approving a lease-purchase agreement for new court facilities in Ada County, Judge Woodland put it this way:

First, Petitioners urge a broad interpretation of Article [VIII], § 3's concept of 'liability.' They have argued that Ada County has incurred liability by agreeing to indemnification provisions in the [Courts Complex Lease]. This is not the kind of liability Article [VIII], § 3 prohibits. If 'liability' were construed so broadly to encompass indemnification provisions, tort liability and the like, counties would be unable to take any action without a two-thirds vote of the electorate.

Mem. Supp. Pet. Judicial Confirmation (Exhibit E entitled *Order Granting Motion for Judgment on the Pleadings* at 8-9).⁴

Justice Jones' concurrence in *In re University Place/Idaho Water Center Project*, 146 Idaho 527, 547, 199 P.3d 102, 122 (2008), also supports this argument.

⁴ Petitioners relied on Judge Woodland's courthouse decision in their briefing (Mem. Supp. Pet. for Judicial Confirmation at 16) and at oral argument (Draft Hr'g Tr. at 12:7 – 13:4) (Aug. 4, 2014). Judge Woodland's decision relied, in part, on the statute of frauds in holding that there could not be a governmental "wink and a nod" promise to stay in the courthouse lease, pointing out that "[e]ven if such a promise existed it could not violate Article VIII, § 3 because it would be unenforceable under Idaho's Statute of Frauds. I.C. § 9-505(4)." Mem. Supp. Pet. Judicial Confirmation (Exhibit E entitled *Order Granting Motion for Judgment on the Pleadings* at 7). Interestingly, in this case, the parties "expressly and without reservation waive[d] any application of the Statute of Frauds in defeat of this Agreement or any of the Project Documents." Master Development Agreement, Section 2.7.

The district court apparently held the view that the performance under the allegedly novated contract was automatically disqualified as being comparable to the performance under the Foundation's contract because the Parking Access Agreement provided the University's parking lease was renewable each year and was subject to termination by the University in the event funds were not available. The fact of the matter is that all state contracts contain those same provisions because Article VIII, § 1 of the Idaho Constitution prohibits the State from incurring multi-year indebtedness without submitting the matter to the public for a vote. Article VIII §3 imposes a similar limitation on public indebtedness with respect to subdivision of state government. It is virtually impossible to present every multi-year governmental contract or lease to the public for a vote. Thus, leases and other contracts that are intended to extend beyond one year always contain provisions (1) making the government's performance subject to the availability of appropriated funds and (2) making the agreement renewable on an annual basis for the contemplated term.

Id. at 547, 199 P.3d at 122.

Recognizing that the government, including subdivisions, needs to be able to enter into long term contracts to function, it is important to note that it is not the twenty-four year nature of the proposed lease that presents a constitutional problem. Neither the long-term lease nor the appropriation contingency cause this Court concern. The devil is in the details. A painstaking review of all the documents before the Court reveals that the District is not free, as it insists, "to simply walk away." Reply Mem. Resp't's Resp. Pet. for Judicial Confirmation; Resp't's Reply to Mem. Supp. Pet. for Judicial Confirmation at 4. The District is free to pay, on an unlimited and open-ended basis, insurance, indemnification costs, litigation costs, taxes, the Agency's fees and costs for the project generally and the Agency's fees and costs for the issuance of bonds specifically.

Because the District's plan creates liabilities for the District beyond one year, the proposed plan needs voter approval to comply with article VIII, section 3 of the Constitution.

The Court has concluded that the lease agreement and accompanying documents subject the District to liability beyond one year. However, in addition, and as an alternative holding, the Court concludes that it cannot approve the proposed lease agreement because there are too many unknowns. These unknowns may be of no consequence, as argued by Petitioner, or they may subject the District to debt or liability beyond one year. These unknowns are: (1) the additional debt requirements for the District, to be determined with the lender/bondholders; (2) the District's "financial covenants" to be determined with lender/bondholders likely to include debt service coverage and other similar covenants; (3) the Purchase and Sale Agreement, to be signed no earlier than December 2014; and (4) the Bond Resolution Act.

At oral argument, Petitioner's counsel stated:

So I would say that the argument that somehow a purchase and sale agreement that's subject to a bunch of contingencies creates an indebtedness or liability is just wrong.

But even if it's right, I think the significant thing to note here is the District has enough cash that it could pay cash for this building, if it had to.

Draft Hr'g Tr. at 17: 14-21 (Aug. 4, 2014).

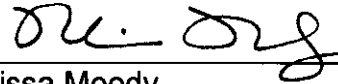
The Court concludes with these remarks because they are squarely in line with the language of Idaho's Constitution and the constitutional framers' intent: pay cash; otherwise, go to the people.

Conclusion

The District's petition for judicial confirmation is denied.

IT IS SO ORDERED.

DATED this 28th day of August 2014.

A handwritten signature in black ink, appearing to read 'Melissa Moody', is written over a horizontal line.

Melissa Moody
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of August 2014, I mailed (served) a true and correct copy of the within instrument to:

Donald E. Knickrehm
GIVENS PURSLEY LLP
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(x) Electronic Mail
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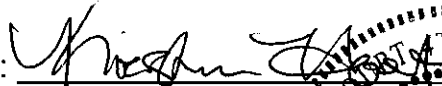
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CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Clerk

